JU6.8
433

FOR REFERENCE ONLY
Do not remove from the library

1979
RECEIVED
FLEMING LIBRARY
DOCUMENTS
DEP

FOR REFERENCE ONLY
Do not remove from the library

UNITED STATES REPORTS

VOLUME 433

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1976

JUNE 21 THROUGH JUNE 29, 1977

END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1979

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Stock Number 028-001-00402-4

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.

OFFICERS OF THE COURT

GRIFFIN B. BELL, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
ALFRED WONG, Marshal.
BETTY J. CLOWERS, Acting Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

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

For the Second Circuit, 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.)

TABLE OF CASES REPORTED

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

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

	Page
Abood *v.* Detroit Board of Education	915
Abramson *v.* United States	911
Acting Comm'r of Social Services of New York *v.* Klein	902
Adkins *v.* I. T. O. Corp. of Baltimore	904
Administrator of General Services; Nixon *v.*	425
Albuquerque; United States *v.*	909
Allen; Pierpont *v.*	910
Alley *v.* Dodge Hotel	916
Applestein *v.* Simons	909
Arizona; Jordan *v.*	906
Arizona; Knapp *v.*	906
Arizona; Richmond *v.*	915
Armstrong; Brennan *v.*	672
Ashcroft *v.* Mattis	915
Association. For labor union, see name of trade.	
Atchison, T. & S. F. R. Co. *v.* Wichita Board of Trade	902
Attorney General of Missouri *v.* Mattis	915
Aviles *v.* United States	911
Bakery & Confectionery Union; Dawkins *v.*	910
Ballard; Crutcher-Rolfs-Cummings, Inc. *v.*	910
Barbour *v.* North Carolina	903
Barker *v.* Kentucky	912
Barker *v.* North Carolina	904
Bates *v.* State Bar of Arizona	350
Bateson Co. *v.* Board of Trustees of Pension Fund	907
Baxter *v.* Cornett	916
Bell *v.* Ohio	907
Bethea *v.* United States	911
Board of Commissioners of Sheffield; United States *v.*	906
Board of Trustees of Pension Fund; J. W. Bateson Co. *v.*	907
Bradley; Milliken *v.*	267

	Page
Bradshaw; J. A. McCarthy, Inc. *v.*	905
Brainerd *v.* Dann	909
Branch *v.* North Carolina	907
Brennan *v.* Armstrong	672
Bridgeton Hospital Assn. *v.* Doe	914
Brinkman; Dayton Board of Education *v.*	406
Broncucia *v.* Colorado	915
Browder *v.* Director, Dept. of Corrections of Illinois	905
Brown; Maritime Terminals, Inc. *v.*	908
Brown; New York *v.*	913
Buchwald; Burleigh House Condominium, Inc. *v.*	909
Buckley *v.* McRae	916
Bureau of Employment Agencies; Hall *v.*	916
Burke *v.* North Carolina	903
Burleigh House Condominium, Inc. *v.* Buchwald	909
Caldwell; St. Louis Board of Education *v.*	914
Califano *v.* McRae	916
California *v.* Nevada	918
California *v.* Southland Royalty Co	907
Carter *v.* United States	913
Casmey; Minnesota Civil Liberties Union *v.*	903
Central Bank of Clayton *v.* Clayton Bank	910
Chadwick; United States *v.*	1
Chappelle *v.* Greater Baton Rouge Airport District	915
Chief Judge, U. S. Court of Appeals; Williams *v.*	906
City. See name of city.	
Clark *v.* U. S. District Court	906
Clark & Son of Boston, Inc. *v.* Stockman	908
Clayton Bank; Central Bank of Clayton *v.*	910
Coker *v.* Georgia	584
Cole; Erie Lackawanna R. Co. *v.*	914
Colorado; Broncucia *v.*	915
Commissioner *v.* Standard Life & Accident Insurance Co	148
Commissioner of Education; Minnesota Civil Liberties Union *v.*	903
Commissioner of Education of New York; Rabinovitch *v.*	901
Commissioner of Health & Resources of Louisiana; Doe *v.*	901
Commissioner of Internal Revenue. See Commissioner.	
Commissioner of Patents and Trademarks; Brainerd *v.*	909
Committee for Public Ed. & Rel. Liberty; La Salle Academy *v.*	902
Committee for Public Ed. & Rel. Liberty; Levitt *v.*	902
Comptroller of N. Y. *v.* Committee for Public Ed. & Rel. Liberty	902
Consolazio; New York *v.*	914
Consumers Union of the U. S., Inc. *v.* Virginia State Bar	917

Page
Consumers Union of the U. S., Inc.; Virginia State Bar *v*..... 917
Continental T. V., Inc. *v*. GTE Sylvania Inc..... 36
Cornett; Baxter *v*..... 916
County. See name of county.
Court of Appeals. See U. S. Court of Appeals.
Cravero *v*. United States..... 915
Creighton University School of Medicine; Seshachalam *v*..... 909
Crowley *v*. U. S. Court of Appeals..... 906
Crutcher-Rolfs-Cummings, Inc. *v*. Ballard..... 910
Cruz *v*. Skelton..... 911
Cummins; Parker Seal Co. *v*..... 903
Daily Review, Inc. *v*. Knutson..... 910
Daily Review, Inc.; Knutson *v*..... 910
Dann; Brainerd *v*..... 909
Darvin *v*. Orange County..... 910
Davis *v*. Kentucky..... 905
Dawkins *v*. Bakery & Confectionery Union..... 910
Dayton Board of Education *v*. Brinkman..... 406
DeKalb County; Fields *v*..... 25
DeKalb County; Fireman's Fund Insurance Co. *v*..... 25
DeKalb County; Miree *v*..... 25
DeKalb County; Phillips *v*..... 25
Department of Game of Washington; Puyallup Tribe *v*..... 165
Detroit Board of Education; Abood *v*..... 915
Director, Dept. of Corrections of Illinois; Browder *v*..... 905
Director, Dept. of Public Safety of Alabama *v*. Rawlinson..... 321
Director of penal or correctional institution. See name of director.
Director of Workers' Compensation *v*. Jacksonville Shipyards..... 904
District Court. See U. S. District Court.
Dodge Hotel; Alley *v*..... 916
Doe; Bridgeton Hospital Assn. *v*..... 914
Doe *v*. Stewart..... 901
Doe; Westby *v*..... 901
Dothard *v*. Rawlinson..... 321
Dravo Corp. *v*. Maxin..... 908
Eberheart *v*. Georgia..... 917
Edmond *v*. United States..... 912
Edwin K. Williams & Co.; Edwin K. Williams & Co.-East *v*..... 908
Edwin K. Williams & Co.-East *v*. Edwin K. Williams & Co..... 908
El Paso Natural Gas Co. *v*. Southland Royalty Co..... 907
Erie Lackawanna R. Co. *v*. Cole..... 914
Estelle *v*. McDonald..... 904
Eu; Socialist Workers Party *v*..... 901

	Page
Evans *v.* Florida	912
Evans *v.* S. S. Kresge Co	908
Ewing, Cole, Erdman & Eubank; Lee *v.*	916
Falvo *v.* United States	909
Favors *v.* Georgia	908
Federal Power Comm'n *v.* Southland Royalty Co	907
Fields *v.* DeKalb County	25
Finch *v.* United States	676
Finnegan *v.* Maryland	912
Fireman's Fund Insurance Co. *v.* DeKalb County	25
Florida; Evans *v.*	912
Fontana *v.* United States	913
Ford; P. C. Pfeiffer Co. *v.*	904
Freeman *v.* United States	913
Friesen *v.* United States	911
Fusco *v.* United States	909
Gallagher *v.* United States	909
Garrison *v.* Resendez	913
General Motors Corp. *v.* Stewart	919
Georgia; Coker *v.*	584
Georgia; Eberheart *v.*	917
Georgia; Favors *v.*	908
Georgia; Hooks *v.*	917
Georgia; Keener *v.*	911
Georgia; Pierce *v.*	916
Governor of Michigan *v.* Bradley	267
Grayco Land Escrow, Ltd. *v.* Wong	910
Greater Baton Rouge Airport District; Chappelle *v.*	915
Greathouse *v.* United States	913
Gregg; U. S. Industries, Inc. *v.*	908
GTE Sylvania Inc.; Continental T. V., Inc. *v.*	36
Hall *v.* Bureau of Employment Agencies	916
Halter Marine Fabricators, Inc. *v.* Nulty	908
Harris *v.* Oklahoma	682
Hazelwood School District *v.* United States	299
Heitner; Shaffer *v.*	186
Heublein, Inc. *v.* Waters	915
Higa *v.* Stetson	909
Hood *v.* South Carolina	911
Hooks *v.* Georgia	917
Hoopes *v.* United States	916
Hopkins; Machinists *v.*	908
House *v.* United States	912

Page
Hudson *v.* United States 912
Hunter *v.* North Carolina 903
Illinois; Winfrey *v.* 913
In re. See name of party.
International. For labor union, see name of trade.
I. T. O. Corp. of Baltimore; Adkins *v.* 904
Jacksonville Shipyards; Director of Workers' Compensation *v.* 904
Jago; Meeks *v.* 911
J. A. McCarthy, Inc. *v.* Bradshaw 905
Jardan *v.* United States 912
Jernigan *v.* Lendall 901
John T. Clark & Son of Boston, Inc. *v.* Stockman 908
Jones *v.* North Carolina Prisoners' Labor Union 119
Jordan *v.* Arizona 906
J. W. Bateson Co. *v.* Board of Trustees of Pension Fund 907
Kampshoff *v.* New York 911
Keener *v.* Georgia 911
Kelly *v.* United States 912
Kendrick *v.* United States 913
Kentucky; Barker *v.* 912
Kentucky; Davis *v.* 905
Kirk *v.* United States 907
Klein; Toia *v.* 902
Knapp *v.* Arizona 906
Knutson *v.* Daily Review, Inc. 910
Knutson; Daily Review, Inc. *v.* 910
Kresge Co.; Evans *v.* 908
Labor Union. See name of trade.
La Salle Academy *v.* Committee for Public Ed. & Rel. Liberty 902
Lee *v.* Ewing, Cole, Erdman & Eubank 916
Lektro-Vend Corp.; Vendo Co. *v.* 623
Leland *v.* United States 916
Lendall; Jernigan *v.* 901
Levitt *v.* Committee for Public Education & Religious Liberty 902
Lex Tex Ltd. *v.* Universal Textured Yarns, Inc. 910
Librach, *In re* 906
Lipscomb *v.* United States 913
Local. For labor union, see name of trade.
Loew's Theatres, Inc. *v.* Pons 907
Loman *v.* United States 912
Lorillard *v.* Pons 907
Lyles *v.* United States 911
Machinists *v.* Hopkins 908

	Page
Maggio *v.* Newman	914
Maine; United States *v.*	917
Maritime Terminals, Inc. *v.* Brown	908
Marriott Corp. *v.* Richard	915
Maryland; Finnegan *v.*	912
Mastrian *v.* Wood	913
Mattis; Ashcroft *v.*	915
Maxin; Dravo Corp. *v.*	908
McCarthy, Inc. *v.* Bradshaw	905
McClatchy Newspapers *v.* Noble	904
McClatchy Newspapers; Noble *v.*	908
McDonald; Estelle *v.*	904
McGrath; Timmons *v.*	905
McKenzie *v.* Montana	905
McRae; Buckley *v.*	916
McRae; Califano *v.*	916
Meeks *v.* Jago	911
Memphis Publishing Co.; Reid *v.*	915
Mercantile Trust Co. Nat. Assn. *v.* St. Louis County Nat. Bank	909
Milliken *v.* Bradley	267
Minnesota Civil Liberties Union *v.* Casmey	903
Miree *v.* DeKalb County	25
Mitchell *v.* United States	916
Montana; McKenzie *v.*	905
Montana; Reece *v.*	912
Moody *v.* Willie	910
Negron *v.* United States	912
Netelkos *v.* United States	915
Nevada; California *v.*	918
Newman; Maggio *v.*	914
New York *v.* Brown	913
New York *v.* Consolazio	914
New York; Kampshoff *v.*	911
New York *v.* Yarter	910
Nixon *v.* Administrator of General Services	425
Noble *v.* McClatchy Newspapers	908
Noble; McClatchy Newspapers *v.*	904
North Carolina; Barbour *v.*	903
North Carolina; Barker *v.*	904
North Carolina; Branch *v.*	907
North Carolina; Burke *v.*	903
North Carolina; Hunter *v.*	903
North Carolina Prisoners' Labor Union; Jones *v.*	119

Page
Nulty; Halter Marine Fabricators, Inc. *v*. 908
Nyquist; Rabinovitch *v*. 901
O'Berry *v*. Wainwright. 911
Ohio; Bell *v*. 907
Oklahoma; Harris *v*. 682
Orange County; Darvin *v*. 910
Parker Seal Co. *v*. Cummins. 903
P. C. Pfeiffer Co. *v*. Ford. 904
Phillips *v*. DeKalb County. 25
Phillips; Williams *v*. 906
Picha *v*. United States. 912
Pierce *v*. Georgia. 916
Pierpont *v*. Allen. 910
Plenty, *In re*. 906
Pons; Lorillard *v*. 907
Powell *v*. United States. 912
Prestige Lincoln-Mercury, Inc. *v*. Quality Mercury, Inc. 914
Prosecutor of Hunterdon County; Shanahan *v*. 916
Puyallup Tribe *v*. Department of Game of Washington. 165
Quality Mercury, Inc.; Prestige Lincoln-Mercury, Inc. *v*. 914
Quinn *v*. United States. 910
Rabinovitch *v*. Nyquist. 901
Rawlinson; Dothard *v*. 321
Reece *v*. Montana. 912
Regan *v*. Zurak. 914
Reid *v*. Memphis Publishing Co. 915
Renshaw, *In re*. 906
Resendez; Garrison *v*. 913
Richard; Marriott Corp. *v*. 915
Richards *v*. Texas. 911
Richmond *v*. Arizona. 915
Rittenhouse; Shanahan *v*. 916
Robinson *v*. United States. 916
Rush *v*. Savchuk. 902
Russillo *v*. United States. 912
St. Clair *v*. United States. 909
St. Louis Board of Education *v*. Caldwell. 914
St. Louis County Nat. Bank; Mercantile Trust Co. Nat. Assn. *v*. . . . 909
Sanabria *v*. United States. 907
Sanchez-Ruiz *v*. United States. 912
Sanfratello *v*. United States. 913
Savchuk; Rush *v*. 902
Schleis *v*. United States. 905

	Page
School District of Omaha *v.* United States	667
Scripps-Howard Broadcasting Co.; Zacchini *v.*	562
Secretary, Dept. of Social Services of South Dakota *v.* Doe	901
Secretary of Air Force; Higa *v.*	909
Secretary of Health, Education, and Welfare *v.* McRae	916
Secretary of State of Arkansas *v.* Lendall	901
Secretary of State of California; Socialist Workers Party *v.*	901
Seshachalam *v.* Creighton University School of Medicine	909
Shaffer *v.* Heitner	186
Shanahan *v.* Rittenhouse	916
Simons; Applestein *v.*	909
Skelton; Cruz *v.*	911
Snyder *v.* United States	908
Socialist Workers Party *v.* Eu	901
Soriano *v.* United States	911
South Carolina; Hood *v.*	911
Southland Royalty Co.; California *v.*	907
Southland Royalty Co.; El Paso Natural Gas Co. *v.*	907
Southland Royalty Co.; Federal Power Comm'n *v.*	907
Spagnolo *v.* United States	909
Sperow *v.* United States	916
S. S. Kresge Co.; Evans *v.*	908
Standard Life & Accident Insurance Co.; Commissioner *v.*	148
State Bar of Arizona; Bates *v.*	350
Stetson; Higa *v.*	909
Stewart; Doe *v.*	901
Stewart; General Motors Corp. *v.*	919
Stockman; John T. Clark & Son of Boston, Inc. *v.*	908
Superintendent of penal or correctional institution. See name or state title of superintendent.	
Sykes; Wainwright *v.*	72
Texas; Richards *v.*	911
Timmons *v.* McGrath	905
Todaro *v.* United States	909
Toia *v.* Klein	902
United States; Abramson *v.*	911
United States *v.* Albuquerque	909
United States; Aviles *v.*	911
United States; Bethea *v.*	911
United States *v.* Board of Commissioners of Sheffield	906
United States; Carter *v.*	913
United States *v.* Chadwick	1
United States; Cravero *v.*	915

Page
United States; Edmond *v*. 912
United States; Falvo *v*. 909
United States; Finch *v*. 676
United States; Fontana *v*. 913
United States; Freeman *v*. 913
United States; Friesen *v*. 911
United States; Fusco *v*. 909
United States; Gallagher *v*. 909
United States; Greathouse *v*. 913
United States; Hazelwood School District *v*. 299
United States; Hoopes *v*. 916
United States; House *v*. 912
United States; Hudson *v*. 912
United States; Jardan *v*. 912
United States; Kelly *v*. 912
United States; Kendrick *v*. 913
United States; Kirk *v*. 907
United States; Leland *v*. 916
United States; Lipscomb *v*. 913
United States; Loman *v*. 912
United States; Lyles *v*. 911
United States *v*. Maine. 917
United States; Mitchell *v*. 916
United States; Negron *v*. 912
United States; Netelkos *v*. 915
United States; Picha *v*. 912
United States; Powell *v*. 912
United States; Quinn *v*. 910
United States; Robinson *v*. 916
United States; Russillo *v*. 912
United States; St. Clair *v*. 909
United States; Sanabria *v*. 907
United States; Sanchez-Ruiz *v*. 912
United States; Sanfratello *v*. 913
United States; Schleis *v*. 905
United States; School District of Omaha *v*. 667
United States; Snyder *v*. 908
United States; Soriano *v*. 911
United States; Spagnolo *v*. 909
United States; Sperow *v*. 916
United States; Todaro *v*. 909
United States; Yelardy *v*. 913
U. S. Court of Appeals; Crowley *v*. 906

Page
U. S. Dept. of Labor *v.* Jacksonville Shipyards 904
U. S. District Court; Clark *v.* 906
U. S. *ex rel.* See name of real party in interest.
U. S. Industries, Inc. *v.* Gregg 908
Universal Textured Yarns, Inc.; Lex Tex Ltd. *v.* 910
Vendo Co. *v.* Lektro-Vend Corp 623
Virginia State Bar *v.* Consumers Union of the U. S., Inc. 917
Virginia State Bar; Consumers Union of the U. S., Inc. *v.* 917
Wainwright; O'Berry *v.* 911
Wainwright *v.* Sykes 72
Walter; Wolman *v.* 229
Warden. See name of warden.
Waters; Heublein, Inc. *v.* 915
Westby *v.* Doe 901
Wichita Board of Trade; Atchison, T. & S. F. R. Co. *v.* 902
Williams *v.* Phillips 906
Williams & Co.; Edwin K. Williams & Co.-East *v.* 908
Williams & Co.-East *v.* Edwin K. Williams & Co 908
Willie; Moody *v.* 910
Winfrey *v.* Illinois 913
Wolman *v.* Walter 229
Wong; Grayco Land Escrow, Ltd. *v.* 910
Wood; Mastrian *v.* 913
Yarter; New York *v.* 910
Yelardy *v.* United States 913
Zacchini *v.* Scripps-Howard Broadcasting Co 562
Zurak; Regan *v.* 914

TABLE OF CASES CITED

Page

Abney v. United States, 431 U. S. 651 115
Abood v. Detroit Bd. of Ed., 431 U. S. 209 527
Adams v. McCann, 317 U. S. 269 109
Adolph Coors Co. v. FTC, 497 F. 2d 1178 49
Albemarle Paper Co. v. Moody, 422 U. S. 405 329, 332, 339, 340
Albrecht v. Herald Co., 390 U. S. 145 68, 70
Allen v. Trust Co., 326 U. S. 630 662
Allum v. Twomey, 484 F. 2d 740 95
Anderson v. Brand, 303 U. S. 95 568
Anderson v. Nelson, 390 U. S. 523 102
Appalachian Coals v. United States, 288 U. S. 344 47, 647
Argersinger v. Hamlin, 407 U. S. 25 93
Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252 307, 310, 316, 414, 419, 668–670, 673, 674
Arndt v. Griggs, 134 U. S. 316 200
Arnett v. Five Gill Nets, 48 Cal. App. 3d 454 176, 182
Arvizu v. Waco Ind. School Dist., 373 F. Supp. 1264 286
Ashe v. Swenson, 397 U. S. 436 683
Ashwander v. TVA, 297 U. S. 288 222, 380
Atkinson v. Superior Court, 49 Cal. 2d 338 205
Atlantic C. L. R. Co. v. Locomotive Engineers, 398 U. S. 281 630, 638, 640, 643, 654, 659
Austin Ind. School Dist. v. United States, 429 U. S. 990 281, 295, 420

Page

Bailey, In re, 30 Ariz. 407 360
Baker v. Carr, 369 U. S. 186 503
Baker v. Grice, 169 U. S. 284 80
Ballard v. Hunter, 204 U. S. 241 200
Baltimore & O. R. Co. v. Hostetter, 240 U. S. 620 201
Bank of America v. Parnell, 352 U. S. 29 29–31, 33, 34
Barker v. Wingo, 407 U. S. 514 112
Bates v. State Bar of Arizona, 433 U. S. 350 917
Beal v. Doe, 432 U. S. 438 901, 902, 916
Beck v. Ohio, 379 U. S. 89 565
Bekins v. Huish, 1 Ariz. App. 258 205
Bell v. Bruen, 1 How. 169 340
Berger v. New York, 388 U. S. 41 463
Bernheimer v. Converse, 206 U. S. 516 224
Bigelow v. Virginia, 421 U. S. 809 353, 357, 364, 374, 380, 381
Black v. Beto, 382 F. 2d 758 95
Blackmer v. United States, 284 U. S. 421 477
Blair v. United States, 250 U. S. 273 477
Blatch v. State, 216 So. 2d 261 86
Board of Education v. Allen, 392 U. S. 236 237, 240, 249, 251, 252, 256–259, 262, 263, 265
Board of Education v. State, 45 Ohio St. 555 410
Booker v. Special School Dist. No. 1, 351 F. Supp. 799 286
Boro Hall Corp. v. General Motors, 124 F. 2d 822 42
Boswell's Lessee v. Otis, 9 How. 336 198
Bounds v. Smith, 430 U. S. 817 137, 143, 147

Page

Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 333, 335
Boyd v. United States, 116 U. S. 616 11, 530
Bradley v. Milliken, 338 F. Supp. 582 269
Bradley v. Milliken, 345 F. Supp. 914 270
Bradwell v. Illinois, 16 Wall. 130 344
Branzburg v. Hayes, 408 U. S. 665 477
Breard v. Alexandria, 341 U. S. 622 404
Brewer v. Williams, 430 U. S. 387 103, 109, 548
Broaddus v. Rundle, 429 F. 2d 791 95
Broadrick v. Oklahoma, 413 U. S. 601 380, 381
Broderick v. Rosner, 294 U. S. 629 228
Brookhart v. Janis, 384 U. S. 1 109
Brown v. Allen, 344 U. S. 443 79, 80, 82, 87, 103, 105, 106, 108, 115
Brown v. Board of Ed., 347 U. S. 483 282, 283, 292
Brown v. Board of Ed., 349 U. S. 294 280, 281, 283, 287, 288, 296
Brown v. Ohio, 432 U. S. 161 683, 905
Buckley v. Valeo, 424 U. S. 1 363, 467, 498–500, 507, 512, 514, 516, 523, 527, 532, 534, 556, 558–560
Burdick v. United States, 236 U. S. 79 486
Burroughs v. United States, 290 U. S. 534 499
Burton v. United States, 202 U. S. 344 499
Cady v. Dombrowski, 413 U. S. 433 12, 13, 19
Calder v. Bull, 3 Dall. 386 486
Calero-Toledo v. Pearson Yacht Leasing, 416 U. S. 663 194
California v. Green, 399 U. S. 149 615
California Bankers Assn. v. Shultz, 416 U. S. 21 529

Page

California Motor Transport v. Trucking Unlimited, 404 U. S. 508 635, 636, 644, 652, 661
Camara v. Municipal Court, 387 U. S. 523 9, 20, 458
Camire v. Scieszka, 116 N. H. 281 205
Cantor v. Detroit Edison Co., 428 U. S. 579 359–362
Cantwell v. Connecticut, 310 U. S. 296 363, 383
Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 384
Cardwell v. Lewis, 417 U. S. 583 12, 20
Carroll v. United States, 267 U. S. 132 12
Carter-Wallace, Inc. v. United States, 196 Ct. Cl. 35 49
Cassidy v. Glossip, 12 Ohio St. 2d 17 565
Castaneda v. Partida, 430 U. S. 482 103, 309, 311, 316, 320
Chambers v. Maroney, 399 U. S. 42 5, 12, 19, 117
Chambers v. Mississippi, 410 U. S. 284 102
Chapman v. California, 386 U. S. 18 117
Charlotte v. Firefighters, 426 U. S. 283 134, 136
Chicago Bd. of Trade v. United States, 246 U. S. 231 49, 53
Chimel v. California, 395 U. S. 752 5, 14, 17, 23
Chmieleski v. City Products Corp., 71 F. R. D. 118 653
Cincinnati v. Louisville & N. R. Co., 223 U. S. 390 478
City. See name of city.
CSC v. Letter Carriers, 413 U. S. 548 499
Clearfield Trust Co. v. United States, 318 U. S. 363 29, 34
Clothing Workers v. Richman Bros., 348 U. S. 511 631, 638, 640, 643, 654, 659
Coffin v. Coffin, 4 Mass. 1 515
Cohen v. Hurley, 366 U. S. 117 362
Coker v. Georgia, 433 U. S. 584 917

Page
Collins v. State, 550 S. W. 2d 643 595
Colorado Pump & Supply Co. v. Febco, Inc., 472 F. 2d 637 49
Committee for Public Education v. Nyquist, 413 U. S. 756 236, 250–252, 254, 255, 263, 266
Commonwealth. See name of Commonwealth.
Continental Grain Co. v. Barge FBL–585, 364 U. S. 19 206
Continental T. V., Inc. v. GTE Sylvania Inc., 433 U. S. 36 904
Continental Wall Paper Co. v. Louis Voight & Sons, 212 U. S. 227 646
Cook v. Hart, 146 U. S. 183 80
Coolidge v. New Hampshire, 403 U. S. 443 10
Cooper v. California, 386 U. S. 58 9, 12
Cooper v. Telfair, 4 Dall. 14 474
Coors Co. v. FTC, 497 F. 2d 1178 49
Cort v. Ash, 422 U. S. 66 223
Couch v. United States, 409 U. S. 322 530
Cox v. Louisiana, 379 U. S. 536 141, 467
Cox Broadcasting Corp. v. Cohn, 420 U. S. 469 196
Cruz v. Beto, 405 U. S. 319 126, 143
Cruz v. LaVallee, 448 F. 2d 671 94, 103
Cummings v. Missouri, 4 Wall. 277 469, 473, 474, 476, 486, 538
Daniel v. Family Ins. Co., 336 U. S. 220 471
D'Arcy v. Ketchum, 11 How. 165 198
Darr v. Burford, 339 U. S. 200 81
Davis v. United States, 411 U. S. 233 77, 82, 84, 98, 99, 101, 116
Dayton Bd. of Education v. Brinkman, 433 U. S. 406 292, 295, 298, 313, 668–670, 672, 674
DeCoteau v. District County Court, 420 U. S. 425 173, 184
Page
Dent v. West Virginia, 129 U. S. 114 476
Diaz v. Pan American World Airways, 442 F. 2d 385 333
Disney Productions v. Air Pirates, 345 F. Supp. 108 577
Dixon v. Love, 431 U. S. 105 528
Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373 67
Dodd v. State, 232 So. 2d 235 86
Dombrowski v. Eastland, 387 U. S. 82 448
Dombrowski v. Pfister, 380 U. S. 479 380
Dothard v. Rawlinson, 433 U. S. 321 308, 319
Draper v. United States, 358 U. S. 307 23
Dubin v. Philadelphia, 34 Pa. D. & C. 61 208
Eastern Railroad Conf. v. Noerr Motor Freight, 365 U. S. 127 635
Eastland v. United States Servicemen's Fund, 421 U. S. 491 448, 453, 499
Edelman v. Jordan, 415 U. S. 651 60, 278, 289, 290
Edgar v. United States, 404 U. S. 1206 285
Edwards v. South Carolina, 372 U. S. 229 141
Elrod v. Burns, 427 U. S. 347 518
Engineers v. Chicago, R. I. & P. R. Co., 382 U. S. 423 324
Enterprise Irrigation Dist. v. Farmers Canal Co., 243 U. S. 157 568
EPA v. Brown, 431 U. S. 99 438
EPA v. Mink, 410 U. S. 73 445, 499
Erie R. Co. v. Tompkins, 304 U. S. 64 28, 35
Escobedo v. Williams, 378 U. S. 478 109
Estelle v. Williams, 425 U. S. 501 89, 91, 100, 108, 114
Ettore v. Philco Broadcasting, 229 F. 2d 481 572, 573, 575
Everson v. Board of Education, 330 U. S. 1 251, 253, 256, 257, 259, 262, 265, 266

Page

Ex parte. See name of party.
Farbenfabriken Bayer v. Sterling Drug, 307 F. 2d 207 646, 652
Faretta v. California, 422 U. S. 806 382
Faulkner v. Gibbs, 338 U. S. 267 662
Fay v. New York, 332 U. S. 261 615
Fay v. Noia, 372 U. S. 391 77, 81–83, 87–89, 92, 94, 96–102, 112, 113, 116
FAA Administrator v. Robertson, 422 U. S. 255 445
Federal Life Ins. Co. v. United States, 527 F. 2d 1096 161
FTC v. Proctor & Gamble Co., 386 U. S. 568 364
Feil v. FTC, 285 F. 2d 879 383
Fisher v. United States, 425 U. S. 391 530
Fitzpatrick v. Bitzer, 427 U. S. 445 291
Flemming v. Nestor, 363 U. S. 603 485
Fletcher v. Peck, 6 Cranch 87 537
Folsom v. Marsh, 9 F. Cas. 342 445, 539
Ford Motor Co. v. Indiana Treasury Dept., 323 U. S. 459 170
Fox Film Corp. v. Muller, 296 U. S. 207 81, 568
Francis v. Henderson, 425 U. S. 536 82, 84, 87, 96, 98–100, 109, 116
Frank v. Mangum, 237 U. S. 309 79
Frank v. Maryland, 359 U. S. 360 8
Franklin Life Ins. Co. v. United States, 399 F. 2d 757 151, 162
Frazier v. Roberts, 441 F. 2d 1224 95
Freedman v. Maryland, 380 U. S. 51 141, 539
Freeman v. Alderson, 119 U. S. 185 198
Freeman v. Bee Machine Co., 319 U. S. 448 664
Frontiero v. Richardson, 411 U. S. 677 335

Page

Fuentes v. Shevin, 407 U. S. 67 193, 194, 207, 210
Furman v. Georgia, 408 U. S. 238 591–593, 602, 604, 607, 608, 610, 611, 613–615, 617–622
Garland, Ex parte, 4 Wall. 333 469, 538
General Electric Co. v. Gilbert, 429 U. S. 125 142
General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261 632, 664
G. M. Leasing Corp. v. United States, 429 U. S. 338 11
George v. O'Kelly, 448 F. 2d 148 285
Georgia v. Rachel, 384 U. S. 780 107
Gertz v. Robert Welch, Inc., 418 U. S. 323 383, 574, 578, 582
Gideon v. Wainwright, 372 U. S. 335 93
Gillin v. Federal Paper Board Co., 479 F. 2d 97 333
Goldfarb v. Virginia State Bar, 421 U. S. 773 359–362, 373, 388, 401
Goldstein v. California, 412 U. S. 546 577, 578
Gooding v. Wilson, 405 U. S. 518 380
Grafton v. United States, 206 U. S. 333 683
Graves v. Walton County Bd. of Ed., 300 F. Supp. 188 284
Gray v. American Radiator Corp., 22 Ill. 2d 432 223, 226
Gray Line, Inc. v. Gray Line Sightseeing, 246 F. Supp. 495 652
Great Commonwealth Life Ins. Co. v. United States, 491 F. 2d 109 161
Green v. County School Bd., 391 U. S. 430 280, 283, 287
Green v. Rundle, 452 F. 2d 232 94, 102
Green v. United States, 355 U. S. 184 109, 680
Greenwood v. Peacock, 384 U. S. 808 106

Page
Greer v. Spock, 424 U. S. 828 130, 134, 136
Gregg v. Georgia, 428 U. S. 153 587, 591, 592, 594, 596, 598–601, 603, 610, 613, 617, 619–621, 915
Griggs v. Duke Power Co., 401 U. S. 424 328–330, 332, 334, 340
Griswold v. Connecticut, 381 U. S. 479 507
Grosjean v. American Press Co., 297 U. S. 233 145
Gulf Oil Co. v. Gilbert, 330 U. S. 501 225, 228
Gustafson v. Florida, 414 U. S. 260 18
Haas v. Henkel, 216 U. S. 462 499
Haelan Labs. v. Topps Chewing Gum, 202 F. 2d 866 569
Hamling v. United States, 418 U. S. 87 338
Hankerson v. North Carolina, 432 U. S. 233 903, 904
Hanson v. Denckla, 357 U. S. 235 199, 204, 208, 212, 215, 216, 224, 228
Harmon v. Brucker, 355 U. S. 579 438, 439
Harrington v. California, 395 U. S. 250 97
Harris v. Balk, 198 U. S. 215 200, 201, 208
Harris v. New York, 401 U. S. 222 96
Hart v. Andrews, 103 Ohio St. 218 567
Hart v. Community School Bd., 383 F. Supp. 699 286
Hartford Life Ins. Co. v. Ibs, 237 U. S. 662 224
Hawk, Ex parte, 321 U. S. 114 81
Hawker v. New York, 170 U. S. 189 476
Hazelwood School Dist. v. United States, 433 U. S. 299 338, 347, 348
Head v. New Mexico Bd., 374 U. S. 424 357, 400
Healy v. James, 408 U. S. 169 141
Hecht Co. v. Bowles, 321 U. S. 321 650
Page
Helfenbein v. International Industries, 438 F. 2d 1068 646
Helvering v. Hallock, 309 U. S. 106 58
Henderson v. Kibbe, 431 U. S. 145 92
Henderson v. Kibbe, 534 F. 2d 493 102
Henry v. Mississippi, 379 U. S. 443 77, 83, 87, 91, 104, 108, 112, 114
Herb v. Pitcairn, 324 U. S. 117 566
Hess v. Pawloski, 274 U. S. 352 202, 223
Hill v. Lafourche Parish School Bd., 291 F. Supp. 819 284
Hills v. Gautreaux, 425 U. S. 284 282, 295, 419, 420
Hogan v. A. S. Barnes & Co., 114 U. S. P. Q. 314 572
Home Ins. Co. v. Dick, 281 U. S. 397 225
Housh v. Peth, 165 Ohio St. 35 569
Huffman v. Pursue, Ltd., 420 U. S. 592 664
Hughes Tool Co. v. Fawcett Publications, 290 A. 2d 693 214, 227
Huling v. Kaw Valley R. Co., 130 U. S. 559 200
Humphrey v. Cady, 405 U. S. 504 102
Humphrey's Executor v. United States, 295 U. S. 602 442, 509–511, 559
Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U. S. 183 212
Hutchinson v. Chase & Gilbert, 45 F. 2d 139 203
Hynes v. Mayor of Oradell, 425 U. S. 610 534, 535
Illinois Brick Co. v. Illinois, 431 U. S. 720 47, 60
Indiana ex rel. Anderson v. Brand, 303 U. S. 95 568
In re. See name of party.
International Harvester Co. v. Kentucky, 234 U. S. 579 202
International Salt Co. v. United States, 332 U. S. 392 652

Page

International Shoe Co. v. Washington, 326 U. S. 310 193, 202–204, 213, 216, 217, 219, 228
Irvin v. Dowd, 359 U. S. 394 81
Jackson, Ex parte, 96 U. S. 727 10
Jackson v. Denno, 378 U. S. 368 75, 77, 86
James's Claim, 1 Dall. 47 474
Janel Sales Corp. v. Lanvin Perfumes, 396 F. 2d 398 48, 653
Jefferson Standard Life Ins. Co. v. United States, 408 F. 2d 842 151
Johnson v. Avery, 393 U. S. 483 143, 146, 147
Johnson v. Louisiana, 406 U. S. 356 615
Johnson v. United States, 333 U. S. 10 9
Johnson v. Zerbst, 304 U. S. 458 79, 83, 92, 102, 118
Jones Metal Products v. Walker, 29 Ohio St. 2d 173 333
Jonnet v. Dollar Savings Bank, 530 F. 2d 1123 205
Jurek v. Texas, 428 U. S. 262 591, 620
Jurinko v. Edwin L. Wiegand Co., 477 F. 2d 1038 333
Kaiser v. General Motors, 396 F. Supp. 33 42
Kalem Co. v. Harper Bros., 222 U. S. 55 575
Katz v. United States, 389 U. S. 347 7, 10, 11, 458, 459
Katz Drug Co. v. W. A. Sheaffer Pen Co., 6 F. Supp. 212 653
Katzenbach v. Morgan, 384 U. S. 641 471
Kaufman v. United States, 394 U. S. 217 85
Kearney, Ex parte, 7 Wheat. 38 78
Kelly v. Kosuga, 358 U. S. 516 646
Kennedy v. Mendoza-Martinez, 372 U. S. 144 474, 476, 478
Kewanee Oil Co. v. Bicron Corp., 416 U. S. 470 577, 578

Page

Keyes v. School Dist. No. 1, 413 U. S. 189 410, 417, 420, 421, 423, 669
Keyes v. School Dist. No. 1, 521 F. 2d 465 278, 279
Kibbe v. Kibbe, 1 Kirby 119 198
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U. S. 211 68
Kilbourn v. Thompson, 103 U. S. 168 507, 514, 515
Kline v. Burke Constr. Co., 260 U. S. 226 642
Koster v. Lumbermens Mutual Cas. Co., 330 U. S. 518 215, 222
Kusper v. Pontikes, 414 U. S. 51 140, 467
Labor Board. See NLRB.
Labor Union. See name of trade.
Lafayette Ins. Co. v. French, 18 How. 404 201
Lamont v. Postmaster General, 381 U. S. 301 527
Lane v. Wilson, 307 U. S. 268 256
Lange, Ex parte, 18 Wall. 163 79
Lanza v. New York, 370 U. S. 139 129
Lathrop v. Donohue, 367 U. S. 820 353
Lau v. Nichols, 414 U. S. 563 287
LaVallee v. Delle Rose, 410 U. S. 690 80
Lawn v. United States, 355 U. S. 339 34
Lee v. Macon County Bd. of Ed., 267 F. Supp. 458 284
Lee v. United States, 432 U. S. 23 677, 680
Lee v. Washington, 390 U. S. 333 143
Lefkowitz v. Newsome, 420 U. S. 283 102
Lego v. Twomey, 404 U. S. 477 86
Lemon v. Bossier Parish School Bd., 444 F. 2d 1400 286
Lemon v. Kurtzman, 403 U. S. 602 235, 236, 238, 240, 242, 247, 251, 253, 254, 256–259
Levitt v. Committee for Public Education, 413 U. S. 472 239, 240, 252, 254

Page

Linmark Associates v. Willingboro, 431 U. S. 85 365
Local. For labor union, see name of trade.
Louisville & N. R. Co. v. Deer, 200 U. S. 176 201
Lovell v. Griffin, 303 U. S. 444 467
MacGregor v. Westinghouse Co., 329 U. S. 402 652
Maher v. Roe, 432 U. S. 464 901, 902, 916
Mancusi v. DeForte, 392 U. S. 364 11
Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219 666
Manners v. Morosco, 252 U. S. 317 575
Maple Flooring Mfrs. v. United States, 268 U. S. 563 71
Marbury v. Madison, 1 Cranch 137 503, 537, 559
Marcus v. Search Warrant, 367 U. S. 717 8, 539
Massachusetts v. Mellon, 262 U. S. 447 509, 511
Mathews v. Eldridge, 424 U. S. 319 528
Mattz v. Arnett, 412 U. S. 481 173, 176, 181–183
Mayor v. Educational Equality League, 415 U. S. 605 308, 338
Mazer v. Stein, 347 U. S. 201 576
McAllister v. United States, 348 U. S. 19 338
McDonald v. Mabee, 243 U. S. 90 218
McDonald v. Santa Fe Trail Transp. Co., 427 U. S. 273 334
McDonnell Douglas Corp. v. Green, 411 U. S. 792 305, 329, 339, 340
McGautha v. California, 402 U. S. 183 618
McGee v. International Life Ins. Co., 355 U. S. 220 204, 223, 226
McMann v. Richardson, 397 U. S. 759 99, 117, 118
Meachum v. Fano, 427 U. S. 215 130
Meadows v. Ford Motor Co., 62 F. R. D. 98 333

Page

Meek v. Pittenger, 421 U. S. 349 232, 233, 238, 242, 243, 247, 249, 250, 252, 254–258, 262–265
Mescalero Apache Tribe v. Jones, 411 U. S. 145 174
Miami Herald Pub. Co. v. Tornillo, 418 U. S. 241 581
Miller v. School Dist. 2, 256 F. Supp. 370 283, 284
Milliken v. Bradley, 418 U. S. 717 269–271, 280–282, 295, 410
Milliken v. Bradley, 433 U. S. 267 422, 423, 674
Milliken v. Meyer, 311 U. S. 457 217
Milsen Co. v. Southland Corp., 454 F. 2d 363 646
Milton v. Wainwright, 407 U. S. 371 97
Mine Workers v. Illinois Bar Assn., 389 U. S. 217 376
Minnesota v. National Tea Co., 309 U. S. 551 565
Minor v. Black, 527 F. 2d 1 95
Miranda v. Arizona, 384 U. S. 436 74, 108, 109
Missouri ex rel. Southern R. Co. v. Mayfield, 340 U. S. 1 568
Mitchell v. W. T. Grant Co., 416 U. S. 600 193, 194, 210
Mitchum v. Foster, 407 U. S. 225 106, 630, 632–634, 637, 639, 640, 643, 655, 656
Mooney v. Holohan, 294 U. S. 103 80
Moore v. Dempsey, 261 U. S. 86 79
Moore v. East Cleveland, 431 U. S. 494 527, 529
Moore v. Tangipahoa Parish School Bd., 304 F. Supp. 244 285, 286
Moreno v. Beto, 415 F. 2d 154 95, 103
Morgan v. Kerrigan, 401 F. Supp. 216 286
Moses v. Washington Parish School Bd., 302 F. Supp. 362 285
Muhammad v. Mancusi, 432 F. 2d 1046 21

Page

Mullane v. Central Hanover Trust Co., 339 U. S. 306 206, 224
Murch v. Mottram, 409 U. S. 41 104
Murdock v. Memphis, 20 Wall. 590 81
Murdock v. Pennsylvania, 319 U. S. 105 145, 363
Myers v. United States, 272 U. S. 52 498, 519, 556, 558, 559
Myers v. U. S. Camera Pub. Corp., 9 Misc. 2d 765 572
NAACP v. Alabama, 357 U. S. 449 140, 532, 533
NAACP v. Alabama, 377 U. S. 288 108
NAACP v. Button, 371 U. S. 415 376, 380
NLRB v. Gissel Packing Co., 395 U. S. 575 364, 383
National League of Cities v. Usery, 426 U. S. 833 295
New Orleans v. Dukes, 427 U. S. 297 471
New York Times Co. v. Sullivan, 376 U. S. 254 363, 455, 567, 571, 574, 581
Nielsen, In re, 131 U. S. 176 682, 683
Nordenfelt v. Maxim Nordenfelt Guns, [1894] A. C. 535 653
North American Life & Cas. Co. v. Commissioner, 533 F. 2d 1046 161
Northeast Marine Terminal Co. v. Caputo, 432 U. S. 249 904, 905
Northern Pac. R. Co. v. United States, 356 U. S. 1 50, 53, 57, 58, 65, 66, 647
Northern Securities Co. v. United States, 193 U. S. 197 505, 650
North Georgia Finishing v. Di-Chem, Inc., 419 U. S. 601 194, 210
O'Donoghue v. United States, 289 U. S. 516 442, 509, 511
Officers for Justice v. CSC, 395 F. Supp. 378 332
Ogden v. Saunders, 12 Wheat. 213 537, 542

Page

Oklahoma Packing Co. v. Oklahoma Gas & Electric, 309 U. S. 4 630
Olberding v. Illinois Central R. Co., 346 U. S. 338 202, 223
Olsen v. Smith, 195 U. S. 332 359
Orloff v. Willoughby, 345 U. S. 83 486
Otter Tail Power Co. v. United States, 410 U. S. 366 635, 645, 652
Ownbey v. Morgan, 256 U. S. 94 194, 212
Oyler v. Boles, 368 U. S. 448 609
Paine v. McCarthy, 527 F. 2d 173 95, 103
Paine Lumber Co. v. Neal, 244 U. S. 459 634
Parker v. Brown, 317 U. S. 341 357, 359, 361–363, 389, 404
Pasadena Bd. of Ed. v. Spangler, 427 U. S. 424 280, 282, 410
Patterson v. New York, 432 U. S. 197 903–905
Pell v. Procunier, 417 U. S. 817 125, 128–133, 140, 147
Pennington v. Fourth Nat. Bank, 243 U. S. 269 211
Pennoyer v. Neff, 95 U. S. 714 196–199, 201, 219
People v. Jondreau, 384 Mich. 539 176
Perkins v. Benquet Mining Co., 342 U. S. 437 565–568
Philadelphia & Reading R. Co. v. McKibbin, 243 U. S. 264 202
Philbrook v. Glodgett, 421 U. S. 707 324
Phillips v. Crown Central Petroleum, 376 F. Supp. 1250 653
Phillips v. Martin Marietta Corp., 400 U. S. 542 333, 341, 343, 347
Pierce v. Society of Sisters, 268 U. S. 510 240
Pierre v. Louisiana, 306 U. S. 354 317
Pinto v. Pierce, 389 U. S. 31 86
Pittsburgh Athletic Co. v. KQV Broadcasting, 24 F. Supp. 490 572, 575

Page

Pittsburgh Press Co. v. Human Relations Comm'n, 413 U. S. 376 384, 404
Plaquemines Parish School Bd. v. United States, 415 F. 2d 817 284, 285
Porter v. Dicken, 328 U. S. 252 641, 655, 659
Porter v. United States, 473 F. 2d 1329 478
Powell v. Alabama, 287 U. S. 45 118
Powell v. McCormack, 395 U. S. 486 511, 542
Powell v. Texas, 392 U. S. 514 613
Pratt v. Paris Gas Light & Coke, 168 U. S. 255 652
Preston v. United States, 376 U. S. 364 11, 12, 15
Price v. Georgia, 398 U. S. 323 905
Price v. Johnston, 334 U. S. 266 125
Procunier v. Martinez, 416 U. S. 396 126, 130, 131, 133, 136, 137, 139, 140, 143
Proffitt v. Florida, 428 U. S. 242 591, 620
Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578 655, 657
Prudential Ins. Co. v. Herold, 247 F. 681 152
Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 243
Pugh v. Locke, 406 F. Supp. 318 334, 342–345
Railroad Trainmen v. Virginia Bar, 377 U. S. 1 376
Ralph v. Warden, 438 F. 2d 786 602
Redman v. Terrebonne Parish School Bd., 293 F. Supp. 376 284
Regional Rail Reorg. Act Cases, 419 U. S. 102 471
Reid v. Covert, 354 U. S. 1 498
Reitman v. Mulkey, 387 U. S. 369 413
Response of Carolina v. Leasco Response, 498 F. 2d 314 646
Respublica v. Gordon, 1 Dall. 233 474

Page

Reynolds v. Sims, 377 U. S. 533 506
Roberts v. Louisiana, 428 U. S. 325 591, 610, 613, 615, 616, 620
Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376 578
Robinson v. California, 370 U. S. 660 586, 592
Roe v. Kansas, 278 U. S. 191 478, 490
Roemer v. Maryland Public Works Bd., 426 U. S. 736 235, 236, 255, 266
Rosebud Sioux Tribe v. Kneip, 430 U. S. 584 173, 184
Rosenberg v. Fleuti, 374 U. S. 449 438
Rosenbloom v. Metromedia, Inc., 403 U. S. 29 574
Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219 333, 335
Royall, Ex parte, 117 U. S. 241 80
Rudolph v. Alabama, 375 U. S. 889 615
Ruffin v. Commonwealth, 62 Va. 790 139
Runyon v. McCrary, 427 U. S. 160 60
Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1 345
Salco Corp. v. General Motors, 517 F. 2d 567 42, 63
San Antonio School Dist. v. Rodriguez, 411 U. S. 1 291, 295, 410
Sanders v. United States, 373 U. S. 1 104
Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340 194
Sandura Co. v. FTC, 339 F. 2d 847 51, 66
Santa Fe Industries v. Green, 430 U. S. 462 223
Saxbe v. Washington Post Co., 417 U. S. 843 131, 146
Schaeffer v. San Diego Yellow Cabs, 462 F. 2d 1002 332
Schaffer v. Heitner, 433 U. S. 186 902
Schneckloth v. Bustamonte, 412 U. S. 218 80, 108, 109, 536

Page
Schneider v. State, 308 U. S. 147 353
Schroeder v. New York, 371 U. S. 208 206
Scopes v. State, 154 Tenn. 105 264
Secretary of Agriculture v. ICC, No. 76–1026 (CADC) 902
Semler v. Dental Examiners, 294 U. S. 608 357, 400, 401
Serfass v. United States, 420 U. S. 377 677, 679
Sharkey v. National Broadcasting, 93 F. Supp. 986 572
Shelton v. Tucker, 364 U. S. 479 467
Shuttlesworth v. Birmingham, 394 U. S. 147 467
Siebold, Ex parte, 100 U. S. 371 79
Simpson v. Union Oil Co., 377 U. S. 13 68
Singleton v. Jackson Municipal School Dist., 419 F. 2d 1211 286
Skidmore v. Swift & Co., 323 U. S. 134 142
Smith v. Apple, 264 U. S. 274 631
Smith v. California, 361 U. S. 147 363, 580
Smith v. St. Tammany Parish School Bd., 302 F. Supp. 106 285, 286
Smith v. United States, 337 U. S. 137 109
Snap-On Tools Corp. v. FTC, 321 F. 2d 825 51
Sniadach v. Family Finance Corp., 395 U. S. 337 192–194, 210, 212
Snider v. Peyton, 356 F. 2d 626 603
Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 29
South Dakota v. Opperman, 428 U. S. 364 10, 12, 13, 19, 21, 530
Southern R. Co. v. Mayfield, 340 U. S. 1 568
Spencer, Ex parte, 228 U. S. 652 82
Spencer v. Kugler, 404 U. S. 1027 417
Spencer v. Texas, 385 U. S. 554 609
Page
Spevack v. Klein, 385 U. S. 511 362
Springer v. Philippine Islands, 277 U. S. 189 442, 508
Standard Oil Co. v. United States, 221 U. S. 1 49, 652
Stanford v. Texas, 379 U. S. 476 8, 461, 462, 531, 532
State. See also name of State.
State v. Arthur, 74 Idaho 251 176
State v. Hauser, 101 Ohio St. 404 565, 567
State v. McConville, 65 Idaho 46 176
State ex rel. Adams v. Superior Ct., 57 Wash. 2d 181 173
Staub v. Baxley, 355 U. S. 313 108, 467
Steele v. G. D. Searle & Co., 483 F. 2d 339 201
Steele v. Louisville & N. R. Co., 323 U. S. 192 568
Stell v. Board of Ed. of Savannah, 387 F. 2d 486 284
Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376 578
Stone v. Powell, 428 U. S. 465 79, 87, 92, 105, 106, 110, 113
Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U. S. 1 96, 270, 279–281, 283, 287, 290, 410, 413, 417, 423
Tampa Electric Co. v. Nashville Coal, 276 F. 2d 766 646
Teamsters v. United States, 431 U. S. 324 307, 308, 310, 312, 315, 316, 328, 330, 338
Tennessee v. Davis, 100 U. S. 257 106, 107
Terminiello v. Chicago, 337 U. S. 1 146
Terry v. Henderson, 462 F. 2d 1125 95, 103
Terry v. Ohio, 392 U. S. 1 14, 15, 458
Texas v. White, 423 U. S. 67 12, 19
Thackery v. Helfrich, 123 Ohio St. 334 565
Thomas v. Collins, 323 U. S. 516 467
Thomas v. State, 249 So. 2d 510 86

Page

Thomas v. Taylor, 224 U. S. 73 340
Thompson v. Oklahoma, 429 U. S. 1053 683
Thornhill v. Alabama, 310 U. S. 88 364
Thorpe v. Housing Authority, 393 U. S. 268 438
Tilton v. Richardson, 403 U. S. 672 235, 252
Time, Inc. v. Firestone, 424 U. S. 448 574
Time, Inc. v. Hill, 385 U. S. 374 567, 570, 572, 574, 578, 581
Timken Co. v. United States, 341 U. S. 593 652
Tinker v. Des Moines School Dist., 393 U. S. 503 141, 146
Tollett v. Henderson, 411 U. S. 258 117, 118
Toucey v. New York Life Ins. Co., 314 U. S. 118 631, 641, 660
Townsend v. Sain, 372 U. S. 293 80, 106, 111
TWA v. Hardison, 432 U. S. 63 903
Travelers Health Assn. v. Virginia, 339 U. S. 643 223
Tripoli Co. v. Wella Corp., 425 F. 2d 932 48, 55
Trop v. Dulles, 356 U. S. 86 476, 592, 596
Twentieth Century Club v. Transradio Press Serv., 165 Misc. 71 572
Tyler v. Court of Registration, 175 Mass. 71 207, 208
United Shoe Machinery Corp. v. United States, 258 U. S. 451 652
United States v. American Tobacco Co., 221 U. S. 106 652
United States v. Arnold, Schwinn & Co., 388 U. S. 365 37, 40–48, 53, 54, 57, 59, 63, 64, 67, 71, 340
United States v. Arnold, Schwinn & Co., 291 F. Supp. 564 62
United States v. Atlas Ins. Co., 381 U. S. 233 155

Page

United States v. Battle, 166 U. S. App. D. C. 396 21
United States v. Bausch & Lomb Co., 321 U. S. 707 43
United States v. Bayer Co., 135 F. Supp. 65 646
United States v. Bodin, 375 F. Supp. 1265 577
United States v. Borden Co., 347 U. S. 514 650
United States v. Brewster, 408 U. S. 501 508, 515, 523
United States v. Brown, 381 U. S. 437 468–471, 473, 476, 480, 486, 538, 542
United States v. Burnison, 339 U. S. 87 34
United States v. Burr, 25 F. Cas. 187 544
United States v. Chadwick, 433 U. S. 1 905
United States v. Colgate & Co., 250 U. S. 300 67
United States v. Consumer Life Ins. Co., 430 U. S. 725 149, 158
United States v. Curtiss-Wright Corp., 299 U. S. 304 510, 551
United States v. DeCoster, 159 U. S. App. D. C. 326 117
United States v. Dickinson, 331 U. S. 745 662
United States v. Dinitz, 424 U. S. 600 679
United States v. Dionisio, 410 U. S. 1 459
United States v. Donovan, 429 U. S. 413 463
United States v. Eatherton, 519 F. 2d 603 23
United States v. Edwards, 415 U. S. 800 16, 18, 19
United States v. Evans, 481 F. 2d 990 23
United States v. First Nat. City Bank, 379 U. S. 378 228
United States v. French, 545 F. 2d 1021 23
United States v. Frick, 490 F. 2d 666 23
United States v. Gasoline Retailers Assn., 285 F. 2d 688 356

Page

United States v. General Electric Co., 272 U. S. 476 67, 68
United States v. General Motors, 384 U. S. 127 58
United States v. Gettysburg Electric R. Co., 160 U. S. 668 478, 490
United States v. Ironworkers, 443 F. 2d 544 315
United States v. Issod, 508 F. 2d 990 23
United States v. Jeffers, 342 U. S. 48 11
United States v. Jefferson County Bd. of Ed., 380 F. 2d 385 284
United States v. Jenkins, 420 U. S. 358 677, 679
United States v. Jerrold Electronics, 187 F. Supp. 545 66
United States v. Johnson, 467 F. 2d 630 15
United States v. Jorn, 400 U. S. 470 680
United States v. Katz, 425 F. 2d 928 117
United States v. Kaye, 492 F. 2d 744 23
United States v. Little Lake Misere Land Co., 412 U. S. 580 34, 35
United States v. Lovett, 328 U. S. 303 469, 470, 473–475, 478, 480, 485, 487, 522, 538, 541
United States v. Martin Linen Supply Co., 430 U. S. 564 680
United States v. Mehciz, 437 F. 2d 145 23
United States v. Miller, 317 U. S. 369 475
United States v. Miller, 425 U. S. 435 459
United States v. Missouri, 523 F. 2d 885 286
United States v. Montgomery County Bd. of Ed., 395 U. S. 225 282, 283, 287
United States v. National Soc. of Engineers, 181 U. S. App. D. C. 41 357

Page

United States v. Nixon, 418 U. S. 683 440, 442–444, 446–449, 454, 455, 477, 483, 500, 501, 503, 512, 515–517, 520, 524, 525, 528, 529, 531, 546, 559–561
United States v. O'Brien, 391 U. S. 367 467, 476
United States v. Paramount Pictures, 334 U. S. 131 577
United States v. Parke, Davis & Co., 362 U. S. 29 68
United States v. Perez, 9 Wheat. 579 680
United States v. Philadelphia Nat. Bank, 374 U. S. 321 66
United States v. Poller, 43 F. 2d 911 460
United States v. Rabinowitz, 339 U. S. 56 8
United States v. Raines, 362 U. S. 17 380, 438
United States v. Reynolds, 345 U. S. 1 448
United States v. Reynolds, 397 U. S. 14 475
United States v. Robinson, 414 U. S. 218 15, 16, 18
United States v. Robinson, 153 U. S. App. D. C. 114 22
United States v. Schleis, 543 F. 2d 59 21
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 357
United States v. Soriano, 497 F. 2d 147 23
United States v. Texas, 447 F. 2d 441 285
United States v. Topco Associates, 405 U. S. 596 50, 57, 58, 666
United States v. Tramunti, 513 F. 2d 1087 23
United States v. United States Fidelity & Guaranty Co., 309 U. S. 506 170, 172, 173, 178
United States v. Van Leeuwen, 397 U. S. 249 10
United States v. Washington, 496 F. 2d 620 173, 181, 184

Page

United States v. Washington, 384 F. Supp. 312 182, 184
United States v. Watson, 423 U. S. 411 20
United States v. Wilson, 420 U. S. 332 676, 677, 679
United States v. Yellow Cab Co., 338 U. S. 338 338
U. S. ex rel. See name of real party in interest.
U. S. Industries, Inc. v. Gregg, 540 F. 2d 142 195, 205, 214
United Transportation Union v. Michigan Bar, 401 U. S. 576 376
Valentine v. Chrestensen, 316 U. S. 52 404, 405
Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U. S. 748 357, 362–366, 375, 378, 380, 381, 383, 384, 386, 390, 391, 397, 400, 404, 405
Wainwright v. Sykes, 433 U. S. 72 904
Waley v. Johnston, 316 U. S. 101 79
Walker v. Hutchinson, 352 U. S. 112 206
Walker Process Equipment v. Food Mach. & Chem. Corp., 382 U. S. 172 644, 652
Waller v. Florida, 397 U. S. 387 683
Wallis v. Pan American Petroleum, 384 U. S. 63 29, 31, 32, 35
Walt Disney Productions v. Air Pirates, 345 F. Supp. 108 577
Walz v. Tax Comm'n, 397 U. S. 664 263
Warden v. Hayden, 387 U. S. 294 21, 102
Washington v. Davis, 426 U. S. 229 307, 332, 413, 419–421, 668, 670, 674
Washingtonian Pub. Co. v. Pearson, 306 U. S. 30 577
Watkins, Ex parte, 3 Pet. 193 78, 79
Watkins v. United States, 354 U. S. 178 499

Page

Watson v. Buck, 313 U. S. 387 438
Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 333, 335
Weems v. United States, 217 U. S. 349 592
Wells, Ex parte, 18 How. 307 79
Western Nat. Life Ins. Co. v. Commissioner, 432 F. 2d 298 151
Western Nat. Life Ins. Co. v. Commissioner, 51 T. C. 824 162
Western & Southern Ins. Co. v. Commissioner, 460 F. 2d 8 151
Whalen v. Roe, 429 U. S. 589 455, 457, 458, 529, 532, 554, 555, 615
White Motor Co. v. United States, 372 U. S. 253 47, 50, 51
Whitney v. California, 274 U. S. 357 146
Whitney v. United States, 513 F. 2d 326 95, 102
Whitten v. Tomlinson, 160 U. S. 231 80
Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165 650
Williams v. Georgia, 349 U. S. 375 108
Williams v. Suffolk Ins. Co., 13 Pet. 415 503
Williams v. Twomey, 510 F. 2d 634 117
Williamson v. Lee Optical Co., 348 U. S. 483 357, 400, 471
Williamson Heater Co. v. Radich, 128 Ohio St. 124 565, 567
Wilson, In re, 106 Ariz. 34 361
Wilson v. Loew's Inc., 355 U. S. 597 566
Wolf v. Colorado, 338 U. S. 25 11, 212
Wolff v. McDonnell, 418 U. S. 539 125, 129, 132, 143, 147
Wolman v. Walter, 433 U. S. 229 902, 903
Woodson v. North Carolina, 428 U. S. 280 591, 602–604, 615, 620

	Page
Worcester v. Georgia, 6 Pet. 515	170
Wright v. Council of Emporia, 407 U. S. 451	410
Young, Ex parte, 209 U. S. 123	289
Younger v. Harris, 401 U. S. 37	664
Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579	443, 500, 503, 558, 560
Zenith Corp. v. Hazeltine, 395 U. S. 100	338, 650

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1976

UNITED STATES *v.* CHADWICK ET AL.

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

No. 75–1721. Argued April 26, 1977—Decided June 21, 1977

When respondents arrived by train in Boston from San Diego, they were arrested at their waiting automobile by federal narcotics agents, who had been alerted that respondents were possible drug traffickers. A double-locked footlocker, which respondents had transported on the train and which the agents had probable cause to believe contained narcotics, had been loaded in the trunk of the automobile. Respondents, together with the automobile and footlocker, which was admittedly under the agents' exclusive control, were then taken to the Federal Building in Boston. An hour and a half after the arrests the agents opened the footlocker without respondents' consent or a search warrant and found large amounts of marihuana in it. Respondents were subsequently indicted for possession of marihuana with intent to distribute it. The District Court granted their pretrial motion to suppress the marihuana obtained from the footlocker, holding that warrantless searches are *per se* unreasonable under the Fourth Amendment unless they fall within some established exception to the warrant requirement, and that the footlocker search was not justified under either the "automobile exception" or as a search incident to a lawful arrest; the Court of Appeals affirmed. *Held:* Respondents were entitled to the protection of the Warrant Clause of the Fourth Amendment, with the evalua-

tion of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded. Pp. 6–16.

(a) A fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests inside the four walls of the home. Pp. 6–11.

(b) By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination, and no less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment's Warrant Clause; since there was no exigency calling for an immediate search, it was unreasonable for the Government to conduct the search without the safeguards a judicial warrant provides. P. 11.

(c) The footlocker search was not justified under the "automobile exception," since a person's expectations of privacy in personal luggage are substantially greater than in an automobile. In this connection, the footlocker's mobility did not justify dispensing with a search warrant, because once the federal agents had seized the footlocker at the railroad station and safely transferred it to the Federal Building under their exclusive control, there was not the slightest danger that it or its contents could have been removed before a valid search warrant could be obtained. Pp. 11–13.

(d) Nor was the footlocker search justified as a search incident to a lawful arrest, where the search was remote in time or place from the arrest and no exigency existed, the search having been conducted more than an hour after the federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody. Pp. 14–16.

532 F. 2d 773, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 16. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 17.

Deputy Solicitor General Randolph argued the cause for the United States. On the brief were *Acting Solicitor General Friedman, Assistant Attorney General Thornburgh, Kenneth S. Geller,* and *Sidney M. Glazer.*

Martin G. Weinberg argued the cause for respondents. With him on the brief were *Philip S. Nyman, Robert L. Steadman,* and *Jeanne Baker.**

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

We granted certiorari in this case to decide whether a search warrant is required before federal agents may open a locked footlocker which they have lawfully seized at the time of the arrest of its owners, when there is probable cause to believe the footlocker contains contraband.

(1)

On May 8, 1973, Amtrak railroad officials in San Diego observed respondents Gregory Machado and Bridget Leary load a brown footlocker onto a train bound for Boston. Their suspicions were aroused when they noticed that the trunk was unusually heavy for its size, and that it was leaking talcum powder, a substance often used to mask the odor of marihuana or hashish. Because Machado matched a profile used to spot drug traffickers, the railroad officials reported these circumstances to federal agents in San Diego, who in turn relayed the information, together with detailed descriptions of Machado and the footlocker, to their counterparts in Boston.

When the train arrived in Boston two days later, federal narcotics agents were on hand. Though the officers had not obtained an arrest or search warrant, they had with them a police dog trained to detect marihuana. The agents identified Machado and Leary and kept them under surveillance as they claimed their suitcases and the footlocker, which had been

---

**Joel M. Gora, Jack D. Novik,* and *John Reinstein* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Frank Carrington, Glen R. Murphy, Cecil Hicks, and *James P. Costello* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae.*

transported by baggage cart from the train to the departure area. Machado and Leary lifted the footlocker from the baggage cart, placed it on the floor and sat down on it.

The agents then released the dog near the footlocker. Without alerting respondents, the dog signaled the presence of a controlled substance inside. Respondent Chadwick then joined Machado and Leary, and they engaged an attendant to move the footlocker outside to Chadwick's waiting automobile. Machado, Chadwick, and the attendant together lifted the 200-pound footlocker into the trunk of the car, while Leary waited in the front seat. At that point, while the trunk of the car was still open and before the car engine had been started, the officers arrested all three. A search disclosed no weapons, but the keys to the footlocker were apparently taken from Machado.

Respondents were taken to the Federal Building in Boston; the agents followed with Chadwick's car and the footlocker. As the Government concedes, from the moment of respondents' arrests at about 9 p. m., the footlocker remained under the exclusive control of law enforcement officers at all times. The footlocker and luggage were placed in the Federal Building, where, as one of the agents later testified, "there was no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates." App. 44. The agents had no reason to believe that the footlocker contained explosives or other inherently dangerous items, or that it contained evidence which would lose its value unless the footlocker were opened at once. Facilities were readily available in which the footlocker could have been stored securely; it is not contended that there was any exigency calling for an immediate search.

At the Federal Building an hour and a half after the arrests, the agents opened the footlocker and luggage. They did not obtain respondents' consent; they did not secure a search warrant. The footlocker was locked with a padlock and a

regular trunk lock. It is unclear whether it was opened with the keys taken from respondent Machado, or by other means. Large amounts of marihuana were found in the footlocker.[1]

Respondents were indicted for possession of marihuana with intent to distribute it, in violation of 21 U. S. C. § 841 (a)(1), and for conspiracy, in violation of 21 U. S. C. § 846. Before trial, they moved to suppress the marihuana obtained from the footlocker. In the District Court, the Government sought to justify its failure to secure a search warrant under the "automobile exception" of *Chambers* v. *Maroney*, 399 U. S. 42 (1970), and as a search incident to the arrests. Holding that "[w]arrantless searches are *per se* unreasonable, subject to a few carefully delineated and limited exceptions," the District Court rejected both justifications. 393 F. Supp. 763, 771 (Mass. 1975). The court saw the relationship between the footlocker and Chadwick's automobile as merely coincidental, and held that the double-locked, 200-pound footlocker was not part of "the area from within which [respondents] might gain possession of a weapon or destructible evidence." *Chimel* v. *California*, 395 U. S. 752, 763 (1969).

A divided Court of Appeals for the First Circuit affirmed the suppression of the seized marihuana. The court held that the footlocker had been properly taken into federal custody after respondents' lawful arrest; it also agreed that the agents had probable cause to believe that the footlocker contained a controlled substance when they opened it. But probable cause alone was held not enough to sustain the warrantless search.

[1] Marihuana was also found in the suitcases. The Court of Appeals found no adequate justification for the warrantless suitcase search, and suppressed this evidence. Incriminating statements made by respondent Chadwick during the arrest procedure were also suppressed, on the theory that there had not been probable cause to arrest him and that his statements were therefore tainted as the product of an illegal arrest. However, the petition for certiorari draws into question only the footlocker search; consequently, we need not pass on the legality of Chadwick's arrest or the search of the suitcases.

On the premise that warrantless searches are *per se* unreasonable unless they fall within some established exception to the warrant requirement, the Court of Appeals agreed with the District Court that the footlocker search was not justified either under the "automobile exception" or as a search incident to a lawful arrest.

The Court of Appeals then responded to an argument, suggested by the Government for the first time on appeal, that movable personalty lawfully seized in a public place should be subject to search without a warrant if there exists probable cause to believe it contains evidence of a crime. Conceding that such personalty shares some characteristics of mobility which support warrantless automobile searches, the court nevertheless concluded that a rule permitting a search of personalty on probable cause alone had not yet "received sufficient recognition by the Supreme Court outside the automobile area, or generally, for us to recognize it as a valid exception to the fourth amendment warrant requirement." 532 F. 2d 773, 781 (1976). We granted certiorari, 429 U. S. 814 (1976). We affirm.

(2)

In this Court the Government again contends that the Fourth Amendment Warrant Clause protects only interests traditionally identified with the home.[2] Recalling the colonial writs of assistance, which were often executed in searches of private dwellings, the Government claims that the Warrant Clause was adopted primarily, if not exclusively, in response to unjustified intrusions into private homes on the authority of general warrants. The Government argues there is no evidence that the Framers of the Fourth Amendment intended

[2] The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

to disturb the established practice of permitting warrantless searches outside the home, or to modify the initial clause of the Fourth Amendment by making warrantless searches supported by probable cause *per se* unreasonable.

Drawing on its reading of history, the Government argues that only homes, offices, and private communications implicate interests which lie at the core of the Fourth Amendment. Accordingly, it is only in these contexts that the determination whether a search or seizure is reasonable should turn on whether a warrant has been obtained. In all other situations, the Government contends, less significant privacy values are at stake, and the reasonableness of a government intrusion should depend solely on whether there is probable cause to believe evidence of criminal conduct is present. Where personal effects are lawfully seized outside the home on probable cause, the Government would thus regard searches without a warrant as not "unreasonable."

We do not agree that the Warrant Clause protects only dwellings and other specifically designated locales. As we have noted before, the Fourth Amendment "protects people, not places," *Katz* v. *United States*, 389 U. S. 347, 351 (1967); more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy. In this case, the Warrant Clause makes a significant contribution to that protection. The question, then, is whether a warrantless search in these circumstances was unreasonable.[3]

(3)

It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience

---

[3] In this Court the Government has limited the question presented to "[w]hether a search warrant is required before federal agents may open a locked footlocker that is properly in their possession and that they have probable cause to believe contains contraband." Accordingly, this case presents no issue of the application of the exclusionary rule.

with the writs of assistance and their memories of the general warrants formerly in use in England. These writs, which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods. Though the authority to search granted by the writs was not limited to the home, searches conducted pursuant to them often were carried out in private residences. See generally *Stanford* v. *Texas,* 379 U. S. 476, 481–485 (1965); *Marcus* v. *Search Warrant,* 367 U. S. 717, 724–729 (1961); *Frank* v. *Maryland,* 359 U. S. 360 (1959).

Although the searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the Framers, were those involving invasions of the home, it would be a mistake to conclude, as the Government contends, that the Warrant Clause was therefore intended to guard only against intrusions into the home. First, the Warrant Clause does not in terms distinguish between searches conducted in private homes and other searches. There is also a strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment, which draws no distinctions among "persons, houses, papers, and effects" in safeguarding against unreasonable searches and seizures. See *United States* v. *Rabinowitz,* 339 U. S. 56, 68 (1950) (Frankfurter, J., dissenting).

Moreover, if there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America. Thus, silence in the historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search of respond-

ents' footlocker.[4] What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.

Moreover, in this area we do not write on a clean slate. Our fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances. *Cooper* v. *California,* 386 U. S. 58 (1967). The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 14 (1948). Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization "particularly describing the place to be searched and the persons or things to be seized." Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search. *Camara* v. *Municipal Court,* 387 U. S. 523, 532 (1967).

Just as the Fourth Amendment "protects people, not places," the protections a judicial warrant offers against erro-

---

[4] The Government's historical analysis is further undercut by its own arguments. The Government acknowledges that the core values the Fourth Amendment protects are privacy interests. In its view, those privacy interests which should receive the "maximum protection from governmental search or seizure" provided by the Warrant Clause include private oral and electronic communication, "[i]n addition to the home and other structures such as an office or hotel room . . . ." Brief for United States 30. It is not readily apparent how the Government's contention that the Warrant Clause applies to high privacy areas, both within and without the home, can be reconciled with its earlier contention that judicial warrants are appropriate only for searches conducted within private dwellings.

neous governmental intrusions are effective whether applied in or out of the home. Accordingly, we have held warrantless searches unreasonable, and therefore unconstitutional, in a variety of settings.[5] A century ago, Mr. Justice Field, speaking for the Court, included within the reach of the Warrant Clause printed matter traveling through the mails within the United States:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household." *Ex parte Jackson,* 96 U. S. 727, 733 (1878).

We reaffirmed *Jackson* in *United States* v. *Van Leeuwen,* 397 U. S. 249 (1970), where a search warrant was obtained to open two packages which, on mailing, the sender had declared contained only coins. Judicial warrants have been required for other searches conducted outside the home. *E. g., Katz* v. *United States,* 389 U. S. 347 (1967) (electronic interception of conversation in public telephone booth); *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971) (automobile on private

---

[5] In circumstances involving noncriminal inventory searches, where probable cause to search is irrelevant, we have recognized "that search warrants are not required, linked as the warrant requirement textually is to the probable-cause concept." *South Dakota* v. *Opperman,* 428 U. S. 364, 370 n. 5 (1976). This is so because the salutary functions of a warrant simply have no application in that context; the constitutional reasonableness of inventory searches must be determined on other bases.

premises); *Preston* v. *United States,* 376 U. S. 364 (1964) (automobile in custody); *United States* v. *Jeffers,* 342 U. S. 48 (1951) (hotel room); *G. M. Leasing Corp.* v. *United States,* 429 U. S. 338 (1977) (office); *Mancusi* v. *DeForte,* 392 U. S. 364 (1968) (office). These cases illustrate the applicability of the Warrant Clause beyond the narrow limits suggested by the Government. They also reflect the settled constitutional principle, discussed earlier, that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests,[6] and not simply those interests found inside the four walls of the home. *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949).

In this case, important Fourth Amendment privacy interests were at stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides.

(4)

The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search, but it is argued that the rationale of our automobile

[6] This has been settled law in this Court for over 90 years. At least since *Boyd* v. *United States,* 116 U. S. 616 (1886), we have known that "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ." *Id.,* at 630.

This is not to say that the Fourth Amendment translates precisely into a constitutional privacy right. See *Katz* v. *United States,* 389 U. S. 347, 350–351 (1967).

search cases demonstrates the reasonableness of permitting warrantless searches of luggage; the Government views such luggage as analogous to motor vehicles for Fourth Amendment purposes. It is true that, like the footlocker in issue here, automobiles are "effects" under the Fourth Amendment, and searches and seizures of automobiles are therefore subject to the constitutional standard of reasonableness. But this Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts. *Carroll* v. *United States,* 267 U. S. 132 (1925); *Preston* v. *United States, supra,* at 366–367; *Chambers* v. *Maroney,* 399 U. S. 42 (1970). See also *South Dakota* v. *Opperman,* 428 U. S. 364, 367 (1976).

Our treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable. Nevertheless, we have also sustained "warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." *Cady* v. *Dombrowski,* 413 U. S. 433, 441–442 (1973); accord, *South Dakota* v. *Opperman, supra,* at 367; see *Texas* v. *White,* 423 U. S. 67 (1975); *Chambers* v. *Maroney, supra; Cooper* v. *California,* 386 U. S. 58 (1967).

The answer lies in the diminished expectation of privacy which surrounds the automobile:

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis,* 417 U. S. 583, 590 (1974) (plurality opinion).

Other factors reduce automobile privacy. "All States require

vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways." *Cady* v. *Dombrowski, supra,* at 441. Automobiles periodically undergo official inspection, and they are often taken into police custody in the interests of public safety. *South Dakota* v. *Opperman, supra,* at 368.

The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained.[7] The initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.[8]

---

[7] This may often not be the case when automobiles are seized. Absolutely secure storage facilities may not be available, see *South Dakota* v. *Opperman,* 428 U. S. 364 (1976); *Cady* v. *Dombrowski,* 413 U. S. 433 (1973), and the size and inherent mobility of a vehicle make it susceptible to theft or intrusion by vandals.

[8] Respondents' principal privacy interest in the footlocker was, of

Finally, the Government urges that the Constitution permits the warrantless search of any property in the possession of a person arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime. Although recognizing that the footlocker was not within respondents' immediate control, the Government insists that the search was reasonable because the footlocker was seized contemporaneously with respondents' arrests and was searched as soon thereafter as was practicable. The reasons justifying search in a custodial arrest are quite different. When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless "search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel* v. *California*, 395 U. S., at 763. See also *Terry* v. *Ohio*, 392 U. S. 1 (1968).

Such searches may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in

---

course, not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.

It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in *Chambers* unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage.

all custodial arrests make warrantless searches of items within the "immediate control" area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. *United States* v. *Robinson,* 414 U. S. 218 (1973); *Terry* v. *Ohio, supra.* However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest," *Preston* v. *United States,* 376 U. S., at 367, or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.[9]

Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency. Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the

[9] Of course, there may be other justifications for a warrantless search of luggage taken from a suspect at the time of his arrest; for example, if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage and disarming the weapon. See, *e. g., United States* v. *Johnson,* 467 F. 2d 630, 639 (CA2 1972).

evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded.[10]

Accordingly, the judgment is

Affirmed.

MR. JUSTICE BRENNAN, concurring.

I fully join THE CHIEF JUSTICE's thorough opinion for the Court. I write only to comment upon two points made by my Brother BLACKMUN's dissent.

First, I agree wholeheartedly with my Brother BLACKMUN that it is "unfortunate" that the Government in this case "sought . . . to vindicate an extreme view of the Fourth Amendment." *Post,* at 17. It is unfortunate, in my view, not because this argument somehow "distract[ed]" the Court from other more meritorious arguments made by the Government—these arguments are addressed and convincingly rejected in the Court's opinion—but because it is deeply distressing that the Department of Justice, whose mission is to protect the constitutional liberties of the people of the United States, should even appear to be seeking to subvert them by extreme and dubious legal arguments. It is gratifying that the Court today unanimously rejects the Government's position.

Second, it should be noted that while Part II of the dissent suggests a number of possible alternative courses of action that the agents could have followed without violating the Constitution, no decision of this Court is cited to support the constitutionality of these courses, but only some decisions of Courts of Appeals. *Post,* at 23, nn. 4 and 5. In my view, it is not at all obvious that the agents could

[10] Unlike searches of the person, *United States* v. *Robinson,* 414 U. S. 218 (1973); *United States* v. *Edwards,* 415 U. S. 800 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest.

legally have searched the footlocker had they seized it after Machado and Leary had driven away with it in their car [1] or "at the time and place of the arrests." [2]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I think it somewhat unfortunate that the Government sought a reversal in this case primarily to vindicate an extreme view of the Fourth Amendment that would restrict the protection of the Warrant Clause to private dwellings and a few other "high privacy" areas. I reject this argument for the reasons stated in Parts (2) and (3) of the Court's opinion, with which I am in general agreement. The overbroad nature of the Goverment's principal argument, however, has served to distract the Court from the more important task of defining the proper scope of a search incident to an arrest. The Court fails to accept the opportunity this case presents to apply the rationale of recent decisions and develop a clear doctrine concerning the proper consequences

---

[1] While the contents of the car could have been searched pursuant to the automobile exception, it is by no means clear that the contents of locked containers found inside a car are subject to search under this exception, any more than they would be if the police found them in any other place.

[2] When Machado and Leary were "standing next to [the] open automobile trunk containing the footlocker," and even when they "were seated on it," *post,* at 23, it is not obvious to me that the contents of the heavy, securely locked footlocker were within the area of their "immediate control" for purposes of the search-incident-to-arrest doctrine, the justification for which is the possibility that the arrested person might have immediate access to weapons that might endanger the officer's safety or assist in his escape, or to items of evidence that he might conceal or destroy. I would think that the footlocker in this case hardly was " 'within [respondents'] immediate control'—construing that phrase to mean the area from within which [they] might gain possession of a weapon or destructible evidence." *Chimel* v. *California,* 395 U. S. 752, 763 (1969).

of custodial arrest. Accordingly, I dissent from the judgment.

I

One line of recent decisions establishes that no warrant is required for the arresting officer to search the clothing and effects of one placed in custodial arrest. The rationale for this was explained in *United States* v. *Robinson,* 414 U. S. 218 (1973):

> "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.,* at 235.

Accord, *Gustafson* v. *Florida,* 414 U. S. 260 (1973). Under this doctrine, a search of personal effects need not be contemporaneous with the arrest, and indeed may be delayed a number of hours while the suspect remains in lawful custody. *United States* v. *Edwards,* 415 U. S. 800 (1974).

A second series of decisions concerns the consequences of custodial arrest of a person driving an automobile. The car

may be impounded and, with probable cause, its contents (including locked compartments) subsequently examined without a warrant. *Texas* v. *White,* 423 U. S. 67 (1975); *Cady* v. *Dombrowski,* 413 U. S. 433, 439–448 (1973); *Chambers* v. *Maroney,* 399 U. S. 42, 47–52 (1970). Moreover, once a car has been properly impounded for any reason, the police may follow a standard procedure of inventorying its contents without any showing of probable cause. *South Dakota* v. *Opperman,* 428 U. S. 364 (1976).

I would apply the rationale of these two lines of authority and hold generally that a warrant is not required to seize and search any movable property in the possession of a person properly arrested in a public place. A person arrested in a public place is likely to have various kinds of property with him: items inside his clothing, a briefcase or suitcase, packages, or a vehicle. In such instances the police cannot very well leave the property on the sidewalk or street while they go to get a warrant. The items may be stolen by a passer-by or removed by the suspect's confederates. Rather than requiring the police to "post a guard" over such property, I think it is surely reasonable for the police to take the items along to the station with the arrested person.

In the present case the Court of Appeals held, and respondents do not contest, that it was proper for the federal agents to seize the footlocker and take it to their office. Given the propriety of seizing the footlocker, there is some reason to believe that the subsequent search *a fortiori* was permissible. See *Chambers* v. *Maroney,* 399 U. S., at 51–52. I acknowledge, however, that impounding the footlocker without searching it would have been a less intrusive alternative in this case. The police could have waited to conduct their search until after a warrant had been obtained. Nevertheless, the mere fact that a warrant could have been obtained while the footlocker was safely impounded does not necessarily make the warrantless search unreasonable. See, *e. g., United States*

v. *Edwards,* 415 U. S., at 805; *Cardwell* v. *Lewis,* 417 U. S. 583, 595–596 (1974) (plurality opinion).

As the Court in *Robinson* recognized, custodial arrest is such a serious deprivation that various lesser invasions of privacy may be fairly regarded as incidental. An arrested person, of course, has an additional privacy interest in the objects in his possession at the time of arrest. To be sure, allowing impoundment of those objects pursuant to arrest, but requiring a warrant for examination of their contents, would protect that incremental privacy interest in cases where the police assessment of probable cause is subsequently rejected by a magistrate. But a countervailing consideration is that a warrant would be routinely forthcoming in the vast majority of situations where the property has been seized in conjunction with the valid arrest of a person in a public place. I therefore doubt that requiring the authorities to go through the formality of obtaining a warrant in this situation would have much practical effect in protecting Fourth Amendment values.[1]

I believe this sort of practical evaluation underlies the Court's decisions permitting clothing, personal effects, and automobiles to be searched without a warrant as an incident of arrest, even though it would be possible simply to impound these items until a warrant could be obtained. The Court's opinion does not explain why a wallet carried in the arrested person's clothing, but not the footlocker in the present case, is subject to "reduced expectations of privacy caused by

[1] A search warrant serves additional functions where an arrest takes place in a home or office. The warrant assures the occupants that the officers have legal authority to conduct the search and defines the area to be searched and the objects to be seized. See *Camara* v. *Municipal Court,* 387 U. S. 523, 532 (1967). But a warrant would serve none of these functions where the arrest takes place in a public area and the authorities are admittedly empowered to seize the objects in question. Cf. *United States* v. *Watson,* 423 U. S. 411, 414–424 (1976) (warrant not required for arrest, based on probable cause, in public place).

the arrest." *Ante,* at 16 n. 10. Nor does the Court explain how such items as purses or briefcases fit into the dichotomy.[2] Perhaps the holding in the present case will be limited in the future to objects that are relatively immobile by virtue of their size or absence of a means of propulsion.

It is also possible that today's decision will not have much impact because other doctrines often will be available to sustain warrantless searches of objects in police custody. As the Court acknowledges, *ante,* at 15 n. 9, no warrant is necessary when the authorities suspect the object they have impounded has dangerous contents. Moreover, police may establish a routine procedure of inventorying the contents of any container taken into custody, for reasons of security and property conservation. Cf. *South Dakota* v. *Opperman,* 428 U. S. 364 (1976). Law enforcement officers should not be precluded from conducting an inventory search when they take a potential "Trojan horse" into their office. Finally, exigent circumstances may often justify an immediate search of property seized in conjunction with an arrest, in order to facilitate the apprehension of confederates or the termination of continuing criminal activity. Cf. *Warden* v. *Hayden,* 387 U. S. 294, 298–300 (1967).

Since one of the preceding special circumstances is likely to be available in most instances, and since the suspect's expectations of privacy are properly abated by the fact of arrest itself, it would be better, in my view, to adopt a clear-cut rule permitting property seized in conjunction with a valid arrest in a public place to be searched without a warrant.

---

[2] The Courts of Appeals generally have held that it is proper for the police to seize a briefcase or package in the possession of a person at the time of arrest, and subsequently to search the property without a warrant after the arrested person has been taken into custody. See, *e. g., United States* v. *Schleis,* 543 F. 2d 59 (CA8 1976), cert. pending, No. 76–5722; *United States* v. *Battle,* 166 U. S. App. D. C. 396, 510 F. 2d 776 (1975); *United States ex rel. Muhammad* v. *Mancusi,* 432 F. 2d 1046 (CA2 1970), cert. denied, 402 U. S. 911 (1971).

Such an approach would simplify the constitutional law of criminal procedure without seriously derogating from the values protected by the Fourth Amendment's prohibition of unreasonable searches and seizures.[3]

II

The approach taken by the Court has the perverse result of allowing fortuitous circumstances to control the outcome of the present case. The agents probably could have avoided having the footlocker search held unconstitutional either by delaying the arrest for a few minutes or by conducting the search on the spot rather than back at their office. Probable cause for the arrest was present from the time respondents Machado and Leary were seated on the footlocker inside Boston's South Station and the agents' dog signaled the presence of marihuana. Rather than make an arrest at this moment, the agents commendably sought to determine the possible involvement of others in the illegal scheme. They waited a short time until respondent Chadwick arrived and the footlocker had been loaded into the trunk of his car, and then made the arrest. But if the agents had postponed the arrest just a few minutes longer until the respondents started to drive away, then the car could have been

[3] " 'My basic premise is that Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' " LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127, 141 (footnotes omitted), quoting *United States* v. *Robinson*, 153 U. S. App. D. C. 114, 154, 471 F. 2d 1082, 1122 (1972) (dissenting opinion), rev'd, 414 U. S. 218 (1973).

seized, taken to the agents' office, and all its contents—including the footlocker—searched without a warrant.[4]

Alternatively, the agents could have made a search of the footlocker at the time and place of the arrests. Machado and Leary were standing next to an open automobile trunk containing the footlocker, and thus it was within the area of their "immediate control." And certainly the footlocker would have been properly subject to search at the time if the arrest had occurred a few minutes earlier while Machado and Leary were seated on it.[5]

---

[4] The scope of the "automobile search" exception to the warrant requirement extends to the contents of locked compartments, including glove compartments and trunks. See cases cited *supra*, at 19. The Courts of Appeals have construed this doctrine to include briefcases, suitcases, and footlockers inside automobiles. *United States* v. *Tramunti*, 513 F. 2d 1087, 1104–1105 (CA2 1975); *United States* v. *Issod*, 508 F. 2d 990, 993 (CA7 1974), cert. denied, 421 U. S. 916 (1975); *United States* v. *Soriano*, 497 F. 2d 147 (CA5 1974) (en banc), convictions summarily aff'd *sub nom. United States* v. *Aviles*, 535 F. 2d 658 (1976), cert. pending, Nos. 76–5132 and 76–5143; *United States* v. *Evans*, 481 F. 2d 990, 993–994 (CA9 1973).

[5] *Chimel* v. *California*, 395 U. S. 752, 763 (1969), authorizes an on-the-spot search of the area within the "immediate control" of an arrested person. It is well established that an immediate search of packages or luggage carried by an arrested person is proper. See *Draper* v. *United States*, 358 U. S. 307, 310–311 (1959). Such searches have been sustained by the Courts of Appeals even if they occurred after the arrested person had been handcuffed and thus could no longer gain access to the property in question. *United States* v. *Eatherton*, 519 F. 2d 603, 609–610 (CA1), cert. denied, 423 U. S. 987 (1975); *United States* v. *Kaye*, 492 F. 2d 744 (CA6 1974); *United States* v. *Mehciz*, 437 F. 2d 145 (CA9), cert. denied, 402 U. S. 974 (1971). Searches under the *Chimel* rationale have also been approved when the suitcase or briefcase was close by, but not touching, the arrested person. *United States* v. *French*, 545 F. 2d 1021 (CA5 1977) (suitcase "within an arm's length" of arrested person); *United States* v. *Frick*, 490 F. 2d 666 (CA5 1973), cert. denied *sub nom. Peterson* v. *United States*, 419 U. S. 831 (1974) (briefcase lying on seat of automobile next to which person was arrested).

In many cases, of course, small variations in the facts are determinative of the legal outcome. Criminal law necessarily involves some line drawing. But I see no way that these alternative courses of conduct, which likely would have been held constitutional under the Fourth Amendment, would have been any more solicitous of the privacy or well-being of the respondents. Indeed, as Judge Thomsen observed in dissenting from this aspect of the Court of Appeals' decision that is today affirmed, the course of conduct followed by the agents in this case was good police procedure.[6] It is decisions of the kind made by the Court today that make criminal law a trap for the unwary policeman and detract from the important activities of detecting criminal activity and protecting the public safety.

[6] "A railroad station, after the arrival of a train, is not a good place to conduct such an arrest and search, especially when the agents did not know whether one or more men might respond to the telephone call Machado had made. Nor is a street outside the station a good place to open a footlocker containing marijuana. The agents acted wisely in arresting Machado at the car, and in postponing until they arrived at JFK opening the footlocker, to confirm the fact that it contained contraband." 532 F. 2d 773, 786 (1976).

I might add that postponing the arrest until after the car was started would have increased the likelihood that respondents would attempt to evade arrest, possibly endangering innocent bystanders.

Syllabus

MIREE ET AL. *v.* DeKALB COUNTY, GEORGIA, ET AL.

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

No. 76–607. Argued April 27, 1977—Decided June 21, 1977*

1. In petitioners' consolidated diversity actions against respondent county arising out of an aircraft crash at the county's airport, state rather than federal law *held* to apply to the resolution of petitioners' claim that, as, respectively, survivors of deceased passengers, the assignee of the aircraft owner, and a burn victim, they are the third-party beneficiaries of grant contracts between the county and the Federal Aviation Administration whereby the county agreed to restrict the use of land adjacent to or near the airport to activities compatible with normal aircraft operations, including landings and takeoffs; that the county breached these contracts by operating a garbage dump adjacent to the airport; and that the cause of the crash was the ingestion of birds swarming from the dump into the aircraft's jet engines shortly after takeoff. The rationale of *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, that federal common law may govern in diversity cases where a uniform national rule is necessary to further the Federal Government's interest, is inapplicable, since only the rights of private litigants are at issue and no substantial rights or duties of the United States hinge on the outcome of the litigation. Pp. 28–33.
2. Petitioners' claim, argued in this Court, that the Airport and Airway Development Act of 1970 provides an implied civil right of action to recover for death or injury due to violation of the Act, will not be considered where it was neither pleaded, argued, nor briefed in the courts below. Pp. 33–34.

538 F. 2d 643, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 34.

---

*Together with No. 76–659, *Phillips* v. *DeKalb County, Georgia, et al.*; No. 76–700, *Fireman's Fund Insurance Co.* v. *DeKalb County, Georgia, et al.*; and No. 76–722, *Fields* v. *DeKalb County, Georgia, et al.*, also on certiorari to the same court.

Alan W. Heldman and *J. Arthur Mozley* argued the cause for petitioners in all cases. With *Mr. Heldman* on the briefs for petitioners in No. 76–607 were *Gilbert E. Johnston* and *Hugh M. Dorsey*. *Mr. Mozley* filed briefs for petitioner in No. 76–700. *A. Russell Blank, Claude R. Ross,* and *Baxter H. Finch* filed a brief for petitioner in No. 76–659. *Joseph Claude Freeman, Jr.,* filed a brief for petitioner in No. 76–722.

F. Clay Bush argued the cause and filed a brief for respondent DeKalb County in all cases.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

These consolidated cases arise out of the 1973 crash of a Lear Jet shortly after takeoff from the DeKalb-Peachtree Airport. The United States Court of Appeals for the Fifth Circuit, en banc, affirmed the dismissal of petitioners' complaint against respondent DeKalb County (hereafter respondent), holding that principles of federal common law were applicable to the resolution of petitioners' breach-of-contract claim. We granted certiorari to consider whether federal or state law should have been applied to that claim; we conclude that the latter should govern.

I

Petitioners are, respectively, the survivors of deceased passengers, the assignee of the jet aircraft owner, and a burn victim. They brought separate lawsuits, later consolidated, against respondent in the United States District Court for the Northern District of Georgia.[1] The basis for federal jurisdiction was diversity of citizenship, 28 U. S. C. § 1332, and the complaints asserted that respondent was liable on three inde-

[1] Petitioners also sued the United States under the Federal Tort Claims Act. See 28 U. S. C. §§ 1346 (b), 2671 *et seq.* The litigation before us arises out of the District Court's granting of respondent DeKalb County's motion to dismiss and the entry of final judgment under Fed. Rule Civ. Proc. 54 (b). The United States has made no similar motion, and is not a party to the cases in this Court.

pendent theories: negligence, nuisance, and breach of contract. The District Court granted respondent's motion to dismiss each of these claims. The courts below have unanimously agreed that the negligence and nuisance theories are without merit; only the propriety of the dismissal of the contract claims remains in the cases.

Petitioners seek to impose liability on respondent as third-party beneficiaries of contracts between it and the Federal Aviation Administration (FAA). Their complaints allege that respondent entered into six grant agreements with the FAA. *E. g.*, App. 15.[2] Under the terms of the contracts respondent agreed to

> "take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft." *Id.*, at 19.

Petitioners assert that respondent breached the FAA contracts by owning and maintaining a garbage dump adjacent to the airport, and that the cause of the crash was the ingestion of birds swarming from the dump into the jet engines of the aircraft.

Applying Georgia law, the District Court found that petitioners' claims as third-party beneficiaries under the FAA contracts were barred by the county's governmental immunity, and dismissed the complaints under Fed. Rule Civ. Proc. 12 (b)(6). A divided panel of the Court of Appeals decided that under state law petitioners could sue as third-party beneficiaries and that governmental immunity would not bar the suit. *Miree* v. *United States,* 526 F. 2d 679 (1976). The dissenting judge argued that the court should have applied federal rather than state law; he concluded that under the principles of federal common law the petitioners in this case

[2] In reviewing the sufficiency of a complaint in the context of a motion to dismiss we, of course, treat all of the well-pleaded allegations of the complaint as true.

did not have standing to sue as third-party beneficiaries of the contracts. Sitting en banc, the Court of Appeals reversed the panel on the breach-of-contract issue and adopted the panel dissent on this point as its opinion. *Miree* v. *United States,* 538 F. 2d 643 (1976). Judge Morgan, who had written the panel opinion, argued for five dissenters that there was no identifiable federal interest in the outcome of this diversity case, and thus that federal common law had no applicability.

II

Since the only basis of federal jurisdiction alleged for petitioners' claim against respondent is diversity of citizenship, 28 U. S. C. § 1332, the case would unquestionably be governed by Georgia law, *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), but for the fact that the United States is a party to the contracts in question, entered into pursuant to federal statute. See Airport and Airway Development Act of 1970, 84 Stat. 219, as amended, 49 U. S. C. § 1701 *et seq.* (1970 ed. and Supp. V). The en banc majority of the Court of Appeals adopted, by reference, the view that, given these factors, application of federal common law was required:

> "Although jurisdiction here is based upon diversity, the contract we are interpreting is one in which the United States is a party, and one which is entered into pursuant to authority conferred by federal statute. The necessity of uniformity of decision demands that federal common law, rather than state law, control the contract's interpretation. *United States v. Seckinger,* 1970, 397 U. S. 203 . . . ; *Smith v. United States,* 5 Cir. 1974, 497 F. 2d 500; *First National Bank v. Small Business Administration,* 5 Cir. 1970, 429 F. 2d 280." *Miree* v. *United States,* 526 F. 2d, at 686 (footnote omitted).

We do not agree with the conclusion of the Court of Appeals. The litigation before us raises no question regarding the liability of the United States or the responsibilities of the

United States under the contracts. The relevant inquiry is a narrow one: whether petitioners as third-party beneficiaries of the contracts have standing to sue respondent. While federal common law may govern even in diversity cases [3] where a uniform national rule is necessary to further the interests of the Federal Government, *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943), the application of federal common law to resolve the issue presented here would promote no federal interests even approaching the magnitude of those found in *Clearfield Trust:*

> "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." *Id.,* at 367.

But, in this case, the resolution of petitioners' breach-of-contract claim against respondent will have no direct effect upon the United States or its Treasury.[4] The Solicitor General, waiving his right to respond in these cases, advised us:

> "In the course of the proceedings below, the United States determined that its interests would not be directly affected by the resolution of these issue[s] and there-

---

[3] The *Clearfield Trust* rule may apply in diversity cases. See *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173 (1942); *Bank of America Nat. Trust & Sav. Assn.* v. *Parnell,* 352 U. S. 29 (1956); *Wallis* v. *Pan American Petroleum Corp.,* 384 U. S. 63 (1966).

[4] There is no indication that petitioners' tort claim against the United States, see n. 1, *supra,* will be affected by the resolution of this issue. Indeed, the Federal Tort Claims Act itself looks to state law in determining liability. 28 U. S. C. § 1346 (b).

> fore did not participate in briefing or argument in the court of appeals. In view of these considerations, the United States does not intend to respond to the petitions unless it is requested to do so by the Court."

The operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude. However, we see no reason for concluding that these operations would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts. Since only the rights of private litigants are at issue here, we find the *Clearfield Trust* rationale inapplicable.

We think our conclusion that these cases do not fit within the *Clearfield Trust* rule follows from the Court's later decision in *Bank of America Nat. Trust & Sav. Assn.* v. *Parnell,* 352 U. S. 29 (1956), in which the Court declined to apply that rule in a fact situation analogous to this one. *Parnell* was a diversity action between private parties involving United States bonds. The Bank of America had sued Parnell to recover funds that he had obtained by cashing the bonds, which had been stolen from the bank. There were two issues: whether the bonds were "overdue" and whether Parnell had taken the bonds in good faith. The Court of Appeals, over a dissent, applied federal law to resolve both issues; this Court reversed with respect to the good-faith issue. After stressing that the basis for the *Clearfield Trust* decision was that the application of state law in that case would "subject the rights and duties of the United States to exceptional uncertainty," 352 U. S., at 33, the Court rejected the application of the *Clearfield Trust* rationale:

> "Securities issued by the Government generate immediate interests of the Government. These were dealt with in *Clearfield Trust* and in *National Metropolitan Bank* v. *United States,* 323 U. S. 454. But they also

radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States." 352 U. S., at 33.

The Court recognized, as we do here, that the application of state law to the issue of good faith did not preclude the application of federal law to questions directly involving the rights and duties of the Federal Government, and found:

"Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves. A decision with respect to the 'overdueness' of the bonds is therefore a matter of federal law, which, in view of our holding, we need not elucidate." *Id.*, at 34.

The parallel between *Parnell* and these cases is obvious. The question of whether petitioners may sue respondent does not require decision under federal common law since the litigation is among private parties and no substantial rights or duties of the United States hinge on its outcome. On the other hand, nothing we say here forecloses the applicability of federal common law in interpreting the rights and duties of the United States under federal contracts.

Nor is the fact that the United States has a substantial interest in regulating aircraft travel and promoting air travel safety sufficient, given the narrow question before us, to call into play the rule of *Clearfield Trust*. In *Wallis* v. *Pan American Petroleum Corp.*, 384 U. S. 63, 68 (1966), the Court discussed the nature of a federal interest sufficient to bring forth the application of federal common law:

"In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.* It is by no means enough that, as

> we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress." (Emphasis added.)

The question of whether private parties may, as third-party beneficiaries, sue a municipality for breach of the FAA contracts involves this federal interest only insofar as such lawsuits might be thought to advance federal aviation policy by inducing compliance with FAA safety provisions. However, even assuming the correctness of this notion, we adhere to the language in *Wallis,* cited above, stating that the issue of whether to displace state law on an issue such as this is primarily a decision for Congress. Congress has chosen not to do so in this case.[5] Actually the application of federal common law, as interpreted by the Court of Appeals here would frustrate this federal interest *pro tanto,* since that court held that this breach-of-contract lawsuit would not lie under federal law. On the other hand, at least in the opinion of the majority of the panel below, Georgia law would countenance the action. Even assuming that a different result were to be reached under federal common law, we think this language from *Wallis* all but forecloses its application to these cases:

> "Apart from the highly abstract nature of [the federal] interest, there has been no showing that state law is not adequate to achieve it." *Id.,* at 71.

We conclude that any federal interest in the outcome of the question before us "is far too speculative, far too remote a

[5] The Congress has considered, but not passed, a bill to provide for a federal cause of action arising out of aircraft disasters. See Hearings on S. 961 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, pt. 2, 91st Cong., 1st Sess. (1969).

possibility to justify the application of federal law to transactions essentially of local concern." *Parnell,* 352 U. S., at 33–34.

Although we have determined that Georgia law should be applied to the question raised by respondent's motion to dismiss, we shall not undertake to decide the correct outcome under Georgia law. The dissent to the panel opinion, in a footnote, stated that Georgia law would preclude petitioners from suing as third-party beneficiaries. The panel opinion, of course, held otherwise. We doubt that the Court of Appeals would deem itself bound by the dicta found in the footnote to the dissenting opinion which were simply later adopted by reference in the en banc majority opinion. We therefore vacate the judgment and remand to the Court of Appeals for consideration of the claim under applicable Georgia law.

III

Petitioners have argued in this Court that the Airport and Airway Development Act of 1970 provides an implied civil right of action to recover for death or injury due to violation of the Act. 84 Stat. 219, as amended, 49 U. S. C. § 1701 *et seq.* (1970 ed. and Supp. V).[6] Petitioners, however, allege only diversity of citizenship as the basis for federal jurisdiction of their lawsuits; they do not rely upon federal-question jurisdiction, 28 U. S. C. § 1331, which would be more consistent with a theory of an implied federal cause of action under that Act. The complaints sought recovery solely on the grounds of negligence, nuisance, and breach of contract. There is no indication that petitioners alleged a violation of a federal statute and a right to recovery for such a violation. The fact

[6] In language similar to that used in the FAA grant agreements, §§ 1718 (3) and (4) require, as a condition precedent to approval of an airport development project, written assurances that the airport approaches will be safely maintained and that the use of land adjacent to the airport will be restricted to uses compatible with aircraft takeoff and landing.

that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it. Cf. *Lawn* v. *United States,* 355 U. S. 339, 362–363, n. 16 (1958).

The judgment is vacated, and the cases are remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

There is language in the Court's opinion which might be misinterpreted as rigidly limiting the application of "federal common law" to only those situations where the rights and obligations of the Federal Government are at issue. I do not agree with such a restrictive approach.

I cannot read *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943), and *Bank of America Nat. Trust & Sav. Assn.* v. *Parnell,* 352 U. S. 29 (1956) as, in all circumstances, precluding the application of "federal common law" to all matters involving only the rights of private citizens. Certainly, in a diversity action, state substantive law should not be ousted on the basis of " 'an amorphous doctrine of national sovereignty' divorced from any specific constitutional or statutory provision and premised solely on the argument 'that every authorized activity of the United States represents an exercise of its governmental power.' " *United States* v. *Little Lake Misere Land Co.,* 412 U. S. 580, 592 n. 10 (1973), quoting *United States* v. *Burnison,* 339 U. S. 87, 91, and 92 (1950). However, I am not prepared to foreclose, at this point, the possibility that there may be situations where the rights and obligations of private parties are so dependent on a specific exercise of congressional regulatory power that "the Constitution or Acts of Congress 'require' otherwise than that state law govern of its own force."

United States v. *Little Lake Misere Land Co., supra,* at 592–593.

In such a situation, I would not read *Wallis* v. *Pan American Petroleum Corp.,* 384 U. S. 63, 68 (1966), to preclude a choice of "federal common law" simply because there is no specific federal legislation governing the particular transaction at issue. Once it has been determined that it would be inappropriate to apply state law and that federal law must govern, "the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." *United States* v. *Little Lake Misere Land Co., supra,* at 593. In short, although federal courts will be called upon to invoke it infrequently, there must be " 'federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.' " *Ibid.,* quoting Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 800 (1957).

Although in my view the issue is close, I conclude, on balance, that the cause of action asserted by the plaintiffs is not so intimately related to the purpose of the Airport and Airway Development Act of 1970, 84 Stat. 219, as amended, 49 U. S. C. § 1701 *et seq.* (1970 ed. and Supp. V), as to require the application of federal law in this case. See H. R. Rep. No. 91–601 (1969). Accordingly, the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), applies, and I join the judgment of the Court remanding the cases for a determination of the correct outcome under Georgia law.

CONTINENTAL T. V., INC., ET AL. *v.* GTE SYLVANIA INC.

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

No. 76–15. Argued February 28, 1977—Decided June 23, 1977

In an attempt to improve its market position by attracting more aggressive and competent retailers, respondent manufacturer of television sets limited the number of retail franchises granted for any given area and required each franchisee to sell respondent's products only from the location or locations at which it was franchised. Petitioner Continental, one of respondent's franchised retailers, claimed that respondent had violated § 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of respondent's products other than from specified locations. The District Court rejected respondent's requested jury instruction that the location restriction was illegal only if it unreasonably restrained or suppressed competition. Instead, relying on *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, the District Court instructed the jury that it was a *per se* violation of § 1 if respondent entered into a contract, combination, or conspiracy with one or more of its retailers, pursuant to which it attempted to restrict the locations from which the retailers resold the merchandise they had purchased from respondent. The jury found that the location restriction violated § 1, and treble damages were assessed against respondent. Concluding that *Schwinn* was distinguishable, the Court of Appeals reversed, holding that respondent's location restriction had less potential for competitive harm than the restrictions invalidated in *Schwinn* and thus should be judged under the "rule of reason." *Held:*

1. The statement of the *per se* rule in *Schwinn* is broad enough to cover the location restriction used by respondent. And the retail-customer restriction in *Schwinn* is functionally indistinguishable from the location restriction here, the restrictions in both cases limiting the retailer's freedom to dispose of the purchased products and reducing, but not eliminating, intrabrand competition. Pp. 42–47.

2. The justification and standard for the creation of *per se* rules was stated in *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5: "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively

presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Under this standard, there is no justification for the distinction drawn in *Schwinn* between restrictions imposed in sale and nonsale transactions. Similarly, the facts of this case do not present a situation justifying a *per se* rule. Accordingly, the *per se* rule stated in *Schwinn* is overruled, and the location restriction used by respondent should be judged under the traditional rule-of-reason standard. Pp. 47–59.

537 F. 2d 980, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 59. BRENNAN, J., filed a dissenting statement, in which MARSHALL, J., joined, *post*, p. 71. REHNQUIST, J., took no part in the consideration or decision of the case.

Glenn E. Miller argued the cause for petitioners. With him on the briefs were *Lawrence A. Sullivan* and *Jesse Choper*.

M. Laurence Popofsky argued the cause for respondent. With him on the brief were *Richard L. Goff* and *Stephen V. Bomse*.*

MR. JUSTICE POWELL delivered the opinion of the Court.

Franchise agreements between manufacturers and retailers frequently include provisions barring the retailers from selling franchised products from locations other than those specified in the agreements. This case presents important questions concerning the appropriate antitrust analysis of these restrictions under § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, and the Court's decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967).

---

*Briefs of *amici curiae* urging affirmance were filed by *Lawrence T. Zimmerman* for the Associated Equipment Distributors; by *Lloyd N. Cutler, James S. Campbell, William T. Lake,* and *Donald F. Turner* for the Motor Vehicle Manufacturers Assn.; and by *Philip F. Zeidman* and *John A. Dienelt* for the International Franchise Assn.

238-670 O - 79 - 5

I

Respondent GTE Sylvania Inc. (Sylvania) manufactures and sells television sets through its Home Entertainment Products Division. Prior to 1962, like most other television manufacturers, Sylvania sold its televisions to independent or company-owned distributors who in turn resold to a large and diverse group of retailers. Prompted by a decline in its market share to a relatively insignificant 1% to 2% of national television sales,[1] Sylvania conducted an intensive reassessment of its marketing strategy, and in 1962 adopted the franchise plan challenged here. Sylvania phased out its wholesale distributors and began to sell its televisions directly to a smaller and more select group of franchised retailers. An acknowledged purpose of the change was to decrease the number of competing Sylvania retailers in the hope of attracting the more aggressive and competent retailers thought necessary to the improvement of the company's market position.[2] To this end, Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised.[3] A franchise did not constitute an exclusive territory, and Sylvania retained sole discretion to increase the number of retailers in an area in light of the success or failure of existing retailers in developing their market. The revised marketing strategy appears to have been successful during the period at issue here, for by 1965 Sylvania's share of national television sales had increased to approximately 5%, and the

[1] RCA at that time was the dominant firm with as much as 60% to 70% of national television sales in an industry with more than 100 manufacturers.

[2] The number of retailers selling Sylvania products declined significantly as a result of the change, but in 1965 there were at least two franchised Sylvania retailers in each metropolitan center of more than 100,000 population.

[3] Sylvania imposed no restrictions on the right of the franchisee to sell the products of competing manufacturers.

company ranked as the Nation's eighth largest manufacturer of color television sets.

This suit is the result of the rupture of a franchiser-franchisee relationship that had previously prospered under the revised Sylvania plan. Dissatisfied with its sales in the city of San Francisco,[4] Sylvania decided in the spring of 1965 to franchise Young Brothers, an established San Francisco retailer of televisions, as an additional San Francisco retailer. The proposed location of the new franchise was approximately a mile from a retail outlet operated by petitioner Continental T. V., Inc. (Continental), one of the most successful Sylvania franchisees.[5] Continental protested that the location of the new franchise violated Sylvania's marketing policy, but Sylvania persisted in its plans. Continental then canceled a large Sylvania order and placed a large order with Phillips, one of Sylvania's competitors.

During this same period, Continental expressed a desire to open a store in Sacramento, Cal., a desire Sylvania attributed at least in part to Continental's displeasure over the Young Brothers decision. Sylvania believed that the Sacramento market was adequately served by the existing Sylvania retailers and denied the request.[6] In the face of this denial, Continental advised Sylvania in early September 1965, that it was in the process of moving Sylvania merchandise from its San Jose, Cal., warehouse to a new retail location that it had leased in Sacramento. Two weeks later, allegedly for unrelated reasons, Sylvania's credit department reduced Conti-

[4] Sylvania's market share in San Francisco was approximately 2.5%—half its national and northern California average.

[5] There are in fact four corporate petitioners: Continental T. V., Inc., A & G Sales, Sylpac, Inc., and S. A. M. Industries, Inc. All are owned in large part by the same individual, and all conducted business under the trade style of "Continental T. V." We adopt the convention used by the court below of referring to petitioners collectively as "Continental."

[6] Sylvania had achieved exceptional results in Sacramento, where its market share exceeded 15% in 1965.

nental's credit line from $300,000 to $50,000.[7] In response to the reduction in credit and the generally deteriorating relations with Sylvania, Continental withheld all payments owed to John P. Maguire & Co., Inc. (Maguire), the finance company that handled the credit arrangements between Sylvania and its retailers. Shortly thereafter, Sylvania terminated Continental's franchises, and Maguire filed this diversity action in the United States District Court for the Northern District of California seeking recovery of money owed and of secured merchandise held by Continental.

The antitrust issues before us originated in cross-claims brought by Continental against Sylvania and Maguire. Most important for our purposes was the claim that Sylvania had violated § 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations.[8] At the close of evidence in the jury trial of Continental's claims, Sylvania requested the District Court to instruct the jury that its location restriction was illegal only if it unreasonably restrained or suppressed competition. App. 5–6, 9–15. Relying on this Court's decision in *United States* v. *Arnold, Schwinn & Co., supra,* the District Court rejected the proffered instruction in favor of the following one:

> "Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the

[7] In its findings of fact made in conjunction with Continental's plea for injunctive relief, the District Court rejected Sylvania's claim that its actions were prompted by independent concerns over Continental's credit. The jury's verdict is ambiguous on this point. In any event, we do not consider it relevant to the issue before us.

[8] Although Sylvania contended in the District Court that its policy was unilaterally enforced, it now concedes that its location restriction involved understandings or agreements with the retailers.

> products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions." App. 492.

In answers to special interrogatories, the jury found that Sylvania had engaged "in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions alone," and assessed Continental's damages at $591,505, which was trebled pursuant to 15 U. S. C. § 15 to produce an award of $1,774,515. App. 498, 501.[9]

On appeal, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed by a divided vote. 537 F. 2d 980 (1976). The court acknowledged that there is language in *Schwinn* that could be read to support the District Court's instruction but concluded that *Schwinn* was distinguishable on several grounds. Contrasting the nature of the restrictions, their competitive impact, and the market shares of the franchisers in the two cases, the court concluded that Sylvania's location restriction had less potential for competitive harm than the restrictions invalidated in *Schwinn* and thus should be judged under the "rule of reason" rather than the *per se* rule stated in *Schwinn*. The court found support for its

[9] The jury also found that Maguire had not conspired with Sylvania with respect to this violation. Other claims made by Continental were either rejected by the jury or withdrawn by Continental. Most important was the jury's rejection of the allegation that the location restriction was part of a larger scheme to fix prices. A pendent claim that Sylvania and Maguire had willfully and maliciously caused injury to Continental's business in violation of California law also was rejected by the jury, and a pendent breach-of-contract claim was withdrawn by Continental during the course of the proceedings. The parties eventually stipulated to a judgment for Maguire on its claim against Continental.

position in the policies of the Sherman Act and in the decisions of other federal courts involving nonprice vertical restrictions.[10]

We granted Continental's petition for certiorari to resolve this important question of antitrust law. 429 U. S. 893 (1976).[11]

II

A

We turn first to Continental's contention that Sylvania's restriction on retail locations is a *per se* violation of § 1 of the Sherman Act as interpreted in *Schwinn*. The restrictions at issue in *Schwinn* were part of a three-tier distribution system comprising, in addition to Arnold, Schwinn & Co. (Schwinn), 22 intermediate distributors and a network of franchised retailers. Each distributor had a defined geographic area in which it had the exclusive right to supply franchised retailers. Sales to the public were made only through franchised retailers, who were authorized to sell Schwinn bicycles only from specified locations. In support of this limitation, Schwinn prohibited both distributors and retailers from selling Schwinn bicycles to nonfranchised retailers. At the retail level, therefore, Schwinn was able to control the number of retailers of

[10] There were two major dissenting opinions. Judge Kilkenny argued that the present case is indistinguishable from *Schwinn* and that the jury had been correctly instructed. Agreeing with Judge Kilkenny's interpretation of *Schwinn*, Judge Browning stated that he found the interpretation responsive to and justified by the need to protect " 'individual traders from unnecessary restrictions upon their freedom of action.' " 537 F. 2d, at 1021. See n. 21, *infra*.

[11] This Court has never given plenary consideration to the question of the proper antitrust analysis of location restrictions. Before *Schwinn* such restrictions had been sustained in *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (CA2 1942). Since the decision in *Schwinn*, location restrictions have been sustained by three Courts of Appeals, including the decision below. *Salco Corp.* v. *General Motors Corp.*, 517 F. 2d 567 (CA10 1975); *Kaiser* v. *General Motors Corp.*, 396 F. Supp. 33 (ED Pa. 1975), affirmance order, 530 F. 2d 964 (CA3 1976).

its bicycles in any given area according to its view of the needs of that market.

As of 1967 approximately 75% of Schwinn's total sales were made under the "Schwinn Plan." Acting essentially as a manufacturer's representative or sales agent, a distributor participating in this plan forwarded orders from retailers to the factory. Schwinn then shipped the ordered bicycles directly to the retailer, billed the retailer, bore the credit risk, and paid the distributor a commission on the sale. Under the Schwinn Plan, the distributor never had title to or possession of the bicycles. The remainder of the bicycles moved to the retailers through the hands of the distributors. For the most part, the distributors functioned as traditional wholesalers with respect to these sales, stocking an inventory of bicycles owned by them to supply retailers with emergency and "fill-in" requirements. A smaller part of the bicycles that were physically distributed by the distributors were covered by consignment and agency arrangements that had been developed to deal with particular problems of certain distributors. Distributors acquired title only to those bicycles that they purchased as wholesalers; retailers, of course, acquired title to all of the bicycles ordered by them.

In the District Court, the United States charged a continuing conspiracy by Schwinn and other alleged co-conspirators to fix prices, allocate exclusive territories to distributors, and confine Schwinn bicycles to franchised retailers. Relying on *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944), the Government argued that the nonprice restrictions were *per se* illegal as part of a scheme for fixing the retail prices of Schwinn bicycles. The District Court rejected the price-fixing allegation because of a failure of proof and held that Schwinn's limitation of retail bicycle sales to franchised retailers was permissible under § 1. The court found a § 1 violation, however, in "a conspiracy to divide certain borderline or overlapping counties in the territories served by four Midwestern

cycle distributors." 237 F. Supp. 323, 342 (ND Ill. 1965). The court described the violation as a "division of territory by agreement between the distributors . . . horizontal in nature," and held that Schwinn's participation did not change that basic characteristic. *Ibid.* The District Court limited its injunction to apply only to the territorial restrictions on the resale of bicycles purchased by the distributors in their roles as wholesalers. *Ibid.*

Schwinn came to this Court on appeal by the United States from the District Court's decision. Abandoning its *per se* theories, the Government argued that Schwinn's prohibition against distributors' and retailers' selling Schwinn bicycles to nonfranchised retailers was unreasonable under § 1 and that the District Court's injunction against exclusive distributor territories should extend to all such restrictions regardless of the form of the transaction. The Government did not challenge the District Court's decision on price fixing, and Schwinn did not challenge the decision on exclusive distributor territories.

The Court acknowledged the Government's abandonment of its *per se* theories and stated that the resolution of the case would require an examination of "the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry." 388 U. S., at 374. Despite this description of its task, the Court proceeded to articulate the following "bright line" *per se* rule of illegality for vertical restrictions: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." *Id.*, at 379. But the Court expressly stated that the rule of reason governs when "the manufacturer retains title, dominion, and risk with

respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer." *Id.*, at 380.

Application of these principles to the facts of *Schwinn* produced sharply contrasting results depending upon the role played by the distributor in the distribution system. With respect to that portion of Schwinn's sales for which the distributors acted as ordinary wholesalers, buying and reselling Schwinn bicycles, the Court held that the territorial and customer restrictions challenged by the Government were *per se* illegal. But, with respect to that larger portion of Schwinn's sales in which the distributors functioned under the Schwinn Plan and under the less common consignment and agency arrangements, the Court held that the same restrictions should be judged under the rule of reason. The only retail restriction challenged by the Government prevented franchised retailers from supplying nonfranchised retailers. *Id.*, at 377. The Court apparently perceived no material distinction between the restrictions on distributors and retailers, for it held:

> "The principle is, of course, equally applicable to sales to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products." *Id.*, at 378.

Applying the rule of reason to the restrictions that were not imposed in conjunction with the sale of bicycles, the Court had little difficulty finding them all reasonable in light of the competitive situation in "the product market as a whole." *Id.*, at 382.

B

In the present case, it is undisputed that title to the television sets passed from Sylvania to Continental. Thus, the *Schwinn per se* rule applies unless Sylvania's restriction on

locations falls outside *Schwinn*'s prohibition against a manufacturer's attempting to restrict a "retailer's freedom as to where and to whom it will resell the products." *Id.*, at 378. As the Court of Appeals conceded, the language of *Schwinn* is clearly broad enough to apply to the present case. Unlike the Court of Appeals, however, we are unable to find a principled basis for distinguishing *Schwinn* from the case now before us.

Both Schwinn and Sylvania sought to reduce but not to eliminate competition among their respective retailers through the adoption of a franchise system. Although it was not one of the issues addressed by the District Court or presented on appeal by the Government, the Schwinn franchise plan included a location restriction similar to the one challenged here. These restrictions allowed Schwinn and Sylvania to regulate the amount of competition among their retailers by preventing a franchisee from selling franchised products from outlets other than the one covered by the franchise agreement. To exactly the same end, the Schwinn franchise plan included a companion restriction, apparently not found in the Sylvania plan, that prohibited franchised retailers from selling Schwinn products to nonfranchised retailers. In *Schwinn* the Court expressly held that this restriction was impermissible under the broad principle stated there. In intent and competitive impact, the retail-customer restriction in *Schwinn* is indistinguishable from the location restriction in the present case. In both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired. The fact that one restriction was addressed to territory and the other to customers is irrelevant to functional antitrust analysis and, indeed, to the language and broad thrust of the opinion in *Schwinn*.[12] As Mr. Chief Justice Hughes stated in

[12] The distinctions drawn by the Court of Appeals and endorsed in MR. JUSTICE WHITE'S separate opinion have no basis in *Schwinn*. The intrabrand competitive impact of the restrictions at issue in *Schwinn*

Appalachian Coals, Inc. v. *United States,* 288 U. S. 344, 360, 377 (1933): "Realities must dominate the judgment. . . . The Anti-Trust Act aims at substance."

III

Sylvania argues that if *Schwinn* cannot be distinguished, it should be reconsidered. Although *Schwinn* is supported by the principle of *stare decisis, Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 736 (1977), we are convinced that the need for clarification of the law in this area justifies reconsideration. *Schwinn* itself was an abrupt and largely unexplained departure from *White Motor Co.* v. *United States,* 372 U. S. 253 (1963), where only four years earlier the Court had refused to endorse a *per se* rule for vertical restrictions. Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion

---

ranged from complete elimination to mere reduction; yet, the Court did not even hint at any distinction on this ground. Similarly, there is no suggestion that the *per se* rule was applied because of Schwinn's prominent position in its industry. That position was the same whether the bicycles were sold or consigned, but the Court's analysis was quite different. In light of MR. JUSTICE WHITE's emphasis on the "superior consumer acceptance" enjoyed by the Schwinn brand name, *post,* at 63, we note that the Court rejected precisely that premise in *Schwinn.* Applying the rule of reason to the restrictions imposed in nonsale transactions, the Court stressed that there was "no showing that [competitive bicycles were] not in all respects reasonably interchangeable as articles of competitive commerce with the Schwinn product" and that it did "not regard Schwinn's claim of product excellence as establishing the contrary." 388 U. S., at 381, and n. 7. Although *Schwinn* did hint at preferential treatment for new entrants and failing firms, the District Court below did not even submit Sylvania's claim that it was failing to the jury. Accordingly, MR. JUSTICE WHITE's position appears to reflect an extension of *Schwinn* in this regard. Having crossed the "failing firm" line, MR. JUSTICE WHITE attempts neither to draw a new one nor to explain why one should be drawn at all.

has been critical of the decision,[13] and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach.[14] In our view, the experience of the

[13] A former Assistant Attorney General in charge of the Antitrust Division has described *Schwinn* as "an exercise in barren formalism" that is "artificial and unresponsive to the competitive needs of the real world." Baker, Vertical Restraints in Times of Change: From *White* to *Schwinn* to Where?, 44 Antitrust L. J. 537 (1975). See, *e. g.*, Handler, The Twentieth Annual Antitrust Review—1967, 53 Va. L. Rev. 1667 (1967); McLaren, Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal, 37 Antitrust L. J. 137 (1968); Pollock, Alternative Distribution Methods After *Schwinn*, 63 Nw. U. L. Rev. 595 (1968); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282 (1975); Robinson, Recent Antitrust Developments: 1974, 75 Colum. L. Rev. 243 (1975); Note, Vertical Territorial and Customer Restrictions in the Franchising Industry, 10 Colum. J. L. & Soc. Prob. 497 (1974); Note, Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?, 40 Geo. Wash. L. Rev. 123 (1971); Note, Territorial Restrictions and Per Se Rules—A Re-evaluation of the *Schwinn* and *Sealy* Doctrines, 70 Mich. L. Rev. 616 (1972). But see Louis, Vertical Distributional Restraints Under *Schwinn* and *Sylvania:* An Argument for the Continuing Use of a Partial Per Se Approach, 75 Mich. L. Rev. 275 (1976); Zimmerman, Distribution Restrictions After *Sealy* and *Schwinn*, 12 Antitrust Bull. 1181 (1967). For a more inclusive list of articles and comments, see 537 F. 2d, at 988 n. 13.

[14] Indeed, as one commentator has observed, many courts "have struggled to distinguish or limit *Schwinn* in ways that are a tribute to judicial ingenuity." Robinson, *supra*, n. 13, at 272. Thus, the statement in *Schwinn* that post-sale vertical restrictions as to customers or territories are "unreasonable without more," 388 U. S., at 379, has been interpreted to allow an exception to the *per se* rule where the manufacturer proves "more" by showing that the restraints will protect consumers against injury and the manufacturer against product liability claims. See, *e. g.*, *Tripoli Co.* v. *Wella Corp.*, 425 F. 2d 932, 936–938 (CA3 1970) (en banc). Similarly, the statement that Schwinn's enforcement of its restrictions had been " 'firm and resolute,' " 388 U. S., at 372, has been relied upon to distinguish cases lacking that element. See, *e. g.*, *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F. 2d 398, 406 (CA2 1968). Other factual distinctions have been drawn to justify upholding territorial restrictions

past 10 years should be brought to bear on this subject of considerable commercial importance.

The traditional framework of analysis under § 1 of the Sherman Act is familiar and does not require extended discussion. Section 1 prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce." Since the early years of this century a judicial gloss on this statutory language has established the "rule of reason" as the prevailing standard of analysis. *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911). Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.[15] *Per se* rules of il-

---

that would seem to fall within the scope of the *Schwinn per se* rule. See, *e. g., Carter-Wallace, Inc.* v. *United States,* 196 Ct. Cl. 35, 44–46, 449 F. 2d 1374, 1379–1380 (1971) (*per se* rule inapplicable when purchaser can avoid restraints by electing to buy product at higher price); *Colorado Pump & Supply Co.* v. *Febco, Inc.,* 472 F. 2d 637 (CA10 1973) (apparent territorial restriction characterized as primary responsibility clause). One Court of Appeals has expressly urged us to consider the need in this area for greater flexibility. *Adolph Coors Co.* v. *FTC,* 497 F. 2d 1178, 1187 (CA10 1974). The decision in *Schwinn* and the developments in the lower courts have been exhaustively surveyed in ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition (1977) (ABA Monograph No. 2).

[15] One of the most frequently cited statements of the rule of reason is that of Mr. Justice Brandeis in *Chicago Bd. of Trade* v. *United States,* 246 U. S. 231, 238 (1918):

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because

legality are appropriate only when they relate to conduct that is manifestly anticompetitive. As the Court explained in *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5 (1958), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." [16]

In essence, the issue before us is whether *Schwinn*'s *per se* rule can be justified under the demanding standards of *Northern Pac. R. Co.* The Court's refusal to endorse a *per se* rule in *White Motor Co.* was based on its uncertainty as to whether vertical restrictions satisfied those standards. Addressing this question for the first time, the Court stated:

> "We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' (*Northern Pac. R. Co.* v. *United States, supra,* p. 5) and therefore should

---

knowledge of intent may help the court to interpret facts and to predict consequences."

[16] *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, see *Northern Pac. R. Co.* v. *United States,* 356 U. S., at 5; *United States* v. *Topco Associates, Inc.,* 405 U. S. 596, 609–610 (1972), but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law.

be classified as *per se* violations of the Sherman Act." 372 U. S., at 263.

Only four years later the Court in *Schwinn* announced its sweeping *per se* rule without even a reference to *Northern Pac. R. Co.* and with no explanation of its sudden change in position.[17] We turn now to consider *Schwinn* in light of *Northern Pac. R. Co.*

The market impact of vertical restrictions[18] is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand com-

---

[17] After *White Motor Co.*, the Courts of Appeals continued to evaluate territorial restrictions according to the rule of reason. *Sandura Co.* v. *FTC*, 339 F. 2d 847 (CA6 1964); *Snap-On Tools Corp.* v. *FTC*, 321 F. 2d 825 (CA7 1963). For an exposition of the history of the antitrust analysis of vertical restrictions before *Schwinn*, see ABA Monograph No. 2, pp. 6–8.

[18] As in *Schwinn*, we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As MR. JUSTICE WHITE notes, *post*, at 69–70, some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment. In his concurring opinion in *White Motor Co.* v. *United States*, MR. JUSTICE BRENNAN noted that, unlike nonprice restrictions, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." 372 U. S., at 268. Professor Posner also recognized that "industry-wide resale price maintenance might facilitate cartelizing." Posner, *supra*, n. 13, at 294 (footnote omitted); see R. Posner, Antitrust: Cases, Economic Notes and Other Materials 134 (1974); E. Gellhorn, Antitrust Law and Economics 252 (1976); Note, 10 Colum. J. L. & Soc. Prob., *supra*, n. 13, at 498 n. 12. Furthermore, Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States. Consumer Goods Pricing Act of 1975, 89 Stat. 801, amending 15 U. S. C. §§ 1, 45 (a). No similar expression of congressional intent exists for nonprice restrictions.

petition.[19] Significantly, the Court in *Schwinn* did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers. The pivotal factor was the passage of title: All restrictions were held to be *per se* illegal where title had passed, and all were evaluated and sustained under the rule of reason where it had not. The location restriction at issue here would be subject to the same pattern of analysis under *Schwinn*.

It appears that this distinction between sale and nonsale transactions resulted from the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions. The *per se* rule for sale transactions reflected the view that vertical restrictions are "so obviously destructive" of intrabrand competition [20] that their use would "open the door to exclusivity of outlets and limitation of ter-

---

[19] Interbrand competition is the competition among the manufacturers of the same generic product—television sets in this case—and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors—wholesale or retail—of the product of a particular manufacturer.

The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.

[20] The Court did not specifically refer to intrabrand competition, but this meaning is clear from the context.

ritory further than prudence permits." 388 U. S., at 379–380.[21] Conversely, the continued adherence to the traditional rule of reason for nonsale transactions reflected the view that the restrictions have too great a potential for the promotion of interbrand competition to justify complete prohibition.[22]

---

[21] The Court also stated that to impose vertical restrictions in sale transactions would "violate the ancient rule against restraints on alienation." 388 U. S., at 380. This isolated reference has provoked sharp criticism from virtually all of the commentators on the decision, most of whom have regarded the Court's apparent reliance on the "ancient rule" as both a misreading of legal history and a perversion of antitrust analysis. See, *e. g.*, Handler, *supra*, n. 13, at 1684–1686; Posner, *supra*, n. 13, at 295–296; Robinson, *supra*, n. 13, at 270–271; but see Louis, *supra*, n. 13, at 276 n. 6. We quite agree with MR. JUSTICE STEWART's dissenting comment in *Schwinn* that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." 388 U. S., at 392.

We are similarly unable to accept Judge Browning's interpretation of *Schwinn*. In his dissent below he argued that the decision reflects the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on "price, quality, and quantity of goods and services," 537 F. 2d, at 1019. This view is certainly not explicit in *Schwinn*, which purports to be based on an examination of the "impact [of the restrictions] upon the marketplace." 388 U. S., at 374. Competitive economies have social and political as well as economic advantages, see *e. g.*, *Northern Pac. R. Co.* v. *United States*, 356 U. S., at 4, but an antitrust policy divorced from market considerations would lack any objective benchmarks. As Mr. Justice Brandeis reminded us: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Bd. of Trade* v. *United States*, 246 U. S., at 238. Although MR. JUSTICE WHITE's opinion endorses Judge Browning's interpretation, *post*, at 66–68, it purports to distinguish *Schwinn* on grounds inconsistent with that interpretation, *post*, at 71.

[22] In that regard, the Court specifically stated that a more complete prohibition "might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers." 388 U. S., at 380. The Court also broadly hinted that it would recognize additional exceptions to the *per se*

The Court's opinion provides no analytical support for these contrasting positions. Nor is there even an assertion in the opinion that the competitive impact of vertical restrictions is significantly affected by the form of the transaction. Nonsale transactions appear to be excluded from the *per se* rule, not because of a greater danger of intrabrand harm or a greater promise of interbrand benefit, but rather because of the Court's unexplained belief that a complete *per se* prohibition would be too "inflexibl[e]." *Id.*, at 379.

Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets. Although intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers. None of these key variables, however, is affected by the form of the transaction by which a manufacturer conveys his products to the retailers.

Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a num-

---

rule for new entrants in an industry and for failing firms, both of which were mentioned in *White Motor* as candidates for such exceptions. 388 U. S., at 374. The Court might have limited the exceptions to the *per se* rule to these situations, which present the strongest arguments for the sacrifice of intrabrand competition for interbrand competition. Significantly, it chose instead to create the more extensive exception for nonsale transactions which is available to all businesses, regardless of their size, financial health, or market share. This broader exception demonstrates even more clearly the Court's awareness of the "redeeming virtues" of vertical restrictions.

ber of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. See, *e. g.,* Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506, 511 (1965).[23] For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did. Posner, *supra,* n. 13, at 285; cf. P. Samuelson, Economics 506–507 (10th ed. 1976).

---

[23] Marketing efficiency is not the only legitimate reason for a manufacturer's desire to exert control over the manner in which his products are sold and serviced. As a result of statutory and common-law developments, society increasingly demands that manufacturers assume direct responsibility for the safety and quality of their products. For example, at the federal level, apart from more specialized requirements, manufacturers of consumer products have safety responsibilities under the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (1970 ed., Supp. V), and obligations for warranties under the Consumer Product Warranties Act, 15 U. S. C. § 2301 *et seq.* (1970 ed., Supp. V). Similar obligations are imposed by state law. See, *e. g.,* Cal. Civ. Code Ann. § 1790 *et seq.* (West 1973). The legitimacy of these concerns has been recognized in cases involving vertical restrictions. See, *e. g., Tripoli Co.* v. *Wella Corp.,* 425 F. 2d 932 (CA3 1970).

Economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II], 75 Yale L. J. 373, 403 (1966); Posner, *supra,* n. 13, at 283, 287–288.[24] Although the view that the manufacturer's interest necessarily corresponds with that of the public is not universally shared, even the leading critic of vertical restrictions concedes that *Schwinn*'s distinction between sale and nonsale transactions is essentially unrelated to any relevant economic impact. Comanor, Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath, 81 Harv. L. Rev. 1419, 1422 (1968).[25] Indeed, to the extent that the form of the transaction is related to interbrand benefits, the Court's distinction is inconsistent with its articulated concern for the ability of smaller firms to compete effectively with larger ones. Capital requirements and administrative expenses may prevent smaller firms from using the exception for nonsale transactions. See, *e. g.,* Baker, *supra,* n. 13, at 538; Phillips, *Schwinn* Rules and the "New Economics" of Vertical

[24] "Generally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues." Note, 88 Harv. L. Rev. 636, 641 (1975). In this context, a manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as its "cost of distribution," which it would prefer to minimize. Posner, *supra,* n. 13, at 283.

[25] Professor Comanor argues that the promotional activities encouraged by vertical restrictions result in product differentiation and, therefore, a decrease in interbrand competition. This argument is flawed by its necessary assumption that a large part of the promotional efforts resulting from vertical restrictions will not convey socially desirable information about product availability, price, quality, and services. Nor is it clear that a *per se* rule would result in anything more than a shift to less efficient methods of obtaining the same promotional effects.

Relation, 44 Antitrust L. J. 573, 576 (1975); Pollock, *supra,* n. 13, at 610.[26]

We conclude that the distinction drawn in *Schwinn* between sale and nonsale transactions is not sufficient to justify the application of a *per se* rule in one situation and a rule of reason in the other. The question remains whether the *per se* rule stated in *Schwinn* should be expanded to include nonsale transactions or abandoned in favor of a return to the rule of reason. We have found no persuasive support for expanding the *per se* rule. As noted above, the *Schwinn* Court recognized the undesirability of "prohibit[ing] all vertical restrictions of territory and all franchising . . . ." 388 U. S., at 379–380.[27] And even Continental does not urge us to hold that all such restrictions are *per se* illegal.

We revert to the standard articulated in *Northern Pac. R. Co.,* and reiterated in *White Motor,* for determining whether vertical restrictions must be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 356 U. S., at 5. Such restrictions, in varying forms, are widely used in our free market economy. As indicated above, there is substantial scholarly and judicial au-

---

[26] We also note that *per se* rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen. See, *e. g.,* Keck, The *Schwinn* Case, 23 Bus. Law. 669 (1968); Pollock, *supra,* n. 13, at 608–610.

[27] Continental's contention that balancing intrabrand and interbrand competitive effects of vertical restrictions is not a "proper part of the judicial function," Brief for Petitioners 52, is refuted by *Schwinn* itself. *United States* v. *Topco Associates, Inc.,* 405 U. S., at 608, is not to the contrary, for it involved a horizontal restriction among ostensible competitors.

thority supporting their economic utility. There is relatively little authority to the contrary.[28] Certainly, there has been no showing in this case, either generally or with respect to Sylvania's agreements, that vertical restrictions have or are likely to have a "pernicious effect on competition" or that they "lack . . . any redeeming virtue." *Ibid.*[29] Accordingly, we conclude that the *per se* rule stated in *Schwinn* must be overruled.[30] In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pac. R. Co.* But we do make clear that departure from the rule-of-reason standard

[28] There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal *per se*, see, *e. g.*, *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966); *United States* v. *Topco Associates, Inc.*, *supra*, but we do not regard the problems of proof as sufficiently great to justify a *per se* rule.

[29] The location restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used. See ABA Monograph No. 2, pp. 20–25. But we agree with the implicit judgment in *Schwinn* that a *per se* rule based on the nature of the restriction is, in general, undesirable. Although distinctions can be drawn among the frequently used restrictions, we are inclined to view them as differences of degree and form. See Robinson, *supra*, n. 13, at 279–280; Averill, Sealy, Schwinn and Sherman One: An Analysis and Prognosis, 15 N. Y. L. F. 39, 65 (1969). We are unable to perceive significant social gain from channeling transactions into one form or another. Finally, we agree with the Court in *Schwinn* that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms. Sylvania was faltering, if not failing, and we think it would be unduly artificial to deny it the use of valuable competitive tools.

[30] The importance of *stare decisis* is, of course, unquestioned, but as Mr. Justice Frankfurter stated in *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940), "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing.

In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*. When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act. Accordingly, the decision of the Court of Appeals is

Affirmed.

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

MR. JUSTICE WHITE, concurring in the judgment.

Although I agree with the majority that the location clause at issue in this case is not a *per se* violation of the Sherman Act and should be judged under the rule of reason, I cannot agree that this result requires the overruling of *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967). In my view this case is distinguishable from *Schwinn* because there is less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition. As to intrabrand competition, Sylvania, unlike Schwinn, did not restrict the customers to whom or the territories where its purchasers could sell. As to interbrand competition, Sylvania, unlike Schwinn, had an insignificant market share at the time it adopted its challenged distribution practice and enjoyed no consumer preference that would allow its retailers to charge a premium over other brands. In two short paragraphs, the majority disposes of the view, adopted after careful analysis by the Ninth Circuit en banc below, that these differences provide a "principled basis for distinguishing *Schwinn*," *ante*, at 46, despite holdings by three Courts of Appeals and the District Court on remand in *Schwinn* that

the *per se* rule established in that case does not apply to location clauses such as Sylvania's. To reach out to overrule one of this Court's recent interpretations of the Sherman Act, after such a cursory examination of the necessity for doing so, is surely an affront to the principle that considerations of *stare decisis* are to be given particularly strong weight in the area of statutory construction. *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 736–737 (1977); *Runyon* v. *McCrary,* 427 U. S. 160, 175 (1976); *Edelman* v. *Jordan,* 415 U. S. 651, 671 (1974).

One element of the system of interrelated vertical restraints invalidated in *Schwinn* was a retail-customer restriction prohibiting franchised retailers from selling Schwinn products to nonfranchised retailers. The Court rests its inability to distinguish *Schwinn* entirely on this retail-customer restriction, finding it "[i]n intent and competitive impact . . . indistinguishable from the location restriction in the present case," because "[i]n both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired." *Ante,* at 46. The customer restriction may well have, however, a very different "intent and competitive impact" than the location restriction: It prevents discount stores from getting the manufacturer's product and thus prevents intrabrand price competition. Suppose, for example, that interbrand competition is sufficiently weak that the franchised retailers are able to charge a price substantially above wholesale. Under a location restriction, these franchisers are free to sell to discount stores seeking to exploit the potential for sales at prices below the prevailing retail level. One of the franchised retailers may be tempted to lower its price and act in effect as a wholesaler for the discount house in order to share in the profits to be had from lowering prices and expanding volume.[1]

[1] The franchised retailers would be prevented from engaging in discounting themselves if, under the *Colgate* doctrine, see *infra,* at 67, the

Under a retail customer restriction, on the other hand, the franchised dealers cannot sell to discounters, who are cut off altogether from the manufacturer's product and the opportunity for intrabrand price competition. This was precisely the theory on which the Government successfully challenged Schwinn's customer restrictions in this Court. The District Court in that case found that "[e]ach one of [Schwinn's franchised retailers] knows also that he is not a wholesaler and that he cannot sell as a wholesaler or act as an agent for some other unfranchised dealer, such as a discount house retailer who has not been franchised as a dealer by Schwinn." 237 F. Supp. 323, 333 (ND Ill. 1965). The Government argued on appeal, with extensive citations to the record, that the effect of this restriction was "to keep Schwinn products out of the hands of discount houses and other price cutters so as to discourage price competition in retailing . . . ." Brief for United States, O. T. 1966, No. 25, p. 26. See *id.*, at 29–37.[2]

It is true that, as the majority states, Sylvania's location restriction inhibited to some degree "the freedom of the retailer to dispose of the purchased products" by requiring the retailer to sell from one particular place of business. But the retailer is still free to sell to any type of customer—including discounters and other unfranchised dealers—from any area. I think this freedom implies a significant difference for the effect of a location clause on intrabrand competition. The

---

manufacturer could lawfully terminate dealers who did not adhere to his suggested retail price.

[2] Given the Government's emphasis on the inhibiting effect of the Schwinn restrictions on discounting activities, the Court may well have been referring to this effect when it condemned the restrictions as "obviously destructive of competition." 388 U. S., at 379. But the Court was also heavily influenced by its concern for the freedom of dealers to control the disposition of products they purchased from Schwinn. See *infra,* at 66–69. In any event, the record in *Schwinn* illustrates the potentially greater threat to intrabrand competition posed by customer as opposed to location restrictions.

District Court on remand in *Schwinn* evidently thought so as well, for after enjoining Schwinn's customer restrictions as directed by this Court it expressly sanctioned location clauses, permitting Schwinn to "designat[e] in its retailer franchise agreements the location of the place or places of business for which the franchise is issued." 291 F. Supp. 564, 565–566 (ND Ill. 1968).

An additional basis for finding less restraint of intrabrand competition in this case, emphasized by the Ninth Circuit en banc, is that *Schwinn* involved restrictions on competition among distributors at the wholesale level. As Judge Ely wrote for the six-member majority below:

> "[Schwinn] had created exclusive geographical sales territories for each of its 22 wholesaler bicycle distributors and had made each distributor the sole Schwinn outlet for the distributor's designated area. Each distributor was prohibited from selling to any retailers located outside its territory. . . .
>
> ". . . Schwinn's territorial restrictions requiring dealers to confine their sales to exclusive territories prescribed by Schwinn prevented a dealer from competing for customers outside his territory. . . . Schwinn's restrictions guaranteed each wholesale distributor that it would be absolutely isolated from all competition from other Schwinn wholesalers." 537 F. 2d 980, 989–990 (1976).

Moreover, like its franchised retailers, Schwinn's distributors were absolutely barred from selling to nonfranchised retailers, further limiting the possibilities of intrabrand price competition.

The majority apparently gives no weight to the Court of Appeals' reliance on the difference between the competitive effects of Sylvania's location clause and Schwinn's interlocking "system of vertical restraints affecting both wholesale and retail distribution." *Id.*, at 989. It also ignores post-*Schwinn*

decisions of the Third and Tenth Circuits upholding the validity of location clauses similar to Sylvania's here. *Salco Corp.* v. *General Motors Corp.*, 517 F. 2d 567 (CA10 1975); *Kaiser* v. *General Motors Corp.*, 530 F. 2d 964 (CA3 1976), aff'g 396 F. Supp. 33 (ED Pa. 1975). Finally, many of the scholarly authorities the majority cites in support of its overruling of *Schwinn* have not had to strain to distinguish location clauses from the restrictions invalidated there. *E. g.*, Robinson, Recent Antitrust Developments: 1974, 75 Colum. L. Rev. 243, 278 (1975) (outcome in *Sylvania* not preordained by *Schwinn* because of marked differences in the vertical restraints in the two cases); McLaren, Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal, 37 Antitrust L. J. 137, 144–145 (1968) (by implication *Schwinn* exempts location clauses from its *per se* rule); Pollock, Alternative Distribution Methods After *Schwinn*, 63 Nw. U. L. Rev. 595, 603 (1968) ("Nor does the *Schwinn* doctrine outlaw the use of a so-called 'location clause' . . .").

Just as there are significant differences between *Schwinn* and this case with respect to intrabrand competition, there are also significant differences with respect to interbrand competition. Unlike Schwinn, Sylvania clearly had no economic power in the generic product market. At the time they instituted their respective distribution policies, Schwinn was "the leading bicycle producer in the Nation," with a national market share of 22.5%, 388 U. S., at 368, 374, whereas Sylvania was a "faltering, if not failing" producer of television sets, with "a relatively insignificant 1% to 2%" share of the national market in which the dominant manufacturer had a 60% to 70% share. *Ante*, at 38, 58 n. 29. Moreover, the Schwinn brand name enjoyed superior consumer acceptance and commanded a premium price as, in the District Court's words, "the Cadillac of the bicycle industry." 237 F. Supp., at 335. This premium gave Schwinn dealers a margin of

protection from interbrand competition and created the possibilities for price cutting by discounters that the Government argued were forestalled by Schwinn's customer restrictions.[3] Thus, judged by the criteria economists use to measure market power—product differentiation and market share[4]—Schwinn enjoyed a substantially stronger position in the bicycle market than did Sylvania in the television market. This Court relied on Schwinn's market position as one reason not to apply the rule of reason to the vertical restraints challenged there. "Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a 'failing company.' On the contrary, at the initiation of these practices, it was the leading bicycle producer in the Nation." 388 U. S., at 374. And the Court of Appeals below found "another significant distinction between our case and *Schwinn*" in Sylvania's "precarious market share," which "was so small when it adopted its locations practice that it was threatened with expulsion from the television market." 537 F. 2d, at 991.[5]

---

[3] Relying on the finding of the District Court, the Government argued: "[T]he declared purpose of the Schwinn franchising system [was] to establish and exploit a distinctive identity and superior consumer acceptance for the Schwinn brand name as the Cadillac of bicycles, thereby enabling the charging of a premium price . . . . This scheme could not possibly succeed, and doubtless would long ago have been abandoned, if in the consumer's mind other bicycles were just as good as Schwinn's." Brief for United States, O. T. 1966, No. 25, p. 36.

[4] See, *e. g.*, F. Scherer, Industrial Market Structure and Economics Performance 10–11 (1970); P. Samuelson, Economics 485–491 (10th ed. 1976).

[5] Schwinn's national market share declined to 12.8% in the 10 years following the institution of its distribution program, at which time it ranked second behind a firm with a 22.8% share. 388 U. S., at 368–369. In the three years following the adoption of its locations practice, Sylvania's national market share increased to 5%, placing it eighth among manufacturers of color television sets. *Ante*, at 38–39. At this time Sylvania's shares of the San Francisco, Sacramento, and northern Cali-

In my view there are at least two considerations, both relied upon by the majority to justify overruling *Schwinn,* that would provide a "principled basis" for instead refusing to extend *Schwinn* to a vertical restraint that is imposed by a "faltering" manufacturer with a "precarious" position in a generic product market dominated by another firm. The first is that, as the majority puts it, "when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Ante,* at 52 n. 19. See also *ante,* at 54.[6] Second is the view, argued forcefully in the economic literature cited by the majority, that the potential benefits of vertical restraints in promoting interbrand competition are particularly strong where the manufacturer imposing the restraints is seeking to enter a new market or to expand a small market share. *Ibid.*[7] The majority even recognizes that *Schwinn* "hinted" at an exception for new entrants and failing firms from its *per se* rule. *Ante,* at 53–54, n. 22.

In other areas of antitrust law, this Court has not hesitated to base its rules of *per se* illegality in part on the defendant's market power. Indeed, in the very case from which the majority draws its standard for *per se* rules, *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5 (1958), the

---

fornia markets were respectively 2.5%, 15%, and 5%. *Ante,* at 39 nn. 4, 6. The District Court made no findings as to Schwinn's share of local bicycle markets.

[6] For an extensive discussion of this effect of interbrand competition, see ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 60–67 (1977).

[7] Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506, 511 (1965); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 293 (1975); Scherer, *supra,* n. 4, at 510.

Court stated the reach of the *per se* rule against tie-ins under § 1 of the Sherman Act as extending to all defendants with "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ." 356 U. S., at 6. And the Court subsequently approved an exception to this *per se* rule for "infant industries" marketing a new product. *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (ED Pa. 1960), aff'd *per curiam*, 365 U. S. 567 (1961). See also *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 363 (1963), where the Court held presumptively illegal a merger "which produces a firm controlling an undue percentage share of the relevant market . . . ." I see no doctrinal obstacle to excluding firms with such minimal market power as Sylvania's from the reach of the *Schwinn* rule.[8]

I have, moreover, substantial misgivings about the approach the majority takes to overruling *Schwinn*. The reason for the distinction in *Schwinn* between sale and nonsale transactions was not, as the majority would have it, "the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions," *ante*, at 52; the reason was rather, as Judge Browning argued in dissent below, the notion in many of our cases involving vertical restraints that inde-

[8] Cf. *Sandura Co.* v. *FTC*, 339 F. 2d 847, 850 (CA6 1964) (territorial restrictions on distributors imposed by small manufacturer "competing with and losing ground to the 'giants' of the floor-covering industry" is not *per se* illegal); Baker, Vertical Restraints in Times of Change: From *White* to *Schwinn* to Where?, 44 Antitrust L. J. 537, 545–547 (1975) (presumptive illegality of territorial restrictions imposed by manufacturer with "any degree of market power"). The majority's failure to use the market share of Schwinn and Sylvania as a basis for distinguishing these cases is the more anomalous for its reliance, see *infra*, at 68–70, on the economic analysis of those who distinguish the anticompetitive effects of distribution restraints on the basis of the market shares of the distributors. See Posner, *supra*, at 299; Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II], 75 Yale L. J. 373, 391–429 (1966).

pendent businessmen should have the freedom to dispose of the goods they own as they see fit. Thus the first case cited by the Court in *Schwinn* for the proposition that "restraints upon alienation . . . are beyond the power of the manufacturer to impose upon its vendees and . . . are violations of § 1 of the Sherman Act," 388 U. S., at 377, was this Court's seminal decision holding a series of resale-price-maintenance agreements *per se* illegal, *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911). In *Dr. Miles* the Court stated that "a general restraint upon alienation is ordinarily invalid," citing Coke on Littleton, and emphasized that the case involved "agreements restricting the freedom of trade on the part of dealers who own what they sell." *Id.*, at 404, 407–408. Mr. Justice Holmes stated in dissent: "If [the manufacturer] should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights." *Id.*, at 411.

This concern for the freedom of the businessman to dispose of his own goods as he sees fit is most probably the explanation for two subsequent cases in which the Court allowed manufacturers to achieve economic results similar to that in *Dr. Miles* where they did not impose restrictions on dealers who had purchased their products. In *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), the Court found no antitrust violation in a manufacturer's policy of refusing to sell to dealers who failed to charge the manufacturer's suggested retail price and of terminating dealers who did not adhere to that price. It stated that the Sherman Act did not "restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.*, at 307. In *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), the Court upheld resale-price-maintenance

agreements made by a patentee with its dealers who obtained its goods on a consignment basis. The Court distinguished *Dr. Miles* on the ground that the agreements there were "contracts of sale rather than of agency" and involved "an attempt by the Miles Medical Company . . . to hold its purchasers, after the purchase at full price, to an obligation to maintain prices on a resale by them." 272 U. S., at 487. By contrast, a manufacturer was free to contract with his *agents* to "[fix] the price by which his agents transfer the title from him directly to [the] consumer . . . however comprehensive as a mass or whole in [the] effect [of these contracts]." *Id.*, at 488. Although these two cases have been called into question by subsequent decisions, see *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960), and *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964), their rationale runs through our case law in the area of distributional restraints. In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211, 213 (1951), the Court held that an agreement to fix resale prices was *per se* illegal under § 1 because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Accord, *Albrecht* v. *Herald Co.*, 390 U. S. 145, 152 (1968). See generally Judge Browning's dissent below, 537 F. 2d, at 1018–1022; ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 29–31, 82–83, 87–91, 96–97 (1977); Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum. L. Rev. 422, 427–436 (1965).

After summarily rejecting this concern, reflected in our interpretations of the Sherman Act, for "the autonomy of independent businessmen," *ante*, at 53 n. 21, the majority not surprisingly finds "no justification" for *Schwinn*'s distinction between sale and nonsale transactions because the distinction is "essentially unrelated to any relevant economic impact." *Ante*, at 56. But while according some weight to the business-

man's interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency,[9] this principle is without question more deeply embedded in our cases than the notions of "free rider" effects and distributional efficiencies borrowed by the majority from the "new economics of vertical relationships." *Ante,* at 54–57. Perhaps the Court is right in partially abandoning this principle and in judging the instant nonprice vertical restraints solely by their "relevant economic impact"; but the precedents which reflect this principle should not be so lightly rejected by the Court. The rationale of *Schwinn* is no doubt difficult to discern from the opinion, and it may be wrong; it is not, however, the aberration the majority makes it out to be here.

I have a further reservation about the majority's reliance on "relevant economic impact" as the test for retaining *per se* rules regarding vertical restraints. It is common ground among the leading advocates of a purely economic approach to the question of distribution restraints that the economic arguments in favor of allowing vertical nonprice restraints generally apply to vertical price restraints as well.[10] Although

[9] *E. g.,* Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. Law & Econ. 7 (1966); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [I], 74 Yale L. J. 775 (1965).

[10] Professor Posner writes, for example:

"There is no basis for choosing between [price fixing and market division] on social grounds. If resale price maintenance is like dealer price fixing, and therefore bad, a manufacturer's assignment of exclusive sales territories is like market division, and therefore bad too . . . .

. . . . . .

"[If helping new entrants break into a market] is a good justification for exclusive territories, it is an equally good justification for resale price maintenance, which as we have seen is simply another method of dealing with the free-rider problem. . . . In fact, *any* argument that can be made on behalf of exclusive territories can also be made on behalf of resale price maintenance." Posner, *supra,* n. 7, at 292–293. (Footnote omitted.)

See Bork, *supra,* n. 8, at 391–464.

the majority asserts that "the *per se* illegality of price restrictions . . . involves significantly different questions of analysis and policy," *ante,* at 51 n. 18, I suspect this purported distinction may be as difficult to justify as that of *Schwinn* under the terms of the majority's analysis. Thus Professor Posner, in an article cited five times by the majority, concludes: "I believe that the law should treat price and nonprice restrictions the same and that it should make no distinction between the imposition of restrictions in a sale contract and their imposition in an agency contract." Posner, *supra,* n. 7, at 298. Indeed, the Court has already recognized that resale price maintenance may increase output by inducing "demand-creating activity" by dealers (such as additional retail outlets, advertising and promotion, and product servicing) that outweighs the additional sales that would result from lower prices brought about by dealer price competition. *Albrecht* v. *Herald Co., supra,* at 151 n. 7. These same output-enhancing possibilities of nonprice vertical restraints are relied upon by the majority as evidence of their social utility and economic soundness, *ante,* at 55, and as a justification for judging them under the rule of reason. The effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established *per se* rule against price restraints.

Although the case law in the area of distributional restraints has perhaps been less than satisfactory, the Court would do well to proceed more deliberately in attempting to improve it. In view of the ample reasons for distinguishing *Schwinn* from this case and in the absence of contrary congressional action, I would adhere to the principle that

> "each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and . . . the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions

is to be aplied." *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U. S. 563, 579 (1925).

In order to decide this case, the Court need only hold that a location clause imposed by a manufacturer with negligible economic power in the product market has a competitive impact sufficiently less restrictive than the *Schwinn* restraints to justify a rule-of-reason standard, even if the same weight is given here as in *Schwinn* to dealer autonomy. I therefore concur in the judgment.

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

I would not overrule the *per se* rule stated in *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365 (1967), and would therefore reverse the decision of the Court of Appeals for the Ninth Circuit.

WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA *v.* SYKES

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

No. 75–1578. Argued March 29, 1977—Decided June 23, 1977

During respondent's trial for murder, inculpatory statements made by him to police officers were admitted into evidence. No challenge was made on the ground that respondent had not understood warnings read to him pursuant to *Miranda* v. *Arizona*, 384 U. S. 436; nor did the trial judge *sua sponte* question their admissibility or hold a factfinding hearing. Respondent, who was convicted, did not challenge the admissibility of the statements on appeal, though later he did so, unavailingly, in a motion to vacate the conviction and in state habeas corpus petitions. He then brought this federal habeas corpus action under 28 U. S. C. § 2254, asserting the inadmissibility of his statements by reason of his lack of understanding of the *Miranda* warnings. The District Court ruled that under *Jackson* v. *Denno*, 378 U. S. 368, respondent had a right to a hearing in the state court on the voluntariness of the statements, and that he had not lost that right by failing to assert his claim at trial or on appeal. The Court of Appeals agreed that respondent was entitled to a *Jackson* v. *Denno* hearing and ruled that respondent's failure to comply with Florida's procedural "contemporaneous objection rule" (which, except as specified, requires a defendant to make a motion to suppress evidence prior to trial) would not bar review of the suppression claim unless the right to object was deliberately bypassed for tactical reasons. *Held:* Respondent's failure to make timely objection under the Florida contemporaneous-objection rule to the admission of his inculpatory statements, absent a showing of cause for the noncompliance and some showing of actual prejudice, bars federal habeas corpus review of his *Miranda* claim. *Davis* v. *United States*, 411 U. S. 233; *Francis* v. *Henderson*, 425 U. S. 536. Pp. 77–91.

(a) Florida's rule in unmistakable terms and with specified exceptions requires that motions to suppress be raised before trial. P. 85.

(b) There is no constitutional requirement in *Jackson* v. *Denno*, *supra*, or later cases that there be a voluntariness hearing absent some contemporaneous challenge to the use of a confession. P. 86.

(c) The sweeping language set forth in *Fay* v. *Noia*, 372 U. S. 391,

which would render a State's contemporaneous-objection rule ineffective to bar review of underlying federal claims in federal habeas corpus proceedings—absent a "knowing waiver" or a "deliberate bypass" of the right to so object—is rejected as according too little respect to the state contemporaneous-objection rule. Such a rule enables the record to be made with respect to a constitutional claim when witnesses' recollections are freshest; enables the trial judge who observed the demeanor of witnesses to make the factual determinations necessary for properly deciding the federal question; and may, by forcing a trial court decision on the merits of federal constitutional contentions, contribute to the finality of criminal litigation. Conversely, the rule of *Fay* v. *Noia* may encourage defense lawyers to take their chances on a verdict of not guilty in a state trial court, intending to raise their constitutional claims in a federal habeas corpus court if their initial gamble fails, and detracts from the perception of the trial of a criminal case as a decisive and portentous event. Pp. 87–90.

(d) Adoption of the "cause" and "prejudice" test of *Francis,* while giving greater respect than did *Fay* to the operation of state contemporaneous-objection rules, affords an adequate guarantee that federal habeas corpus courts will not be barred from hearing claims involving an actual miscarriage of justice. The procedural history of this case and the evidence as presented at trial indicate that there exist here neither "cause" nor "prejudice" as are necessary to support federal habeas corpus review of the underlying constitutional contention. Pp. 90–91.

528 F. 2d 522, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined. BURGER, C. J., *post,* p. 91, and STEVENS, J., *post,* p. 94, filed concurring opinions. WHITE, J., filed an opinion concurring in the judgment, *post,* p. 97. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 99.

Charles Corces, Jr., Assistant Attorney General of Florida, argued the cause for petitioner. With him on the brief was *Robert L. Shevin,* Attorney General.

William F. Casler, by appointment of the Court, 429 U. S. 957, argued the cause and filed a brief for respondent.

Edward R. Korman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were

Solicitor General Bork, Assistant Attorney General Thornburgh, and *Deputy Solicitor General Frey.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to consider the availability of federal habeas corpus to review a state convict's claim that testimony was admitted at his trial in violation of his rights under *Miranda* v. *Arizona,* 384 U. S. 436 (1966), a claim which the Florida courts have previously refused to consider on the merits because of noncompliance with a state contemporaneous-objection rule. Petitioner Wainwright, on behalf of the State of Florida, here challenges a decision of the Court of Appeals for the Fifth Circuit ordering a hearing in state court on the merits of respondent's contention.

Respondent Sykes was convicted of third-degree murder after a jury trial in the Circuit Court of DeSoto County. He testified at trial that on the evening of January 8, 1972, he told his wife to summon the police because he had just shot Willie Gilbert. Other evidence indicated that when the police arrived at respondent's trailer home, they found Gilbert dead of a shotgun wound, lying a few feet from the front porch. Shortly after their arrival, respondent came from across the road and volunteered that he had shot Gilbert, and a few minutes later respondent's wife approached the police and told them the same thing. Sykes was immediately arrested and taken to the police station.

Once there, it is conceded that he was read his *Miranda* rights, and that he declined to seek the aid of counsel and indicated a desire to talk. He then made a statement, which was admitted into evidence at trial through the testimony of the two officers who heard it,[1] to the effect that he had shot Gilbert from the front porch of his trailer home. There were several references during the trial to respondent's consump-

[1] No written statement was offered into evidence because Sykes refused to sign the statement once it was typed up. Tr. 35.

tion of alcohol during the preceding day and to his apparent state of intoxication, facts which were acknowledged by the officers who arrived at the scene. At no time during the trial, however, was the admissibility of any of respondent's statements challenged by his counsel on the ground that respondent had not understood the *Miranda* warnings.[2] Nor did the trial judge question their admissibility on his own motion or hold a factfinding hearing bearing on that issue.

Respondent appealed his conviction, but apparently did not challenge the admissibility of the inculpatory statements.[3] He later filed in the trial court a motion to vacate the conviction and, in the State District Court of Appeals and Supreme Court, petitions for habeas corpus. These filings, apparently for the first time, challenged the statements made to police on grounds of involuntariness. In all of these efforts respondent was unsuccessful.

Having failed in the Florida courts, respondent initiated the present action under 28 U. S. C. § 2254, asserting the inadmissibility of his statements by reason of his lack of understanding of the *Miranda* warnings.[4] The United States District Court for the Middle District of Florida ruled that *Jackson* v. *Denno*,

---

[2] At one point early in the trial defense counsel did object to admission of any statements made by respondent to the police, on the basis that the basic elements of an offense had not yet been established. The judge ruled that the evidence could be admitted "subject to [the crime's] being properly established later." *Id.*, at 16.

[3] In a subsequent state habeas action, the Florida District Court of Appeals, Second District, stated that the admissibility of the postarrest statements had been raised and decided on direct appeal. *Sykes* v. *State*, 275 So. 2d 24 (1973). The United States District Court in the present action explicitly found to the contrary, App. to Pet. for Cert. A–21, and respondent does not challenge that finding.

[4] Respondent expressly waived "any contention or allegation as regards ineffective assistance of counsel" at his trial. App. A–47. He advanced an argument challenging the jury instructions relating to justifiable homicide, but the District Court concluded in a single paragraph that the instructions had been adequate.

378 U. S. 368 (1964), requires a hearing in a state criminal trial prior to the admission of an inculpatory out-of-court statement by the defendant. It held further that respondent had not lost his right to assert such a claim by failing to object at trial or on direct appeal, since only "exceptional circumstances" of "strategic decisions at trial" can create such a bar to raising federal constitutional claims in a federal habeas action. The court stayed issuance of the writ to allow the state court to hold a hearing on the "voluntariness" of the statements.

Petitioner warden appealed this decision to the United States Court of Appeals for the Fifth Circuit. That court first considered the nature of the right to exclusion of statements made without a knowing waiver of the right to counsel and the right not to incriminate oneself. It noted that *Jackson* v. *Denno, supra,* guarantees a right to a hearing on whether a defendant has knowingly waived his rights as described to him in the *Miranda* warnings, and stated that under Florida law "[t]he burden is on the State to secure [a] prima facie determination of voluntariness, not upon the defendant to demand it." 528 F. 2d 522, 525 (1976).

The court then directed its attention to the effect on respondent's right of Florida Rule Crim. Proc. 3.190 (i),[5] which it described as "a contemporaneous objection rule" applying to motions to suppress a defendant's inculpatory statements.

---

[5] Rule 3.190 (i):

"Motion to Suppress a Confession or Admissions Illegally Obtained.

"(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

"(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

"(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion."

It focused on this Court's decisions in *Henry* v. *Mississippi*, 379 U. S. 443 (1965); *Davis* v. *United States*, 411 U. S. 233 (1973); and *Fay* v. *Noia*, 372 U. S. 391 (1963), and concluded that the failure to comply with the rule requiring objection at the trial would only bar review of the suppression claim where the right to object was deliberately bypassed for reasons relating to trial tactics. The Court of Appeals distinguished our decision in *Davis, supra* (where failure to comply with a rule requiring pretrial objection to the indictment was found to bar habeas review of the underlying constitutional claim absent showing of cause for the failure and prejudice resulting), for the reason that "[a] major tenet of the *Davis* decision was that no prejudice was shown" to have resulted from the failure to object. It found that prejudice is "inherent" in any situation, like the present one, where the admissibility of an incriminating statement is concerned. Concluding that "[t]he failure to object in this case cannot be dismissed as a trial tactic, and thus a deliberate by-pass," the court affirmed the District Court order that the State hold a hearing on whether respondent knowingly waived his *Miranda* rights at the time he made the statements.

The simple legal question before the Court calls for a construction of the language of 28 U. S. C. § 2254 (a), which provides that the federal courts shall entertain an application for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." But, to put it mildly, we do not write on a clean slate in construing this statutory provision.[6] Its earliest counterpart, applicable only

---

[6] For divergent discussions of the historic role of federal habeas corpus, compare: Hart, The Supreme Court, 1958 Term, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959); Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315 (1961); Brennan, Federal Habeas Corpus and State Prisoners: An Exer-

to prisoners detained by federal authority, is found in the Judiciary Act of 1789. Construing that statute for the Court in *Ex parte Watkins,* 3 Pet. 193, 202 (1830), Mr. Chief Justice Marshall said:

> "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous."

See *Ex parte Kearney,* 7 Wheat. 38 (1822).

In 1867, Congress expanded the statutory language so as to make the writ available to one held in state as well as federal custody. For more than a century since the 1867 amendment, this Court has grappled with the relationship between the classical common-law writ of habeas corpus and the remedy provided in 28 U. S. C. § 2254. Sharp division within the Court has been manifested on more than one aspect of the perplexing problems which have been litigated in this connection. Where the habeas petitioner challenges a final judgment of conviction rendered by a state court, this Court has been called upon to decide no fewer than four different questions, all to a degree interrelated with one another: (1) What types of federal claims may a federal habeas court properly consider? (2) Where a federal claim is cognizable by a federal habeas court, to what extent must that court defer to a resolution of the claim in prior state proceedings? (3) To what extent must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court? (4) In what instances will an adequate and independent state

---

cise in Federalism, 7 Utah L. Rev. 423 (1961); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 468 (1963); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451 (1966); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 170–171 (1970); and Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970).

ground bar consideration of otherwise cognizable federal issues on federal habeas review?

Each of these four issues has spawned its share of litigation. With respect to the first, the rule laid down in *Ex parte Watkins, supra,* was gradually changed by judicial decisions expanding the availability of habeas relief beyond attacks focused narrowly on the jurisdiction of the sentencing court. *See Ex parte Wells,* 18 How. 307 (1856); *Ex parte Lange,* 18 Wall. 163 (1874). *Ex parte Siebold,* 100 U. S. 371 (1880), authorized use of the writ to challenge a conviction under a federal statute where the statute was claimed to violate the United States Constitution. *Frank* v. *Mangum,* 237 U. S. 309 (1915), and *Moore* v. *Dempsey,* 261 U. S. 86 (1923), though in large part inconsistent with one another, together broadened the concept of jurisdiction to allow review of a claim of "mob domination" of what was in all other respects a trial in a court of competent jurisdiction.

In *Johnson* v. *Zerbst,* 304 U. S. 458, 463 (1938), an indigent federal prisoner's claim that he was denied the right to counsel at his trial was held to state a contention going to the "power and authority" of the trial court, which might be reviewed on habeas. Finally, in *Waley* v. *Johnston,* 316 U. S. 101 (1942), the Court openly discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review, and acknowledged that such review is available for claims of "disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Id.,* at 104–105. In *Brown* v. *Allen,* 344 U. S. 443 (1953), it was made explicit that a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game on federal habeas. Only last Term in *Stone* v. *Powell,* 428 U. S. 465 (1976), the Court removed from the purview of a federal habeas court challenges resting on the Fourth Amendment, where there has been a full and fair opportunity to raise them

in the state court. See *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 250 (1973) (POWELL, J., concurring).

The degree of deference to be given to a state court's resolution of a federal-law issue was elaborately canvassed in the Court's opinion in *Brown* v. *Allen, supra.* Speaking for the Court, Mr. Justice Reed stated: "[Such] state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata.*" 344 U. S., at 458. The duty of the federal habeas court to hold a factfinding hearing in specific situations, notwithstanding the prior resolution of the issues in state court, was thoroughly explored in this Court's later decision in *Townsend* v. *Sain,* 372 U. S. 293 (1963). Congress addressed this aspect of federal habeas in 1966 when it amended § 2254 to deal with the problem treated in *Townsend.* 80 Stat. 1105. See *LaVallee* v. *Delle Rose,* 410 U. S. 690 (1973).

The exhaustion-of-state-remedies requirement was first articulated by this Court in the case of *Ex parte Royall,* 117 U. S. 241 (1886). There, a state defendant sought habeas in advance of trial on a claim that he had been indicted under an unconstitutional statute. The writ was dismissed by the District Court, and this Court affirmed, stating that while there was power in the federal courts to entertain such petitions, as a matter of comity they should usually stay their hand pending consideration of the issue in the normal course of the state trial. This rule has been followed in subsequent cases, *e. g., Cook* v. *Hart,* 146 U. S. 183 (1892); *Whitten* v. *Tomlinson,* 160 U. S. 231 (1895); *Baker* v. *Grice,* 169 U. S. 284 (1898); *Mooney* v. *Holohan,* 294 U. S. 103 (1935), and has been incorporated into the language of § 2254.[7] Like other

[7] 28 U. S. C. § 2254:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available

issues surrounding the availability of federal habeas corpus relief, though, this line of authority has not been without historical uncertainties and changes in direction on the part of the Court. See *Ex parte Hawk,* 321 U. S. 114, 116–117 (1944); *Darr* v. *Burford,* 339 U. S. 200 (1950); *Irvin* v. *Dowd,* 359 U. S. 394, 405–406 (1959); *Fay* v. *Noia,* 372 U. S. 391, 435 (1963).

There is no need to consider here in greater detail these first three areas of controversy attendant to federal habeas review of state convictions. Only the fourth area—the adequacy of state grounds to bar federal habeas review—is presented in this case. The foregoing discussion of the other three is pertinent here only as it illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.

As to the role of adequate and independent state grounds, it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts. *Fox Film Corp.* v. *Muller,* 296 U. S. 207 (1935); *Murdock* v. *Memphis,* 20 Wall. 590 (1875). The application of this principle in the context of a federal habeas proceeding has therefore excluded from consideration any questions of state *substantive* law, and thus effectively barred federal habeas review where questions of that sort are either the only ones raised by a petitioner or are in themselves dispositive of his case. The area of controversy which has developed has concerned the reviewability of federal claims which the state court has declined to pass on

---

in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

because not presented in the manner prescribed by its *procedural* rules. The adequacy of such an independent state procedural ground to prevent federal habeas review of the underlying federal issue has been treated very differently than where the state-law ground is substantive. The pertinent decisions marking the Court's somewhat tortuous efforts to deal with this problem are: *Ex parte Spencer,* 228 U. S. 652 (1913); *Brown* v. *Allen,* 344 U. S. 443 (1953); *Fay* v. *Noia, supra; Davis* v. *United States,* 411 U. S. 233 (1973); and *Francis* v. *Henderson,* 425 U. S. 536 (1976).

In *Brown, supra,* petitioner Daniels' lawyer had failed to mail the appeal papers to the State Supreme Court on the last day provided by law for filing, and hand delivered them one day after that date. Citing the state rule requiring timely filing, the Supreme Court of North Carolina refused to hear the appeal. This Court, relying in part on its earlier decision in *Ex parte Spencer, supra,* held that federal habeas was not available to review a constitutional claim which could not have been reviewed on direct appeal here because it rested on an independent and adequate state procedural ground. 344 U. S., at 486–487.

In *Fay* v. *Noia, supra,* respondent Noia sought federal habeas to review a claim that his state-court conviction had resulted from the introduction of a coerced confession in violation of the Fifth Amendment to the United States Constitution. While the convictions of his two codefendants were reversed on that ground in collateral proceedings following their appeals, Noia did not appeal and the New York courts ruled that his subsequent *coram nobis* action was barred on account of that failure. This Court held that petitioner was nonetheless entitled to raise the claim in federal habeas, and thereby overruled its decision 10 years earlier in *Brown* v. *Allen, supra:*

> "[T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state

law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute." 372 U. S., at 399.

As a matter of comity but not of federal power, the Court acknowledged "a limited discretion in the federal judge to deny relief . . . to an applicant who had deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Id.*, at 438. In so stating, the Court made clear that the waiver must be knowing and actual—" 'an intentional relinquishment or abandonment of a known right or privilege.' " *Id.*, at 439, quoting *Johnson* v. *Zerbst*, 304 U. S., at 464. Noting petitioner's "grisly choice" between acceptance of his life sentence and pursuit of an appeal which might culminate in a sentence of death, the Court concluded that there had been no deliberate bypass of the right to have the federal issues reviewed through a state appeal.[8]

[8] Not long after *Fay*, the Court in *Henry* v. *Mississippi*, 379 U. S. 443 (1965), considered the question of the adequacy of a state procedural ground to bar direct Supreme Court review, and concluded that failure to comply with a state contemporaneous-objection rule applying to the admission of evidence did not necessarily foreclose consideration of the underlying Fourth Amendment claim. The state procedural ground would be "adequate," and thus dispositive of the case on direct appeal to the United States Supreme Court, only where "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Id*, at 447. Because, the Court reasoned, the purposes of the contemporaneous-objection rule were largely served by the motion for a directed verdict at the close of the State's case, enforcement of the contemporaneous-objection rule was less than essential and therefore lacking in the necessary "legitimacy" to make it an adequate state ground.

Rather than searching the merits of the constitutional claim, though, the Court remanded for determination whether a separate adequate state ground might exist—that is, whether petitioner had knowingly and deliberately waived his right to object at trial for tactical or other reasons. This was the same type of waiver which the Court in *Fay* had said must be demonstrated in order to bar review on state procedural grounds in a federal habeas proceeding.

A decade later we decided *Davis* v. *United States, supra,* in which a federal prisoner's application under 28 U. S. C. § 2255 sought for the first time to challenge the makeup of the grand jury which indicted him. The Government contended that he was barred by the requirement of Fed. Rule Crim. Proc. 12 (b)(2) providing that such challenges must be raised "by motion before trial." The Rule further provides that failure to so object constitutes a waiver of the objection, but that "the court for cause shown may grant relief from the waiver." We noted that the Rule "promulgated by this Court and, pursuant to 18 U. S. C. § 3771, 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived," 411 U. S., at 241, and held that this standard contained in the Rule, rather than the *Fay* v. *Noia* concept of waiver, should pertain in federal habeas as on direct review. Referring to previous constructions of Rule 12 (b)(2), we concluded that review of the claim should be barred on habeas, as on direct appeal, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.

Last Term, in *Francis* v. *Henderson, supra,* the rule of *Davis* was applied to the parallel case of a state procedural requirement that challenges to grand jury composition be raised before trial. The Court noted that there was power in the federal courts to entertain an application in such a case, but rested its holding on "considerations of comity and concerns for the orderly administration of criminal justice . . . ." 425 U. S., at 538–539. While there was no counterpart provision of the state rule which allowed an exception upon some showing of cause, the Court concluded that the standard derived from the Federal Rule should nonetheless be applied in that context since " '[t]here is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than

to similar defaults by state defendants.' " *Id.*, at 542, quoting *Kaufman* v. *United States*, 394 U. S. 217, 228 (1969). As applied to the federal petitions of state convicts, the *Davis* cause-and-prejudice standard was thus incorporated directly into the body of law governing the availability of federal habeas corpus review.

To the extent that the dicta of *Fay* v. *Noia* may be thought to have laid down an all-inclusive rule rendering state contemporaneous-objection rules ineffective to bar review of underlying federal claims in federal habeas proceedings—absent a "knowing waiver" or a "deliberate bypass" of the right to so object—its effect was limited by *Francis*, which applied a different rule and barred a habeas challenge to the makeup of a grand jury. Petitioner Wainwright in this case urges that we further confine its effect by applying the principle enunciated in *Francis* to a claimed error in the admission of a defendant's confession.

Respondent first contends that any discussion as to the effect that noncompliance with a state procedural rule should have on the availability of federal habeas is quite unnecessary because in his view Florida did not actually have a contemporaneous-objection rule. He would have us interpret Florida Rule Crim. Proc. 3.190 (i),[9] which petitioner asserts is a traditional "contemporaneous objection rule," to place the burden on the trial judge to raise on his own motion the question of the admissibility of any inculpatory statement. Respondent's approach is, to say the least, difficult to square with the language of the Rule, which in unmistakable terms and with specified exceptions requires that the motion to suppress be raised before trial. Since all of the Florida appellate courts refused to review petitioner's federal claim on the merits after his trial, and since their action in so doing is quite consistent with a line of Florida authorities inter-

[9] See n. 5, *supra*.

preting the rule in question as requiring a contemporaneous objection, we accept the State's position on this point. See *Blatch* v. *State,* 216 So. 2d 261, 264 (Fla. App. 1968); *Dodd* v. *State,* 232 So. 2d 235, 238 (Fla. App. 1970); *Thomas* v. *State,* 249 So. 2d 510, 512 (Fla. App. 1971).

Respondent also urges that a defendant has a right under *Jackson* v. *Denno,* 378 U. S. 368 (1964), to a hearing as to the voluntariness of a confession, even though the defendant does not object to its admission. But we do not read *Jackson* as creating any such requirement. In that case the defendant's objection to the use of his confession was brought to the attention of the trial court, *id.,* at 374, and n. 4, and nothing in the Court's opinion suggests that a hearing would have been required even if it had not been. To the contrary, the Court prefaced its entire discussion of the merits of the case with a statement of the constitutional rule that was to prove dispositive—that a defendant has a "right at some stage in the proceedings *to object* to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness . . . ." *Id.,* at 376–377 (emphasis added). Language in subsequent decisions of this Court has reaffirmed the view that the Constitution does not require a voluntariness hearing absent some contemporaneous challenge to the use of the confession.[10]

We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that respondent's confession be challenged at trial or not at all, and

[10] In *Pinto* v. *Pierce,* 389 U. S. 31, 32 (1967), the Court stated: "*Jackson* v. *Denno,* 378 U. S. 368 (1964), held that a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing. . . ."

In *Lego* v. *Twomey,* 404 U. S. 477, 478 (1972), we summarized the *Jackson* holding as conferring the right to a voluntariness hearing on "a criminal defendant who challenges the voluntariness of a confession" sought to be used against him at trial.

thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here. See *Henry* v. *Mississippi,* 379 U. S. 443 (1965). We thus come to the crux of this case. Shall the rule of *Francis* v. *Henderson, supra,* barring federal habeas review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial? [11] We answer that question in the affirmative.

As earlier noted in the opinion, since *Brown* v. *Allen,* 344 U. S. 443 (1953), it has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings. This rule of *Brown* v. *Allen* is in no way changed by our holding today. Rather, we deal only with contentions of federal law which were *not* resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure. We leave open for resolution in future decisions the precise definition of the "cause"-and-"prejudice" standard, and note here only that it is narrower than the standard set forth in dicta in *Fay* v. *Noia,* 372 U. S. 391 (1963), which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention. It is the sweeping language of *Fay* v. *Noia,* going

---

[11] Petitioner does not argue, and we do not pause to consider, whether a bare allegation of a *Miranda* violation, without accompanying assertions going to the actual voluntariness or reliability of the confession, is a proper subject for consideration on federal habeas review, where there has been a full and fair opportunity to raise the argument in the state proceeding. See *Stone* v. *Powell,* 428 U. S. 465 (1976). We do not address the merits of that question because of our resolution of the case on alternative grounds.

far beyond the facts of the case eliciting it, which we today reject.[12]

The reasons for our rejection of it are several. The contemporaneous-objection rule itself is by no means peculiar to Florida, and deserves greater respect than *Fay* gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right. A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question. While the 1966 amendment to § 2254 requires deference to be given to such determinations made by state courts, the determinations themselves are less apt to be made in the first instance if there is no contemporaneous objection to the admission of the evidence on federal constitutional grounds.

A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional

---

[12] We have no occasion today to consider the *Fay* rule as applied to the facts there confronting the Court. Whether the *Francis* rule should preclude federal habeas review of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court, we leave for another day.

The Court in *Fay* stated its knowing-and-deliberate-waiver rule in language which applied not only to the waiver of the right to appeal, but to failures to raise individual substantive objections in the state trial. Then, with a single sentence in a footnote, the Court swept aside all decisions of this Court "to the extent that [they] may be read to suggest a standard of discretion in federal habeas corpus proceedings different from what we lay down today . . . ." 372 U. S., at 439 n. 44. We do not choose to paint with a similarly broad brush here.

grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nonetheless convict the defendant, and he will have one less federal constitutional claim to assert in his federal habeas petition.[13] If the state trial judge admits the evidence in question after a full hearing, the federal habeas court pursuant to the 1966 amendment to § 2254 will gain significant guidance from the state ruling in this regard. Subtler considerations as well militate in favor of honoring a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

We think that the rule of *Fay* v. *Noia,* broadly stated, may encourage "sandbagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off. The refusal of federal habeas courts to honor contemporaneous-objection rules may also make state courts themselves less stringent in their enforcement. Under the rule of *Fay* v. *Noia,* state appellate courts know that a federal constitutional issue raised for the first time in the proceeding before them may well be decided in any event by a federal *habeas* tribunal. Thus, their choice is between addressing the issue notwithstanding the petitioner's failure to timely object, or else face

[13] Responding to concerns such as these, MR. JUSTICE POWELL's concurring opinion last Term in *Estelle* v. *Williams,* 425 U. S. 501, 513 (1976), proposed an "inexcusable procedural default" test to bar the availability of federal habeas review where the substantive right claimed could have been safeguarded if the objection had been raised in a timely manner at trial.

the prospect that the federal habeas court will decide the question without the benefit of their views.

The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

We believe the adoption of the *Francis* rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of § 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection.

The "cause"-and-"prejudice" exception of the *Francis* rule

will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here. Respondent has advanced no explanation whatever for his failure to object at trial,[14] and, as the proceeding unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.

We accordingly conclude that the judgment of the Court of Appeals for the Fifth Circuit must be reversed, and the cause remanded to the United States District Court for the Middle District of Florida with instructions to dismiss respondent's petition for a writ of habeas corpus.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I concur fully in the judgment and in the Court's opinion. I write separately to emphasize one point which, to me, seems of critical importance to this case. In my view, the

---

[14] In *Henry* v. *Mississippi*, 379 U. S., at 451, the Court noted that decisions of counsel relating to trial strategy, even when made without the consultation of the defendant, would bar direct federal review of claims thereby forgone, except where "the circumstances are exceptional."

Last Term in *Estelle* v. *Williams, supra,* the Court reiterated the burden on a defendant to be bound by the trial judgments of his lawyer.

"Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney." 425 U. S., at 512.

"deliberate bypass" standard enunciated in *Fay* v. *Noia,* 372 U. S. 391 (1963), was never designed for, and is inapplicable to, errors—even of constitutional dimension—alleged to have been committed during trial.

In *Fay* v. *Noia,* the Court applied the "deliberate bypass" standard to a case where the critical procedural decision—whether to take a criminal appeal—was entrusted to a convicted defendant. Although Noia, the habeas petitioner, was represented by counsel, he himself had to make the decision whether to appeal or not; the role of the attorney was limited to giving advice and counsel. In giving content to the new deliberate-bypass standard, *Fay* looked to the Court's decision in *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), a case where the defendant had been called upon to make the decision whether to request representation by counsel in his federal criminal trial. Because in both *Fay* and *Zerbst,* important rights hung in the balance of the *defendant's own decision,* the Court required that a waiver impairing such rights be a knowing and intelligent decision by the defendant himself. As *Fay* put it:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts . . . then it is open to the federal court on habeas to deny him all relief . . . ." 372 U. S., at 439.

The touchstone of *Fay* and *Zerbst,* then, is the exercise of volition by the defendant himself with respect to his own federal constitutional rights. In contrast, the claim in the case before us relates to events during the trial itself. Typically, habeas petitioners claim that unlawfully secured evidence was admitted, but see *Stone* v. *Powell,* 428 U. S. 465 (1976), or that improper testimony was adduced, or that an improper jury charge was given, but see *Henderson* v. *Kibbe,* 431 U. S. 145, 157 (1977) (BURGER, C. J., concurring in judgment),

or that a particular line of examination or argument by the prosecutor was improper or prejudicial. But unlike *Fay* and *Zerbst,* preservation of this type of claim under state procedural rules does not generally involve an assertion by the defendant himself; rather, the decision to assert or not to assert constitutional rights or constitutionally based objections at trial is necessarily entrusted to the defendant's attorney, who must make on-the-spot decisions at virtually all stages of a criminal trial. As a practical matter, a criminal defendant is rarely, if ever, in a position to decide, for example, whether certain testimony is hearsay and, if so, whether it implicates interests protected by the Confrontation Clause; indeed, it is because " '[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law' " that we held it constitutionally required that every defendant who faces the possibility of incarceration be afforded counsel. *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972); *Gideon* v. *Wainwright,* 372 U. S. 335, 345 (1963).

Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.[1] The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds.[2]

---

[1] Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make. See ABA Project on Standards for Criminal Justice, The Prosecution Function and Defense Function § 5.2, pp. 237–238 (App. Draft 1971).

[2] One is left to wonder what use there would have been to an objection to a confession corroborated by witnesses who heard Sykes freely admit the killing at the scene within minutes after the shooting.

Since trial decisions are of necessity entrusted to the accused's attorney, the *Fay-Zerbst* standard of "knowing and intelligent waiver" is simply inapplicable. The dissent in this case, written by the author of *Fay* v. *Noia,* implicitly recognizes as much. According to the dissent, *Fay* imposes the knowing-and-intelligent-waiver standard "where possible" during the course of the trial. In an extraordinary modification of *Fay,* MR. JUSTICE BRENNAN would now require "that the lawyer actually exercis[e] his expertise and judgment in his client's service, and with his client's knowing and intelligent participation *where possible";* he does not intimate what guidelines would be used to decide when or under what circumstances this would actually be "possible." *Post,* at 116. (Emphasis supplied.) What had always been thought the standard governing the *accused's* waiver of his own constitutional rights the dissent would change, in the trial setting, into a standard of conduct imposed upon the defendant's *attorney.* This vague "standard" would be unmanageable to the point of impossibility.

The effort to read this expanded concept into *Fay* is to no avail; that case simply did not address a situation where the defendant had to look to his lawyer for vindication of constitutionally based interests. I would leave the core holding of *Fay* where it began, and reject this illogical uprooting of an otherwise defensible doctrine.

MR. JUSTICE STEVENS, concurring.

Although the Court's decision today may be read as a significant departure from the "deliberate bypass" standard announced in *Fay* v. *Noia,* 372 U. S. 391, I am persuaded that the holding is consistent with the way other federal courts have actually been applying *Fay.*[1] The notion that a client

[1] The suggestion in *Fay,* 372 U. S., at 439, that the decision must be made personally by the defendant has not fared well, see *United States ex rel. Cruz* v. *LaVallee,* 448 F. 2d 671, 679 (CA2 1971); *United States ex*

must always consent to a tactical decision not to assert a constitutional objection to a proffer of evidence has always seemed unrealistic to me.[2] Conversely, if the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused.[3] Matters such

---

rel. Green v. *Rundle,* 452 F. 2d 232, 236 (CA3 1971), although a decision by counsel may not be binding if made over the objection of the defendant, *Paine* v. *McCarthy,* 527 F. 2d 173, 175–176 (CA9 1975). Courts have generally found a "deliberate bypass" where counsel could reasonably have decided not to object, *United States ex rel. Terry* v. *Henderson,* 462 F. 2d 1125, 1129 (CA2 1972); *Whitney* v. *United States,* 513 F. 2d 326, 329 (CA8 1974); *United States ex rel. Broaddus* v. *Rundle,* 429 F. 2d 791, 795 (CA3 1970), but they have not found a bypass when they consider the right "deeply embedded" in the Constitution, *Frazier* v. *Roberts,* 441 F. 2d 1224, 1230 (CA8 1971), or when the procedural default was not substantial, *Minor* v. *Black,* 527 F. 2d 1, 5 n. 3 (CA6 1975); *Black* v. *Beto,* 382 F. 2d 758, 760 (CA5 1967). Sometimes, even a deliberate choice by trial counsel has been held not to be a "deliberate bypass" when the result would be unjust, *Moreno* v. *Beto,* 415 F. 2d 154 (CA5 1969). In short, the actual disposition of these cases seems to rest on the court's perception of the totality of the circumstances, rather than on mechanical application of the "deliberate bypass" test.

[2] "If counsel is to have the responsibility for conducting a contested criminal trial, quite obviously he must have the authority to make important tactical decisions promptly as a trial progresses. The very reasons why counsel's participation is of such critical importance in assuring a fair trial for the defendant, see *Powell* v. *Alabama,* 287 U. S. 45, 68–69, . . . make it inappropriate to require that his tactical decisions always be personally approved, or even thoroughly understood, by his client. Unquestionably, assuming the lawyer's competence, the client must accept the consequences of his trial strategy. A rule which would require the client's participation in every decision to object, or not to object, to proffered evidence would make a shambles of orderly procedure." *United States ex rel. Allum* v. *Twomey,* 484 F. 2d 740, 744–745 (CA7 1973).

[3] The test announced in *Fay* was not actually applied in that case. The Court held that habeas relief was available notwithstanding the client's participation in the waiver decision, and notwithstanding the fact that the decision was made on a tactical basis. The client apparently feared that the State might be able to convict him even without the use

as the competence of counsel, the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake, and the overall fairness of the entire proceeding, may be more significant than the language of the test the Court purports to apply. I therefore believe the Court has wisely refrained from attempting to give precise content to its "cause"-and-"prejudice" exception to the rule of *Francis* v. *Henderson*, 425 U. S. 536.[4]

In this case I agree with the Court's holding that collateral attack on the state-court judgment should not be allowed. The record persuades me that competent trial counsel could well have made a deliberate decision not to object to the admission of the respondent's in-custody statement. That statement was consistent, in many respects, with the respondent's trial testimony. It even had some positive value, since it portrayed the respondent as having acted in response to provocation, which might have influenced the jury to return a verdict on a lesser charge.[5] To the extent that it was damaging, the primary harm would have resulted from its effect in impeaching the trial testimony, but it would have been admissible for impeachment in any event, *Harris* v. *New*

---

of his confession, and that he might be sentenced to death if reconvicted. See *Fay, supra,* at 397 n. 3, 440.

[4] As *Fay* v. *Noia, supra,* at 438, makes clear, we are concerned here with a matter of equitable discretion rather than a question of statutory authority; and equity has always been characterized by its flexibility and regard for the necessities of each case, cf. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15.

[5] According to the statement the respondent made to the police, the victim came into his trailer, picked up his shotgun, and played with it; they quarreled and the victim cut the respondent's hand with a knife; then the victim left the trailer and made an insulting gesture, at which time the respondent shot him. Other evidence established that respondent was quite drunk at the time. The primary difference between this and the respondent's trial testimony was that at trial the respondent testified that the victim had threatened him before leaving the trailer, and had turned and started toward the respondent just before the shooting.

York, 401 U. S. 222. Counsel may well have preferred to have the statement admitted without objection when it was first offered rather than making an objection which, at best,[6] could have been only temporarily successful.

Moreover, since the police fully complied with *Miranda,* the deterrent purpose of the *Miranda* rule is inapplicable to this case. Finally, there is clearly no basis for claiming that the trial violated any standard of fundamental fairness. Accordingly, no matter how the rule is phrased, this case is plainly not one in which a collateral attack should be allowed. I therefore join the opinion of the Court.

MR. JUSTICE WHITE, concurring in the judgment.

Under the Court's cases a state conviction will survive challenge in federal habeas corpus not only when there has been a deliberate bypass within the meaning of *Fay* v. *Noia,* 372 U. S. 391 (1963), but also when the alleged constitutional error is harmless beyond a reasonable doubt within the intendment of *Harrington* v. *California,* 395 U. S. 250 (1969), and similar cases. The petition for habeas corpus of respondent Sykes alleging the violation of his constitutional rights by the admission of certain evidence should be denied if the alleged error is deemed harmless. This would be true even had there been proper objection to the evidence and no procedural default whatsoever by either respondent or his counsel. *Milton* v. *Wainwright,* 407 U. S. 371 (1972).

It is thus of some moment to me that the Court makes its own assessment of the record and itself declares that the evidence of guilt in this case is sufficient to "negate any possibility of actual prejudice resulting to the respondent from the

[6] The objection was weak since the police officers gave the respondent the appropriate warnings. His claim that he was too intoxicated to understand the warnings is not only implausible, but also somewhat inconsistent with any attempt to give credibility to his trial testimony, which necessarily required recollection of the circumstances surrounding the shooting.

admission of his inculpatory statement." *Ante,* at 91. This appears to be tantamount to a finding of harmless error under the *Harrington* standard and is itself sufficient to foreclose the writ and to warrant reversal of the judgment.

This would seem to obviate consideration of whether, in the light of *Davis* v. *United States,* 411 U. S. 233 (1973), and *Francis* v. *Henderson,* 425 U. S. 536 (1976), the deliberate-bypass rule of *Fay* v. *Noia, supra,* should be further modified with respect to those occasions during trial where the defendant does not comply with the contemporaneous-objection rule when evidence is offered but later seeks federal habeas corpus, claiming that admitting the evidence violated his constitutional rights. The Court nevertheless deals at length with this issue, and it is not inappropriate for me to add the following comments.

In terms of the necessity for Sykes to show prejudice, it seems to me that the harmless-error rule provides ample protection to the State's interest. If a constitutional violation has been shown and there has been no deliberate bypass—at least as I understand that rule as applied to alleged trial lapses of defense counsel—I see little if any warrant, having in mind the State's burden of proof, not to insist upon a showing that the error was harmless beyond a reasonable doubt. As long as there is acceptable cause for the defendant's not objecting to the evidence, there should not be shifted to him the burden of proving specific prejudice to the satisfaction of the habeas corpus judge.

With respect to the necessity to show cause for noncompliance with the state rule, I think the deliberate-bypass rule of *Fay* v. *Noia* affords adequate protection to the State's interest in insisting that defendants not flout the rules of evidence. The bypass rule, however, as applied to events occurring during trial, cannot always demand that the defendant himself concur in counsel's judgment. Furthermore, if counsel is aware of the facts and the law (here the contemporaneous-

objection rule and the relevant constitutional objection that might be made) and yet decides not to object because he thinks the objection is unfounded, would damage his client's case, or for any other reason that flows from his exercise of professional judgment, there has been, as I see it, a deliberate bypass. It will not later suffice to allege in federal habeas corpus that counsel was mistaken, unless it is "plain error" appearing on the record or unless the error is sufficiently egregious to demonstrate that the services of counsel were not "within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson,* 397 U. S. 759, 771 (1970). Other reasons not amounting to deliberate bypass, such as ignorance of the applicable rules, would be sufficient to excuse the failure to object to evidence offered during trial.

I do agree that it is the burden of the habeas corpus petitioner to negative deliberate bypass and explain his failure to object. Sykes did neither here, and I therefore concur in the judgment.

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

Over the course of the last decade, the deliberate-bypass standard announced in *Fay* v. *Noia,* 372 U. S. 391, 438–439 (1963), has played a central role in efforts by the federal judiciary to accommodate the constitutional rights of the individual with the States' interests in the integrity of their judicial procedural regimes. The Court today decides that this standard should no longer apply with respect to procedural defaults occurring during the trial of a criminal defendant. In its place, the Court adopts the two-part "cause"-and-"prejudice" test originally developed in *Davis* v. *United States,* 411 U. S. 233 (1973), and *Francis* v. *Henderson,* 425 U. S. 536 (1976). As was true with these earlier cases,[1]

[1] The Court began its retreat from the deliberate-bypass standard of *Fay* in *Davis* v. *United States,* where a congressional intent to restrict

however, today's decision makes no effort to provide concrete guidance as to the content of those terms. More particularly, left unanswered is the thorny question that must be recognized to be central to a realistic rationalization of this area of law: How should the federal habeas court treat a procedural default in a state court that is attributable purely and simply to the error or negligence of a defendant's trial counsel? Because this key issue remains unresolved, I shall attempt in this opinion a re-examination of the policies [2] that should

---

the bypass formulation with respect to collateral review under 28 U. S. C. § 2255 was found to inhere in Fed. Rule Crim. Proc. 12 (b)(2). By relying upon Congress' purported intent, *Davis* managed to evade any consideration of the justifications and any shortcomings of the bypass test. Subsequently, in *Francis* v. *Henderson*, a controlling congressional expression of intent no longer was available, and the Court therefore employed the shibboleth of "considerations of comity and federalism" to justify application of *Davis* to a § 2254 proceeding. 425 U. S., at 541. Again, any coherent analysis of the bypass standard or the waivability of constitutional rights was avoided—as it was that same day in *Estelle* v. *Williams*, 425 U. S. 501 (1976), which proceeded to find a surrender of a constitutional right in an opinion that was simply oblivious to some 40 years of existing case law. See *infra*, at 108–109. Thus, while today's opinion follows from *Davis*, *Francis*, and *Estelle*, the entire edifice is a mere house of cards whose foundation has escaped any systematic inspection.

[2] I use the term "policies" advisedly, for it is important to recognize the area of my disagreement with the Court. This Court has never taken issue with the foundation principle established by *Fay* v. *Noia*—that in considering a petition for the writ of habeas corpus, federal courts possess the *power* to look beyond a state procedural forfeiture in order to entertain the contention that a defendant's constitutional rights have been abridged. 372 U. S., at 398–399. Indeed, only last Term, the Court reiterated: "There can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this." *Francis* v. *Henderson*, 425 U. S., at 538. Today's decision reconfirms this federal power by authorizing federal intervention under the "cause"-and-"prejudice" test. Were such power unavailable, federal courts would be bound by Fla. Rule Crim. Proc. 3.190, which contains no explicit provision for relief from procedural defaults. Our disagreement, there-

inform—and in *Fay* did inform—the selection of the standard governing the availability of federal habeas corpus jurisdiction in the face of an intervening procedural default in the state court.

I

I begin with the threshold question: What is the meaning and import of a procedural default? If it could be assumed that a procedural default more often than not is the product of a defendant's conscious refusal to abide by the duly constituted, legitimate processes of the state courts, then I might agree that a regime of collateral review weighted in favor of a State's procedural rules would be warranted.[3] *Fay*, however, recognized that such rarely is the case; and therein lies *Fay*'s basic unwillingness to embrace a view of habeas jurisdiction that results in "an airtight system of [procedural] forfeitures." 372 U. S., at 432.

This, of course, is not to deny that there are times when the failure to heed a state procedural requirement stems from an intentional decision to avoid the presentation of constitutional claims to the state forum. *Fay* was not insensitive to this possibility. Indeed, the very purpose of its bypass test is to detect and enforce such intentional procedural

---

fore, centers upon the standard that should govern a federal district court in the exercise of this power to adjudicate the constitutional claims of a state prisoner—which, in turn, depends upon an evaluation of the competing policies and values served by collateral review weighted against those furthered through strict deference to a State's procedural rules.

It is worth noting that because we deal with the standards governing the exercise of the conceded power of federal habeas courts to excuse a state procedural default, Congress, as the primary expositor of federal-court jurisdiction, remains free to undo the potential restrictiveness of today's decision by expressly defining the standard of intervention under 28 U. S. C. § 2254. Cf. *Davis* v. *United States*, 411 U. S., at 241–242.

[3] Even this concession to procedure would, in my view, be unnecessary so long as the habeas court is capable of distinguishing between intentional and inadvertent defaults with acceptable accuracy—as I believe it can. See n. 4, *infra*.

forfeitures of outstanding constitutionally based claims. *Fay* does so through application of the longstanding rule used to test whether action or inaction on the part of a criminal defendant should be construed as a decision to surrender the assertion of rights secured by the Constitution: To be an effective waiver, there must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). Incorporating this standard, *Fay* recognized that if one "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief . . . ." 372 U. S., at 439. For this reason, the Court's assertion that it "think[s]" that the *Fay* rule encourages intentional "sandbagging" on the part of the defense lawyers is without basis, *ante,* at 89; certainly the Court points to no cases or commentary arising during the past 15 years of actual use of the *Fay* test to support this criticism. Rather, a consistent reading of case law demonstrates that the bypass formula has provided a workable vehicle for protecting the integrity of state rules in those instances when such protection would be both meaningful and just.[4]

[4] Over the years this Court has without notable difficulty applied the *Fay* rule to a variety of contexts. *E. g., Lefkowitz* v. *Newsome,* 420 U. S. 283 (1975); *Humphrey* v. *Cady,* 405 U. S. 504, 517 (1972); *Anderson* v. *Nelson,* 390 U. S. 523, 525 (1968); *Warden* v. *Hayden,* 387 U. S. 294, 297 n. 3 (1967); cf. *Chambers* v. *Mississippi,* 410 U. S. 284, 290 n. 3 (1973). Similarly, the standard has been capable of intelligent application by the lower federal courts in order to bar the collateral reconsideration of tactical decisions by the defense, *e. g., United States ex rel. Green* v. *Rundle,* 452 F. 2d 232, 236 (CA3 1971) (counsel concedes tactical decision); *Whitney* v. *United States,* 513 F. 2d 326, 329 (CA8 1974) (counsel forgoes challenge to seized evidence in order to avoid concession of any possessory interest in searched premises), while otherwise permitting federal review, *Henderson* v. *Kibbe,* 534 F. 2d 493, 496–497 (CA2 1976), rev'd

But having created the bypass exception to the availability of collateral review, *Fay* recognized that intentional, tactical forfeitures are not the norm upon which to build a rational system of federal habeas jurisdiction. In the ordinary case, litigants simply have no incentive to slight the state tribunal, since constitutional adjudication on the state and federal levels are not mutually exclusive. *Brown* v. *Allen,* 344 U. S. 443 (1953); *Brewer* v. *Williams,* 430 U. S. 387 (1977); *Castaneda* v. *Partida,* 430 U. S. 482 (1977). Under the regime of collateral review recognized since the days of *Brown* v. *Allen,* and enforced by the *Fay* bypass test, no rational lawyer would risk the "sandbagging" feared by the Court.[5] If a constitutional challenge is not properly raised

on other grounds, 431 U. S. 145 (1977); *Paine* v. *McCarthy,* 527 F. 2d 173 (CA9 1975). And in cases similar to the present one where Fifth Amendment violations were in issue, *Fay* has afforded a meaningful standard governing the scope of federal collateral review. Compare *United States ex rel. Terry* v. *Henderson,* 462 F. 2d 1125, 1129 (CA2 1972) (bypass found where counsel relied on confession to rebut premeditation in murder trial); and *United States ex rel. Cruz* v. *LaVallee,* 448 F. 2d 671, 679 (CA2 1971) (bypass found where trial strategy called for confessing to killing but arguing that mitigating circumstances exist), with *Moreno* v. *Beto,* 415 F. 2d 154 (CA5 1969) (defense not held to bypass where defense counsel deliberately chose not to raise and submit voluntariness issue to jury due to unwillingness to expose client to unconstitutional procedure).

[5] In brief, the defense lawyer would face two options: (1) He could elect to present his constitutional claims to the state courts in a proper fashion. If the state trial court is persuaded that a constitutional breach has occurred, the remedies dictated by the Constitution would be imposed, the defense would be bolstered, and the prosecution accordingly weakened, perhaps precluded altogether. If the state court rejects the properly tendered claims, the defense has lost nothing: Appellate review before the state courts and federal habeas consideration are preserved. (2) He could elect to "sandbag." This presumably means, first, that he would hold back the presentation of his constitutional claim to the trial court, thereby increasing the likelihood of a conviction since the prosecution would be able to present evidence that, while arguably constitutionally deficient, may be highly prejudicial to the defense. Second, he would thereby have forfeited all state review and remedies with respect to these claims (sub-

on the state level, the explanation generally will be found elsewhere than in an intentional tactical decision.

In brief then, any realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel. See, *e. g.*, Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 997 (1965). The case under consideration today is typical. The Court makes no effort to identify a tactical motive for the failure of Sykes' attorney to challenge the admissibility or reliability of a highly inculpatory statement. While my Brother STEVENS finds a possible tactical advantage, I agree with the Court of Appeals that this reading is most implausible: "We can find no possible advantage which the defense might have gained, or thought they might gain, from the failure to conform with Florida Criminal Procedure Rule 3.190 (i)." 528 F. 2d 522, 527 (1976). Indeed, there is no basis for inferring that Sykes or his state trial lawyer was even aware of the existence of his claim under the Fifth Amendment; for this is not a case where the trial judge expressly drew the attention of the defense to a possible constitutional contention or procedural requirement, *e. g.*, *Murch* v. *Mottram*, 409 U. S. 41 (1972); cf. *Henry* v. *Mississippi*, 379 U. S. 443, 448 n. 3 (1965), or where the defense signals its knowledge of a constitutional claim by abandoning a challenge previously raised, *e. g.*, *Sanders* v. *United States*, 373 U. S. 1,

---

ject to whatever "plain error" rule is available). Third, to carry out his scheme, he would now be compelled to deceive the federal habeas court and to convince the judge that he did not "deliberately bypass" the state procedures. If he loses on this gamble, all federal review would be barred, and his "sandbagging" would have resulted in nothing but the forfeiture of all judicial review of his client's claims. The Court, without substantiation, apparently believes that a meaningful number of lawyers are induced into option 2 by *Fay*. I do not. That belief simply offends common sense.

18 (1963). Rather, any realistic reading of the record demonstrates that we are faced here with a lawyer's simple error.[6]

Fay's answer thus is plain: the bypass test simply refuses to credit what is essentially a lawyer's mistake as a forfeiture of constitutional rights. I persist in the belief that the interests of Sykes and the State of Florida are best rationalized by adherence to this test, and by declining to react to inadvertent defaults through the creation of an "airtight system of forfeitures."

II

What are the interests that Sykes can assert in preserving the availability of federal collateral relief in the face of his inadvertent state procedural default? Two are paramount.

As is true with any federal habeas applicant, Sykes seeks access to the federal court for the determination of the validity of his federal constitutional claim. Since at least *Brown* v. *Allen,* it has been recognized that the "fair effect [of] the habeas corpus jurisdiction as enacted by Congress" entitles a state prisoner to such federal review. 344 U. S., at 500 (opinion of Frankfurter, J.). While some of my Brethren may feel uncomfortable with this congressional choice of policy, see, *e. g., Stone* v. *Powell,* 428 U. S. 465 (1976), the Legislative Branch nonetheless remains entirely free to determine that the constitutional rights of an individual subject to state custody, like those of the civil rights

[6] The likelihood that we are presented with a lawyer's simple mistake is not answered by respondent's stipulation to his trial counsel's competency. At oral argument it was made clear that Sykes so stipulated solely because of the position expressed by the habeas court that a challenge to his prior legal representation would require the return to the state courts and the further exhaustion of state remedies, a detour that respondent insisted on avoiding. Tr. of Oral Arg. 49. Furthermore, in light of the prevailing standards, or lack of standards, for judging the competency of trial counsel, see *infra,* at 117, it is perfectly consistent for even a lawyer who commits a grievous error—whether due to negligence or ignorance—to be deemed to have provided competent representation.

plaintiff suing under 42 U. S. C. § 1983, are best preserved by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights . . . ." *Mitchum* v. *Foster,* 407 U. S. 225, 242 (1972).

With respect to federal habeas corpus jurisdiction, Congress explicitly chose to effectuate the federal court's primary responsibility for preserving federal rights and privileges by authorizing the litigation of constitutional claims and defenses in a district court after the State vindicates its own interest through trial of the substantive criminal offense in the state courts.[7] This, of course, was not the only course that Congress might have followed: As an alternative, it might well have decided entirely to circumvent all state procedure through the expansion of existing federal removal statutes such as 28 U. S. C. §§ 1442 (a)(1) and 1443, thereby authorizing the pretrial transfer of all state criminal cases to the federal courts whenever federal defenses or claims are in issue.[8] But liberal post-trial federal review is the redress

[7] Congress' grant of post-trial access to the federal courts was reconfirmed by its modification of 28 U. S. C. § 2254 following our decisions in *Fay* and *Townsend* v. *Sain,* 372 U. S. 293 (1963). This legislative amendment of the habeas statute essentially embraced the relitigation standards outlined in *Townsend* without altering the broad framework for collateral review contained in *Brown* v. *Allen,* 344 U. S. 443 (1953), *Fay,* and like cases. See, *e. g., Stone* v. *Powell,* 428 U. S. 465, 528–529 (1976) (BRENNAN, J., dissenting).

[8] Whether in a civil or criminal case, Congress' broad authority to allocate federal issues for decision in its choice of forum is clear. See, *e. g., Tennessee* v. *Davis,* 100 U. S. 257 (1880); *Greenwood* v. *Peacock,* 384 U. S. 808, 833 (1966): "We have no doubt that Congress, if it chose, could provide for exactly such a system. We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared. And in the exercise of that power, we may assume that Congress is constitutionally fully free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another." The same day as *Greenwood* the Court applied § 1443 (1) as authorizing (subject to further fact-

that Congress ultimately chose to allow and the consequences of a state procedural default should be evaluated in conformance with this policy choice. Certainly, we can all agree that once a state court has assumed jurisdiction of a criminal case, the integrity of its own process is a matter of legitimate concern. The *Fay* bypass test, by seeking to discover intentional abuses of the rules of the state forum, is, I believe, compatible with this state institutional interest. See Part III, *infra*. But whether *Fay* was correct in penalizing a litigant solely for his intentional forfeitures properly must be read in light of Congress' desired norm of widened post-trial access to the federal courts. If the standard adopted today is later construed to require that the simple mistakes of attorneys are to be treated as binding forfeitures, it would serve to subordinate the fundamental rights contained in our constitutional charter to inadvertent defaults of rules promulgated by state agencies, and would essentially leave it to the States, through the enactment of procedure and the certification of the competence of local attorneys, to determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed him by Congress.[9]

---

finding) the removal of a state trespass prosecution to the United States District Court. *Georgia* v. *Rachel*, 384 U. S. 780 (1966). Once a criminal case is thus removed to the federal court, the State no longer can assert any interest in having trial of the state substantive offense governed by the State's choice of procedure, for this Court has long provided that federal procedure then obtains. *Tennessee* v. *Davis, supra*, at 272. In this sense, the prevailing system of post-trial federal collateral review is more generous to state procedure than would be required, and, some would say, desired. See generally Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793 (1965).

[9] Of course, even under the Court's new standard, traditional principles continue to apply, and the federal judiciary is not bound by state rules of procedure that are unreasonable on their face, or that are either unrea-

Thus, I remain concerned that undue deference to local procedure can only serve to undermine the ready access to a federal court to which a state defendant otherwise is entitled. But federal review is not the full measure of Sykes' interest, for there is another of even greater immediacy: assuring that his constitutional claims can be addressed to *some* court. For the obvious consequence of barring Sykes from the federal courthouse is to insulate Florida's alleged constitutional violation from any and all judicial review because of a lawyer's mistake. From the standpoint of the habeas petitioner, it is a harsh rule indeed that denies him "any review at all where the state has granted none," *Brown* v. *Allen,* 344 U. S., at 552 (Black, J., dissenting)—particularly when he would have enjoyed both state and federal consideration had his attorney not erred.

Fay's answer to Sykes' predicament, measuring the existence and extent of his procedural waiver by the *Zerbst* standard is, I submit, a realistic one. The Fifth Amendment assures that no person "shall be compelled in any criminal case to be a witness against himself . . . ." A defendant like Sykes can forgo this protection in two ways: He may decide to waive his substantive self-incrimination right at the point that he gives an inculpatory statement to the police authorities, *Miranda* v. *Arizona,* 384 U. S. 436, 478 (1966), or he and his attorney may choose not to challenge the admissibility of an incriminating statement when such a challenge would be effective under state trial procedure. See *Estelle* v. *Williams,* 425 U. S. 501, 524 (1976) (dissenting opinion). With few exceptions in the past 40 years, *e. g., Estelle* v. *Williams, supra; Schneckloth* v. *Bustamonte,* 412 U. S. 218 (1973), this Court has required that the substantive waiver, to be valid, must be a knowing and intelligent one.

---

sonably or inconsistently applied. See, *e. g., Henry* v. *Mississippi,* 379 U. S. 443 (1965); *NAACP* v. *Alabama,* 377 U. S. 288 (1964); *Staub* v. *Baxley,* 355 U. S. 313 (1958); *Williams* v. *Georgia,* 349 U. S. 375 (1955).

See, *e. g., Brewer* v. *Williams,* 430 U. S., at 404; *Brookhart* v. *Janis,* 384 U. S. 1, 4 (1966); *Escobedo* v. *Williams,* 378 U. S. 478, 490 n. 14 (1964); *Green* v. *United States,* 355 U. S. 184, 191–192 (1957); *Smith* v. *United States,* 337 U. S. 137, 149–150 (1949); *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 275 (1942). It has long been established that such is the case for the waiver of the protections of the *Miranda* rule. See 384 U. S., at 475; *Schneckloth* v. *Bustamonte, supra,* at 240. *Fay* simply evaluates the procedural waiver of Sykes' Fifth Amendment rights by the same standard.

From the standpoint of the habeas petitioner this symmetry is readily understandable. To him, the inevitable consequence of either type of forfeiture—be it substantive or procedural—is that the protection of the Fifth Amendment is lost and his own words are introduced at trial to the prejudice of his defense. The defendant's vital interest in preserving his Fifth Amendment privilege entitles him to informed and intelligent consideration of any decision leading to its forfeiture. It may be, of course, that the State's countervailing institutional interests are more compelling in the case of eliciting a procedural default, thereby justifying a relaxation of the *Zerbst* standard. I discuss this possibility in greater detail in Part III, *infra.* It is sufficient for present purposes, however, that there is no reason for believing that this necessarily is true. That the State legitimately desires to preserve an orderly and efficient judicial process is undeniable. But similar interests of efficiency and the like also can be identified with respect to other state institutions, such as its law enforcement agencies. Yet, as was only recently reconfirmed, we would not permit and have not permitted the state police to enhance the orderliness and efficiency of their law enforcement activities by embarking on a campaign of acquiring inadvertent waivers of important constitutional rights. *Brewer* v. *Williams, supra,* at 401–406; see generally *Francis* v. *Henderson,* 425 U. S., at 548–549, n. 2 (dissenting opinion).

A procedural default should be treated accordingly. Indeed, a recent development in the law of habeas corpus suggests that adherence to the deliberate-bypass test may be more easily justified today than it was when *Fay* was decided. It also suggests that the "prejudice" prong of the Court's new test may prove to be a redundancy. Last Term the Court ruled that alleged violations of the Fourth Amendment in most circumstances no longer will be cognizable in habeas corpus. *Stone* v. *Powell,* 428 U. S. 465 (1976). While, for me, the principle that generated this conclusion was not readily apparent, I expressed my concern that the *Stone* decision contains the seeds for the exclusion from collateral review of a variety of constitutional rights that my Brethren somehow deem to be unimportant—perhaps those that they are able to conclude are not "guilt-related." See *id.,* at 517–518 (dissenting opinion). If this trail is to be followed, it would be quite unthinkable that an unintentional procedural default should be allowed to stand in the way of vindication of constitutional rights bearing upon the guilt or innocence of a defendant. Indeed, if as has been argued, a key to decision in this area turns upon a comparison of the importance of the constitutional right at stake with the state procedural rule, Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 236–237, then the Court's threshold effort to identify those rights of sufficient importance to be litigated collaterally should largely predetermine the outcome of this balance.

In sum, I believe that *Fay*'s commitment to enforcing intentional but not inadvertent procedural defaults offers a realistic measure of protection for the habeas corpus petitioner seeking federal review of federal claims that were not litigated before the State. The threatened creation of a more "airtight system of forfeitures" would effectively deprive habeas petitioners of the opportunity for litigating

their constitutional claims before any forum and would disparage the paramount importance of constitutional rights in our system of government. Such a restriction of habeas corpus jurisdiction should be countenanced, I submit, only if it fairly can be concluded that *Fay*'s focus on knowing and voluntary forfeitures unduly interferes with the legitimate interests of state courts or institutions. The majority offers no suggestion that actual experience has shown that *Fay*'s bypass test can be criticized on this score. And, as I now hope to demonstrate, any such criticism would be unfounded.

III

A regime of federal habeas corpus jurisdiction that permits the reopening of state procedural defaults does not invalidate any state procedural rule as such;[10] Florida's courts remain entirely free to enforce their own rules as they choose, and to deny any and all state rights and remedies to a defendant who fails to comply with applicable state procedure. The relevant inquiry is whether more is required—specifically, whether the fulfillment of important interests of the State necessitates that federal courts be called upon to impose additional sanctions for inadvertent noncompliance with state procedural requirements such as the contemporaneous-objection rule involved here.

---

[10] This is not to suggest that the availability of collateral review has no bearing on the States' selection and enforcement of procedural requirements. On the contrary, to the extent that a State desires to have input into the process of developing federal law, and seeks to guarantee its primary factfinding role as authorized by § 2254 and *Townsend* v. *Sain*, 372 U. S. 293 (1963), the existence of broad federal habeas power will tend to encourage the liberalizing and streamlining of state rules that otherwise might serve to bar such state participation. From every perspective, I would suppose that any such effect of *Fay* would be considered a salutary one, see, *e. g.*, Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 348 (1973), although the Court implies the contrary, *ante*, at 89–90.

Florida, of course, can point to a variety of legitimate interests in seeking allegiance to its reasonable procedural requirements, the contemporaneous-objection rule included. See *Henry* v. *Mississippi*, 379 U. S., at 448. As *Fay* recognized, a trial, like any organized activity, must conform to coherent process, and "there must be sanctions for the flouting of such procedure." 372 U. S., at 431. The strict enforcement of procedural defaults, therefore, may be seen as a means of deterring any tendency on the part of the defense to slight the state forum, to deny state judges their due opportunity for playing a meaningful role in the evolving task of constitutional adjudication, or to mock the needed finality of criminal trials. All of these interests are referred to by the Court in various forms.[11]

The question remains, however, whether any of these policies or interests are efficiently and fairly served by enforcing both intentional and inadvertent defaults pursuant to the identical stringent standard. I remain convinced that when one pierces the surface justifications for a harsher rule posited by the Court, no standard stricter than *Fay*'s deliberate-bypass test is realistically defensible.

---

[11] In my view, the strongest plausible argument for strict enforcement of a contemporaneous-objection rule is one that the Court barely relies on at all: the possibility that the failure of timely objection to the admissibility of evidence may foreclose the making of a fresh record and thereby prejudice the prosecution in later litigation involving that evidence. There may be force to this contention, but it rests on the premise that the State in fact has suffered actual prejudice because of a procedural lapse. Florida demonstrates no such injury here. Sykes' trial occurred in June 1972. He subsequently filed his petition for a writ of habeas corpus in April 1973, thereby apprising Florida of his constitutional objection. There is no basis in the record for concluding that lost evidence or other form of prejudice, see, *e. g.*, *Barker* v. *Wingo*, 407 U. S. 514, 532 (1972), arising during this 10½-month interval effectively forestalls Florida's defense of the Fifth Amendment claim or the reprosecution of Sykes should his constitutional challenge prevail.

Punishing a lawyer's unintentional errors by closing the federal courthouse door to his client is both a senseless and misdirected method of deterring the slighting of state rules. It is senseless because unplanned and unintentional action of any kind generally is not subject to deterrence; and, to the extent that it is hoped that a threatened sanction addressed to the defense will induce greater care and caution on the part of trial lawyers, thereby forestalling negligent conduct or error, the potential loss of all valuable state remedies would be sufficient to this end.[12] And it is a misdirected sanction because even if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the habeas applicant, as opposed to his lawyer, hardly is the proper recipient of such a penalty. Especially with fundamental constitutional rights

[12] Under § 2254, the availability of federal review is not limited or dependent on forgoing litigation in the state courts. Because the state forum thus affords purely an additional measure of protection, *Fay* recognized: "A man under conviction for crime has an obvious inducement to do his very best to keep his state remedies open, and not stake his all on the outcome of a federal habeas proceeding which, in many respects, may be less advantageous to him than a state court proceeding. . . . And if because of inadvertence or neglect he runs afoul of a state procedural requirement, and thereby forfeits his state remedies, appellate and collateral, as well as direct review thereof in this Court, those consequences should be sufficient to vindicate the State's valid interest in orderly procedure." 372 U. S., at 433. See Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1351 (1961). This Court's recent decision in *Stone* v. *Powell,* 428 U. S. 465 (1976), seems to subscribe to a similar view that deterrence is not meaningfully furthered by adopting an overkill of sanctions. There the Court reasoned that police misconduct under the Fourth Amendment will be deterred by state review of any search-and-seizure claim, and that further federal-court consideration would have but an "incremental" and "isolated" deterrent impact. *Id.,* at 494. Assuming that criminal defendants and lawyers are no less rational than police, they should be deterred from risking the unnecessary forfeiture of all state remedies and the initial opportunity for judicial victory before the state courts.

at stake, no fictional relationship of principal-agent or the like can justify holding the criminal defendant accountable for the naked errors of his attorney.[13] This is especially true when so many indigent defendants are without any realistic choice in selecting who ultimately represents them at trial.[14] Indeed, if responsibility for error must be apportioned between the parties, it is the State, through its attorney's admissions and certification policies, that is more fairly held to blame for the fact that practicing lawyers too often are ill-prepared or ill-equipped to act carefully and knowledgeably when faced with decisions governed by state procedural requirements.

[13] Traditionally, the rationale for binding a criminal defendant by his attorney's mistakes has rested on notions akin to agency law. See, *e. g.*, Comment, Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest, 54 Calif. L. Rev. 1262, 1278–1281 (1966). With respect to ordinary commercial matters, the common law established and recognized principal-agent relationships for the protection of innocent third parties who deal with the latter. In the context of a criminal trial, this analogy is not apt, for the State, primarily in control of the criminal process and responsible for qualifying and assigning attorneys to represent the accused, is not a wholly innocent bystander. Consequently, the dominant relationship of the trial counsel with respect to his client more recently has been found simply to inhere in "our legal system" or "our adversary system." *Estelle* v. *Williams*, 425 U. S., at 512. There is undoubted truth in this; obviously "our legal system" presupposes that attorneys will function competently, that their clients cannot participate in all decisions, *Henry* v. *Mississippi*, 379 U. S., at 451, and that the trial of a criminal defendant will not inevitably be followed by a trial of his attorney's performance. *Fay* reacts to this institutional demand by enforcing both action and inaction of attorneys—even if they prove to backfire in actual practice—provided that it is found that the lawyer was aware of his client's rights and knowingly applied his professional judgment in his client's behalf. In brief, the bypass test rightfully defers to the attorney's "vast array of trial decisions, strategic and tactical," *Estelle* v. *Williams, supra*, at 512, but not to sheer inadvertence where no decision was made.

[14] See generally Tague, An Indigent's Right to the Attorney of His Choice, 27 Stan. L. Rev. 73 (1974).

Hence, while I can well agree that the proper functioning of our system of criminal justice, both federal and state, necessarily places heavy reliance on the professionalism and judgment of trial attorneys, I cannot accept a system that ascribes the absolute forfeiture of an individual's constitutional claims to situations where his lawyer manifestly exercises *no* professional judgment at all—where carelessness, mistake, or ignorance is the explanation for a procedural default. Of course, it is regrettable that certain errors that might have been cured earlier had trial counsel acted expeditiously must be corrected collaterally and belatedly. I can understand the Court's wistfully wishing for the day when the trial was the sole, binding and final "event" of the adversarial process—although I hesitate to agree that in the eyes of the criminal defendant it has ever ceased being the "main" one, *ante,* at 90. But it should be plain that in the real world, the interest in finality is repeatedly compromised in numerous ways that arise with far greater frequency than do procedural defaults. The federal criminal system, to take one example, expressly disapproves of interlocutory review in the generality of cases even though such a policy would foster finality by permitting the authoritative resolution of all legal and constitutional issues prior to the convening of the "main event." See generally *Abney* v. *United States,* 431 U. S. 651 (1977). Instead, it relies on the belated correction of error, through appeal and collateral review, to ensure the fairness and legitimacy of the criminal sanction. Indeed, the very existence of the well-established right collaterally to reopen issues previously litigated before the state courts, *Brown* v. *Allen,* 344 U. S. 443 (1953), represents a congressional policy choice that is inconsistent with notions of strict finality—and probably more so than authorizing the litigation of issues that, due to inadvertence, were never addressed to any court. Ultimately, all of these limitations on the finality of criminal convictions emerge from the tension between justice

and efficiency in a judicial system that hopes to remain true to its principles and ideals. Reasonable people may disagree on how best to resolve these tensions. But the solution that today's decision risks embracing seems to me the most unfair of all: the denial of any judicial consideration of the constitutional claims of a criminal defendant because of errors made by his attorney which lie outside the power of the habeas petitioner to prevent or deter and for which, under no view of morality or ethics, can he be held responsible.

In short, I believe that the demands of our criminal justice system warrant visiting the mistakes of a trial attorney on the head of a habeas corpus applicant only when we are convinced that the lawyer actually exercised his expertise and judgment in his client's service, and with his client's knowing and intelligent participation where possible. This, of course, is the precise system of habeas review established by *Fay* v. *Noia*.

IV

Perhaps the primary virtue of *Fay* is that the bypass test at least yields a coherent yardstick for federal district courts in rationalizing their power of collateral review. See n. 4, *supra*. In contrast, although some four years have passed since its introduction in *Davis* v. *United States*, 411 U. S. 233 (1973), the only thing clear about the Court's "cause"-and-"prejudice" standard is that it exhibits the notable tendency of keeping prisoners in jail without addressing their constitutional complaints. Hence, as of today, all we know of the "cause" standard [15] is its requirement that habeas applicants bear an undefined burden of explanation for the failure to obey the state rule, *ante*, at 91. Left unresolved is whether a habeas petitioner like Sykes can adequately discharge this burden by

[15] The earlier cases of *Davis* v. *United States*, 411 U. S. 233 (1973), and *Francis* v. *Henderson*, 425 U. S., at 542, similarly are not instructive in defining "cause," since both decisions appear to have disposed of the habeas application primarily on the "prejudice" aspect of the test.

offering the commonplace and truthful explanation for his default: attorney ignorance or error beyond the client's control. The "prejudice" inquiry, meanwhile, appears to bear a strong resemblance to harmless-error doctrine. Compare *ante,* at 91, with *Chapman* v. *California,* 386 U. S. 18, 24 (1967). I disagree with the Court's appraisal of the harmlessness of the admission of respondent's confession, but if this is what is meant by prejudice, respondent's constitutional contentions could be as quickly and easily disposed of in this regard by permitting federal courts to reach the merits of his complaint. In the absence of a persuasive alternative formulation to the bypass test, I would simply affirm the judgment of the Court of Appeals and allow Sykes his day in court on the ground that the failure of timely objection in this instance was not a tactical or deliberate decision but stemmed from a lawyer's error that should not be permitted to bind his client.

One final consideration deserves mention. Although the standards recently have been relaxed in various jurisdictions,[16] it is accurate to assert that most courts, this one included,[17] traditionally have resisted any realistic inquiry into the competency of trial counsel. There is nothing unreasonable,

---

[16] A majority of courts have now passed beyond the standard of attorney competence embodied in the so-called "mockery" test, which abdicates any judicial supervision over attorney performance so long as the attorney does not make a farce of the trial. See, *e. g., United States* v. *Katz,* 425 F. 2d 928 (CA2 1970) (attorney who was prone to fall asleep during trial held to have provided competent representation). The new emerging rule essentially requires that the attorney provide assistance within a reasonable range of professional competence, see *United States* v. *DeCoster,* 159 U. S. App. D. C. 326, 487 F. 2d 1197 (1973); *United States ex rel. Williams* v. *Twomey,* 510 F. 2d 634, 640, (CA7 1975).

[17] See, *e. g., Chambers* v. *Maroney,* 399 U. S. 42, 55–60 (1970) (Harlan, J., dissenting). Recently, this Court, however, has made clear that attorneys are expected to perform "within the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson,* 397 U. S. 759, 771 (1970); *Tollett* v. *Henderson,* 411 U. S. 258, 266 (1973).

however, in adhering to the proposition that it is the responsibility of a trial lawyer who takes on the defense of another to be aware of his client's basic legal rights and of the legitimate rules of the forum in which he practices his profession.[18] If he should unreasonably permit such rules to bar the assertion of the colorable constitutional claims of his client, then his conduct may well fall below the level of competence that can fairly be expected of him.[19] For almost 40 years it has been established that inadequacy of counsel undercuts the very competence and jurisdiction of the trial court and is always open to collateral review. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938).[20] Obviously, as a practical matter, a trial counsel cannot procedurally waive his own inadequacy. If the scope of habeas jurisdiction previously governed by *Fay* v. *Noia* is to be redefined so as to enforce the errors and neglect of lawyers with unnecessary and unjust rigor, the time may come when conscientious and fairminded federal and state courts, in adhering to the teaching of *Johnson* v. *Zerbst,* will have to reconsider whether they can continue to indulge the comfortable fiction that all lawyers are skilled or even competent craftsmen in representing the fundamental rights of their clients.

---

[18] Indeed, at least this level of knowledge and proficiency would seem to be a prerequisite for the provision of "effective and substantial aid" as guaranteed by the Sixth Amendment. *Powell* v. *Alabama,* 287 U. S. 45, 53 (1932).

[19] "Counsel's failure to evaluate properly facts giving rise to a constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof [of incompetent counsel]." *Tollett* v. *Henderson, supra,* at 266–267.

[20] *Zerbst* dealt specifically with an instance where trial counsel was altogether lacking, but "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson, supra,* at 771 n. 14 (citations omitted).

Syllabus

JONES, SECRETARY, DEPARTMENT OF CORRECTION OF NORTH CAROLINA, ET AL. *v.* NORTH CAROLINA PRISONERS' LABOR UNION, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 75–1874. Argued April 19, 1977—Decided June 23, 1977

Appellee prisoners' labor union brought this action under 42 U. S. C. § 1983, claiming that its First Amendment and equal protection rights were violated by regulations promulgated by the North Carolina Department of Correction that prohibited prisoners from soliciting other inmates to join the Union and barred Union meetings and bulk mailings concerning the Union from outside sources. A three-judge District Court, which noted that appellants had "permitted" inmates to join the Union, granted substantial injunctive relief, having concluded that prohibiting inmate-to-inmate solicitation "border[ed] on the irrational," and that since bulk mailings to and meetings with inmates by the Jaycees, Alcoholics Anonymous, and in one institution the Boy Scouts (hereafter collectively "service organizations") had been permitted, appellants, absent a showing of detriment to penological objectives, "may not pick and choose depending on [their] approval or disapproval of the message or purpose of the group." *Held:*

1. The challenged regulations do not violate the First Amendment as made applicable to the States by the Fourteenth. Pp. 125–133.

(a) The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, *Pell* v. *Procunier*, 417 U. S. 817, 822, perhaps the most obvious of which is associational rights that the First Amendment protects outside of prison walls. Pp. 125–126.

(b) The District Court overstated what appellants' concession as to true membership entailed—appellants permitted membership in the Union (which involved no dues or obligations) because of the reasonable assumption that the individual could believe what he chose to believe, but appellants never acquiesced in, or permitted, group activity by the Union, and the ban on inmate solicitation and group meetings was rationally related to the reasonable objectives of prison administration. Pp. 126–129.

(c) First Amendment speech rights are barely implicated here, mail

rights themselves not being involved but only the cost savings through bulk mailings. Pp. 130–131.

(d) The prohibition on inmate-to-inmate solicitation does not unduly abridge inmates' free speech rights. If the prison officials are otherwise entitled to control organized union activity within the confines of a prison the solicitation ban is not impermissible under the First Amendment, for such a prohibition is both reasonable and necessary. *Pell* v. *Procunier, supra,* at 822. Pp. 131–132.

(e) First Amendment associational rights are also not unduly abridged here. Appellants' conclusion that the presence of a prisoners' union would be detrimental to prison order and security has not been conclusively shown to be wrong, and the regulations drafted were no broader than necessary to meet the perceived threat of group meetings and organizational activity to such order and security. Pp. 132–133.

2. Appellants' prohibition against the receipt by and distribution to the inmates of bulk mail from the Union as well as the prohibition of Union meetings among inmates whereas the service organizations were given bulk mailing and meeting rights, does not violate the Equal Protection Clause. The prison does not constitute a "public forum," and appellants demonstrated a rational basis for distinguishing between the Union (which occupied an adversary role and espoused a purpose illegal under North Carolina law) and the service organizations (which performed rehabilitation services). Pp. 133–136.

409 F. Supp. 937, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., filed a concurring opinion, *post,* p. 136. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post,* p. 138. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 139.

Jacob L. Safron, Special Deputy Attorney General of North Carolina, argued the cause for appellants. With him on the brief was *Rufus L. Edmisten,* Attorney General.

Norman B. Smith argued the cause for appellee. With him on the brief was *Deborah Mailman.*

Kenneth S. Geller argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were

Acting Solicitor General Friedman, Assistant Attorney General Thornburgh, and *Jerome M. Feit.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Pursuant to regulations promulgated by the North Carolina Department of Correction, appellants prohibited inmates from soliciting other inmates to join appellee, the North Carolina Prisoners' Labor Union, Inc. (Union), barred all meetings of the Union, and refused to deliver packets of Union publications that had been mailed in bulk to several inmates for redistribution among other prisoners. The Union instituted this action, based on 42 U. S. C. § 1983, to challenge these policies. It alleged that appellants' efforts to prevent the operation of a prisoners' union violated the First and Fourteenth Amendment rights of it and its members and that the refusal to grant the Union those privileges accorded several other organizations operating within the prison system deprived the Union of equal protection of the laws. A three-judge court was convened. After a hearing, the court found merit in the Union's free speech, association, and equal protection arguments, and enjoined appellants from preventing inmates from soliciting other prisoners to join the Union and from "refus[ing] receipt of the Union's publications on the ground that they are calculated to encourage membership in the organization or solicit joining." The court also held that the Union "shall be accorded the privilege of holding meetings under such limitations and control as are neutrally applied to all inmate organizations . . . ." 409 F. Supp. 937. We noted probable jurisdiction to consider whether the First and Fourteenth Amendments extend prisoner labor unions such protection. 429 U. S. 976. We have decided that they do not, and we accordingly reverse the judgment of the District Court.

---

*The Prisoners' Union, Inc., filed a brief as *amicus curiae* urging affirmance.

I

Appellee, an organization self-denominated as a Prisoners' Labor Union, was incorporated in late 1974, with a stated goal of "the promotion of charitable labor union purposes" and the formation of a "prisoners' labor union at every prison and jail in North Carolina to seek through collective bargaining . . . to improve . . . working . . . conditions. . . ." [1] It also proposed to work toward the alteration or elimination of practices and policies of the Department of Correction which it did not approve of, and to serve as a vehicle for the presentation and resolution of inmate grievances. By early 1975, the Union had attracted some 2,000 inmate "members" in 40 different prison units throughout North Carolina. The State of North Carolina, unhappy with these developments, set out to prevent inmates from forming or operating a "union." While the State tolerated individual "membership," or belief, in the Union, it sought to prohibit inmate solicitation of other inmates, meetings between members of the Union, and bulk mailings concerning the Union from outside sources. Pursuant to a regulation promulgated by the Department of Correction on March 26, 1975, such solicitation and group activity were proscribed.

Suit was filed by the Union in the United States District Court for the Eastern District of North Carolina on March 18, 1975, approximately a week before the date upon which the regulation was to take effect. The Union claimed that its rights, and the rights of its members, to engage in protected free speech, association, and assembly activities were being infringed by the no-solicitation and no-meeting rules. It also alleged a deprivation of equal protection of the laws in that

[1] These are the corporation purposes listed in the Articles of Incorporation issued by the Secretary of State of North Carolina. Collective bargaining for inmates with respect to pay, hours of employment, and other terms and conditions of incarceration is illegal under N. C. Gen. Stat. § 95–98 (1975).

the Jaycees and Alcoholics Anonymous were permitted to have meetings and other organizational rights, such as the distribution of bulk mailing material, that the Union was being denied. A declaratory judgment and injunction against continuation of these restrictive policies were sought, as were substantial damages.[2]

A three-judge District Court, convened pursuant to 28 U. S. C. §§ 2281 and 2284, while dismissing the Union's prayers for damages and attorney's fees, granted it substantial injunctive relief. The court found that appellants "permitted" inmates to join the Union, but "oppose[d] the solicitation of other inmates to join," either by inmate-to-inmate solicitation or by correspondence. 409 F. Supp., at 941. The court noted, *id.*, at 942:

> "[Appellants] sincerely believe that the very existence of the Union will increase the burdens of administration and constitute a threat of essential discipline and control. They are apprehensive that inmates may use the Union to establish a power bloc within the inmate population which could be utilized to cause work slowdowns or stoppages or other undesirable concerted activity."

The District Court concluded, however, that there was "no consensus" among experts on these matters, and that it was "left with no firm conviction that an association of inmates is necessarily good or bad . . . ." *Id.*, at 942–943. The court felt that since appellants countenanced the bare fact of Union membership, it had to allow solicitation activity, whether by inmates or by outsiders:

> "We are unable to perceive why it is necessary or essential to security and order in the prisons to forbid

---

[2] Other allegations were contained in the complaint, respecting the opening of outgoing prison mail and the interference with visitation rights of certain paralegals. These specific allegations are not before us, and we will not deal with them further.

solicitation of membership in a union permitted by the authorities. This is not a case of riot. There is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions." *Id.*, at 944.

The other questions, respecting the bulk mailing by the Union of literature into the prisons for distribution and the question of meetings of inmate members, the District Court resolved against appellants "by application of the equal protection clause of the fourteenth amendment." *Ibid.* Finding that such meetings and bulk mailing privileges had been permitted the Jaycees, Alcoholics Anonymous, and, in one institution, the Boy Scouts, the District Court concluded that appellants "may not pick and choose depending on [their] approval or disapproval of the message or purpose of the group" unless "the activity proscribed is shown to be detrimental to proper penological objectives, subversive to good discipline, or otherwise harmful." *Ibid.* The court concluded that appellants had failed to meet this burden. Appropriate injunctive relief was thereupon ordered.[3]

---

[3] Appellants were enjoined as follows:

"(1) Inmates and all other persons shall be permitted to solicit and invite other inmates to join the plaintiff Union orally or by written or printed communication; provided, however, that access to inmates by outsiders solely for the purpose of soliciting membership may be denied except that inmate members of the Union may become entitled to be visited by free persons who are engaged with them in legitimate Union projects to the same extent that other members of free society are admitted for like purposes.

"(2) Free persons otherwise entitled to visitation with inmates, be they attorneys, paralegals, friends, relatives, etc. shall not be denied access to such visitation by reason of their association or affiliation with the Union.

"(3) The Union shall be accorded the privilege of bulk mailing to the extent that such a privilege is accorded other organizations.

"(4) The Union and its inmate members shall be accorded the privilege of holding meetings under such limitations and control as are neutrally

II

A

The District Court, we believe, got off on the wrong foot in this case by not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement. While litigation by prison inmates concerning conditions of confinement, challenged other than under the Eighth Amendment, is of recent vintage, this Court has long recognized that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston,* 334 U. S. 266, 285 (1948); see also *Pell* v. *Procunier,* 417 U. S. 817, 822 (1974); *Wolff* v. *McDonnell,* 418 U. S. 539, 555 (1974). The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration. We noted in *Pell* v. *Procunier, supra,* at 822:

> "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law."

Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison

---

applied to all inmate organizations, and to the extent that other meetings of prisoners are permitted."

walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution. Equally as obvious, the inmate's "status as a prisoner" and the operational realities of a prison dictate restrictions on the associational rights among inmates.

Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators. We noted in *Procunier* v. *Martinez,* 416 U. S. 396, 405 (1974):

> "[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." (Footnote omitted.)

See also *Cruz* v. *Beto,* 405 U. S. 319, 321 (1972). It is in this context that the claims of the Union must be examined.

B

State correctional officials uniformly testified that the concept of a prisoners' labor union was itself fraught with potential dangers, whether or not such a union intended, illegally, to press for collective-bargaining recognition.[4] Appellant

[4] The District Court observed that "it is clear beyond argument that no association of prisoners may operate as a true labor union . . . ." It concluded that "it [is] of no legal significance that the charter purports to authorize more than can lawfully be accomplished." 409 F. Supp. 937, 940 n. 1. But, whether or not illegal activity was actually actively pursued by the Union, it is clear that its announced purpose to engage in collective bargaining is a factor which prison officials may legitimately consider in determining whether the Union is likely to be a disruptive influence, or otherwise detrimental to the effective administration of the North Carolina prison system.

Ralph Edwards, the Commissioner of the Department of Correction, stated in his affidavit:

> "The creation of an inmate union will naturally result in increasing the existing friction between inmates and prison personnel. It can also create friction between union inmates and non-union inmates."

Appellant David Jones, the Secretary of the Department of Correction, stated:

> "The existence of a union of inmates can create a divisive element within the inmate population. In a time when the units are already seriously over-crowded, such an element could aggravate already tense conditions. The purpose of the union may well be worthwhile projects. But it is evident that the inmate organizers could, if recognized as spokesman for all inmates, make themselves to be power figures among the inmates. If the union is successful, these inmates would be in a position to misuse their influence. After the inmate union has become established, there would probably be nothing this Department could do to terminate its existence, even if its activities became overtly subversive to the functioning of the Department. Work stoppages and mutinies are easily foreseeable. Riots and chaos would almost inevitably result. Thus, even if the purposes of the union are as stated in the complaint, the potential for a dangerous situation exists, a situation which could not be brought under control."

The District Court did not reject these beliefs as fanciful or erroneous. It, instead, noted that they were held "sincerely," and were arguably correct.[5] 409 F. Supp., at 942–943. With-

[5] The District Court did hold that there was "not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions." *Id.*, at 944. This historical finding, however, does not state that appellants' fears as to future disruptions are ground-

out a showing that these beliefs were unreasonable, it was error for the District Court to conclude that appellants needed to show more. In particular, the burden was not on appellants to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order." *Id.*, at 944–945. Rather, "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier*, 417 U. S., at 827. The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this.

The District Court, however, gave particular emphasis to what it viewed as appellants' tolerance of membership by inmates in the Union as undermining appellants' position. It viewed a system which permitted inmate "membership" but prohibited inmate-to-inmate solicitation (as well, it should be noted, as meetings, or other group activities) as bordering "on the irrational," and felt that "[t]he defendants' *own* hypothesis in this case is that the existence of the Union and membership in it are not dangerous, for otherwise they would surely have undertaken to forbid membership." 409 F. Supp., at 944. This, however, considerably overstates what appellants' concession as to pure membership entails. Appellants permitted membership because of the reasonable assumption that each individual prisoner could believe what he chose to believe, and that outside individuals should be able to communicate ideas and beliefs to individual inmates. Since a

---

less; there, the court indicated the opposite: "On conflicting expert opinion evidence we are left with no firm conviction that an association of inmates is necessarily good or bad . . . ." *Id.*, at 943.

member *qua* member incurs no dues or obligations—a prisoner apparently may become a member simply by considering himself a member—this position simply reflects the concept that thought control, by means of prohibiting beliefs, would not only be undesirable but impossible.

But appellants never acquiesced in, or permitted, group activity of the Union in the nature of a functioning organization of the inmates within the prison, nor did the District Court find that they had. It is clearly not irrational to conclude that individuals may believe what they want, but that concerted group activity, or solicitation therefor, would pose additional and unwarranted problems and frictions in the operation of the State's penal institutions. The ban on inmate solicitation and group meetings, therefore, was rationally related to the reasonable, indeed to the central, objectives of prison administration. Cf. *Pell* v. *Procunier, supra,* at 822.

C

The invocation of the First Amendment, whether the asserted rights are speech or associational, does not change this analysis. In a prison context, an inmate does not retain those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier, supra,* at 822. Prisons, it is obvious, differ in numerous respects from free society. They, to begin with, are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance. In seeking a "mutual accommodation between institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application," *Wolff* v. *McDonnell,* 418 U. S., at 556, this Court has repeatedly recognized the need for major restrictions on a prisoner's rights. See, *e. g., id.,* at 561–562; *Lanza* v. *New York,* 370 U. S. 139, 143 (1962). These restrictions have applied as well

where First Amendment values were implicated. See, *e. g., Pell* v. *Procunier, supra; Procunier* v. *Martinez,* 416 U. S. 396 (1974); *Meachum* v. *Fano,* 427 U. S. 215 (1976).

An examination of the potential restrictions on speech or association that have been imposed by the regulations under challenge, demonstrates that the restrictions imposed are reasonable, and are consistent with the inmates' status as prisoners and with the legitimate operational considerations of the institution. To begin with, First Amendment speech rights are barely implicated in this case.[6] Mail rights are not themselves implicated; the only question respecting the mail is that of *bulk* mailings.[7] The advantages of bulk mailings to inmates by the Union are those of cheaper rates and convenience. While the District Court relied on the cheaper bulk mailing rates in finding an equal protection violation, *infra,* at 133, it is clear that losing these cost advantages does not

[6] The State has not hampered the ability of prison inmates to communicate their grievances to correctional officials. In banning Union solicitation or organization, appellants have merely affected one of several ways in which inmates may voice their complaints to, and seek relief, from prison officials. There exists an inmate grievance procedure through which correctional officials are informed about complaints concerning prison conditions, and through which remedial action may be secured. See Affidavit of Director Edwards, App. 127. With this presumably effective path available for the transmission of grievances, the fact that the Union's grievance procedures might be more "desirable" does not convert the prohibitory regulations into unconstitutional acts. See *Procunier* v. *Martinez,* 416 U. S. 396, 413 (1974); cf. *Greer* v. *Spock,* 424 U. S. 828, 847 (1976) (Powell, J., concurring).

[7] The complaint alleged only that the bulk mail prohibition denied the Union equal protection of the laws:

"The refusal by Defendants to allow the Prisoners' Union Newsletter to arrive in bundles for distribution, while allowing the Jaycee Newsletter to arrive in the same manner violates Plaintiff's Fourteenth Amendment right to equal protection of the laws."

The District Court, likewise, dealt with the bulk mail question only in terms of the Equal Protection Clause of the Fourteenth Amendment. 409 F. Supp., at 944.

fundamentally implicate *free speech* values. Since other avenues of outside informational flow by the Union remain available, the prohibition on bulk mailing, reasonable in the absence of First Amendment considerations, remains reasonable.[8] Cf. *Pell* v. *Procunier, supra; Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974).

Nor does the prohibition on inmate-to-inmate solicitation of membership trench untowardly on the inmates' First Amendment speech rights. Solicitation of membership itself involves a good deal more than the simple expression of

---

[8] The ban on bulk mailing by the Union does not extend to individual mailings to individual inmates. In his affidavit, Director Edwards stated: "They are permitted to receive publications sent to them directly, but they are prohibited from receiving packets of material from unions or any other source for redistribution. This is in accordance with the Department's policy requiring publication[s] mailed to inmates to be sent directly from the publisher. A serious security problem would result if inmates could receive packets of material and then redistribute them as they see fit. It would be impossible for the Department to inspect every magazine, every book, etc., to insure that no contraband had been placed inside the publication. The exception in regard to Jaycees is based on the recognized fact that the Jaycees are substantial citizens from the free community who are most unlikely to attempt to smuggle contraband into the union or disseminate propaganda subversive of the legitimate purposes of the prison system." App. 129.

See also N. C. Department of Correction Guidebook, Commissioner's Administrative Directives—Publications Received by Inmates, App. 138–139. As the State has disavowed any intention of interfering with correspondence between outsiders and individual inmates in which Union matters are discussed, we do not have to discuss questions of the First Amendment right of inmates, or outsiders, see *Procunier* v. *Martinez, supra,* at 408–409, in the context of a total prohibition on the communication of information about the Union. The District Court apparently thought that *solicitation* by means of correspondence is prohibited, even if the general discussion of Union affairs is not, 409 F. Supp., at 941. The Union does not press this point here, and it is not alleged in its complaint, but, clearly, if the appellants are permitted to prohibit solicitation activities, they may prohibit solicitation activities by means which use the mails.

individual views as to the advantages or disadvantages of a union or its views; it is an invitation to collectively engage in a legitimately prohibited activity. If the prison officials are otherwise entitled to control organized union activity within the prison walls, the prohibition on solicitation for such activity is not then made impermissible on account of First Amendment considerations, for such a prohibition is then not only reasonable but necessary. *Pell* v. *Procunier,* 417 U. S., at 822.

First Amendment associational rights, while perhaps more directly implicated by the regulatory prohibitions, likewise must give way to the reasonable considerations of penal management. As already noted, numerous associational rights are necessarily curtailed by the realities of confinement. They may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment. As we noted in *Pell* v. *Procunier, supra,* at 823, "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."

Appellant prison officials concluded that the presence, perhaps even the objectives, of a prisoners' labor union would be detrimental to order and security in the prisons, *supra,* at 127. It is enough to say that they have not been conclusively shown to be wrong in this view. The interest in preserving order and authority in the prisons is self-evident. Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration. *Wolff* v. *McDonnell,* 418 U. S., at 561–562. Responsible prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the

time when they can compile a dossier on the eve of a riot.[9] The case of a prisoners' union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots. If the appellants' views as to the possible detrimental effects of the organizational activities of the Union are reasonable, as we conclude they are, then the regulations are drafted no more broadly than they need be to meet the perceived threat—which stems directly from group meetings and group organizational activities of the Union. Cf. *Procunier* v. *Martinez,* 416 U. S., at 412–416. When weighed against the First Amendment rights asserted, these institutional reasons are sufficiently weighty to prevail.

D

The District Court rested on the Equal Protection Clause of the Fourteenth Amendment to strike down appellants' prohibition against the receipt and distribution of bulk mail from the Union as well as the prohibition of Union meetings among the inmates. It felt that this was a denial of equal protection because bulk mailing and meeting rights had been extended to the Jaycees, Alcoholics Anonymous, and the Boy Scouts. The court felt that just as outside the prison, a "government may not pick and choose depending upon its approval or disapproval of the message or purpose of the group," 409 F. Supp., at 944, so, too, appellants could not choose among groups without first demonstrating that the activity proscribed is "detrimental to proper penological objectives, subversive to good discipline, or otherwise harmful." *Ibid.*

This analysis is faulty for two reasons. The District Court

[9] The informed discretion of prison officials that there is potential danger may be sufficient for limiting rights even though this showing might be "unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of the general public." *Pell* v. *Procunier,* 417 U. S. 817, 825 (1974).

erroneously treated this case as if the prison environment were essentially a "public forum." We observed last Term in upholding a ban on political meetings at Fort Dix that a Government enclave such as a military base was not a public forum. *Greer* v. *Spock,* 424 U. S. 828 (1976). We stated, *id.,* at 838 n. 10:

> "The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever."

A prison may be no more easily converted into a public forum than a military base. Thus appellants need only demonstrate a rational basis for their distinctions between organizational groups. Cf. *City of Charlotte* v. *Firefighters,* 426 U. S. 283 (1976). Here, appellants' affidavits indicate exactly why Alcoholics Anonymous and the Jaycees have been allowed to operate within the prison. Both were seen as serving a rehabilitative purpose, working in harmony with the goals and desires of the prison administrators, and both had been determined not to pose any threat to the order or security of the institution.[10] The affidavits indicate that the administra-

[10] Director Edwards listed the objectives for which the Jaycees had been allowed within the North Carolina prison system, namely the "productive association [of inmates] with stable community representatives and the accomplishment of service projects to the community . . . ." When these objectives cease, "the functions of the organization and its oppor-

tors' view of the Union differed critically in both these respects.[11]

Those conclusions are not unreasonable. Prison administrators may surely conclude that the Jaycees and Alcoholics Anonymous differ in fundamental respects from appellee Union, a group with no past to speak of, and with the avowed intent to pursue an adversary relationship with the prison officials. Indeed, it would be enough to distinguish the Union from Alcoholics Anonymous to note that the chartered purpose of

---

tunities to assemble as an organization would also cease." Affidavit of Director Edwards, App. 125. With respect to Alcoholics Anonymous, he stated, *id.*, at 126:

"The objectives of the Alcoholics Anonymous Program are to provide therapeutic support, insight, and an opportunity for productive sharing of experiences among those who have encountered the deteriorative effects of alcoholism. Alcoholics Anonymous is structured on a peer pressure basis which begins while the individual client is confined and is intended to have carry over effects into Alcoholic Anonymous groups in the free community."

[11] With respect to Alcoholics Anonymous and the Jaycees, Director Edwards stated, *ibid.*:

"The goals and the objectives of [both] the Alcoholics Anonymous and the Jaycee Program were presented to correctional staff as meaningful courses of action with positive goals relative to the productive restoration of offenders to active, lawful participation in the community. The goals of both organizations [were] scrutinized, evaluated, and approved. Operational guidelines have been drawn up in each instance following approval to certify that the primary objective of the correctional system—to maintain order and security—would not be abridged by the operation of these programs within the confines of prison units."

Opposed to these articulated reasons for allowing these groups is his statement with respect to the Union, *ibid.*:

"The Division of Prisons was unable to validate a substantive rehabilitation purpose or associative purpose in the design of the organization. To accept the organizational objectives of a prisoner's union would be to approve an organization whose design and purpose would compromise the order and security of the correctional system."

See also *supra*, at 127.

the Union, apparently pursued in the prison, was illegal under North Carolina law.[12]

Since a prison is most emphatically not a "public forum," these reasonable beliefs of appellants are sufficient, cf. *Greer* v. *Spock, supra; City of Charlotte* v. *Firefighters, supra.* The District Court's further requirement of a demonstrable showing that the Union was in fact harmful is inconsistent with the deference federal courts should pay to the informed discretion of prison officials. *Procunier* v. *Martinez,* 416 U. S., at 405. It is precisely in matters such as this, the decision as to which of many groups should be allowed to operate within the prison walls, where, confronted with claims based on the Equal Protection Clause, the courts should allow the prison administrators the full latitude of discretion, unless it can be firmly stated that the two groups are so similar that discretion has been abused. That is surely not the case here. There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence. The regulations of appellants challenged in the District Court offended neither the First nor the Fourteenth Amendment, and the judgment of that court holding to the contrary is

Reversed.

MR. CHIEF JUSTICE BURGER, concurring.

I concur fully in the Court's opinion.

This is but another in a long line of cases in the federal courts raising questions concerning the authority of the States

---

[12] See n. 1, *supra.* It was acknowledged at oral argument that the Union newsletter has since reiterated the Union's goal, as stated in the charter, and that the newsletter has contained authorization cards whereby the inmate could "authorize the agents or representatives of said Union to represent me and to act as a collective bargaining agent in all matters pertaining to rates of pay, hours of employment and all other terms and conditions of incarceration." Record 25. See Tr. of Oral Arg. 31, 34–35.

to regulate and administer matters peculiarly local in nature. Too often there is confusion as to what the Court decides in this type of case. The issue here, of course, is not whether prisoner "unions" are "good" or "bad," but, rather, whether the Federal Constitution prohibits state prison officials from deciding to exclude such organizations of inmates from prison society in their efforts to carry out one of the most vexing of all state responsibilities—that of operating a penological institution. In determining that it does not, we do not suggest that prison officials could not or should not permit such inmate organizations, but only that the Constitution does not require them to do so.

The solutions to problems arising within correctional institutions will never be simple or easy. Prisons, by definition, are closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society. Of necessity, rules far different from those imposed on society at large must prevail within prison walls. The federal courts, as we have often noted, are not equipped by experience or otherwise to "second guess" the decisions of state legislatures and administrators in this sensitive area except in the most extraordinary circumstances. This recognition, of course, does not imply that a prisoner is stripped of all constitutional protection as he passes through the prison's gates. Indeed, this Court has made clear on numerous occasions that the Constitution and other federal laws protect certain basic rights of inmates. *E. g., Bounds* v. *Smith,* 430 U. S. 817 (1977). Rather, it "reflects no more than a healthy sense of realism" on our part to understand that needed reforms in the area of prison administration must come, not from the federal courts, but from those with the most expertise in this field—prison administrators themselves. See *Procunier* v. *Martinez,* 416 U. S. 396, 405 (1974). And, in the last half dozen years, enlightened correctional administrators have made significant strides in the area of prison reform.

Notable in this respect are the grievance procedures instituted by the Federal Bureau of Prisons* after pilot experiments, and now by a number of States including North Carolina, which permit inmates to register their complaints with penal officials and obtain nonjudicial relief. However, while I applaud such procedures, and indeed urged their adoption, W. Burger, Report on the Federal Judicial Branch—1973, 59 A. B. A. J. 1125 (1973), I do not suggest that the procedures are constitutionally mandated. Similarly, we do not pass today on the "social utility" of inmate organizations, whether they be characterized as "unions" or otherwise, but only on whether the Constitution requires prison officials to permit their operation.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

My disagreement with the Court is extremely narrow. The Court has not sanctioned a restraint on discussion between inmates on the relative advantages or disadvantages of belonging to a prisoners' union. The prohibition of inmate-to-inmate solicitation which the Court upholds is defined as "an invitation to collectively engage in a legitimately prohibited activity." *Ante,* at 132. The Court has made it clear that mere membership in a union is not such an activity, *ante,* at 128–129. The language of appellants' "no-solicitation regula-

*Statistics compiled by the Federal Bureau of Prisons indicate that in 1975 alone, more than 5,000 complaints by inmates were brought to the attention of federal prison officials pursuant to the grievance procedures. Approximately one-fourth of these complaints were ultimately resolved in favor of the inmate. Preliminary figures for 1976 indicate an even greater utilization of the grievance procedures; it is estimated that more than 10,000 complaints were registered by inmates during that year. Brief for United States as *Amicus Curiae* 31–32, n. 15. The development of this grievance procedure appears to have slowed down the rate of growth of federal prisoner petitions filed in the federal district courts. 1975 Annual Report of the Director, Administrative Office of the United States Courts XI48–XI51.

tion" is, however, somewhat broader.* Therefore, instead of concluding that the entire regulation is valid, *ante,* at 136, I would hold it invalid to the extent that it exceeds the Court's definition.

I join the portions of the Court's opinion concerning the bulk mailing and union meeting claims.

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

There was a time, not so very long ago, when prisoners were regarded as "slave[s] of the State," having "not only forfeited [their] liberty, but all [their] personal rights . . . ." *Ruffin* v. *Commonwealth,* 62 Va. 790, 796 (1871). In recent years, however, the courts increasingly have rejected this view, and with it the corollary which holds that courts should keep their "hands off" penal institutions.[1] Today, however, the Court, in apparent fear of a prison reform organization that has the temerity to call itself a "union," takes a giant step backwards toward that discredited conception of prisoners' rights and the role of the courts. I decline to join in what I hope will prove to be a temporary retreat.

I

In *Procunier* v. *Martinez,* 416 U. S. 396 (1974), I set forth at some length my understanding of the First Amendment rights of prison inmates. The fundamental tenet I advanced is simply stated: "A prisoner does not shed . . . basic First Amendment rights at the prison gate. Rather, he 'retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.' *Coffin* v.

*"Persons in the custody of the Department of Correction are prohibited from soliciting other inmates about membership in any inmate union." Jurisdictional Statement 38.

[1] For brief exposition of the "hands-off" doctrine and its demise, see Fox, The First Amendment Rights of Prisoners, 63 J. Crim. L. C. & P. S. 162 (1972).

Reichard, 143 F. 2d 443, 445 (CA6 1944)." *Id.,* at 422 (concurring opinion). It follows from this tenet that a restriction on the First Amendment rights of prisoners, like a restriction on the rights of nonprisoners, "can only be justified by a substantial government interest and a showing that the means chosen to effectuate the State's purpose are not unnecessarily restrictive of personal freedoms." *Id.,* at 423. This does not mean that any expressive conduct that would be constitutionally protected outside a prison is necessarily protected inside; as I also stated in *Martinez:* "[T]he First Amendment must in each context 'be applied "in light of the special characteristics of the . . . environment," ' *Healy* v. *James,* 408 U. S. 169, 180 (1972), and the exigencies of governing persons in prisons are different from and greater than those in governing persons without." *Id.,* at 424. But the basic mode of First Amendment analysis—the requirement that restrictions on speech be supported by "reasons imperatively justifying the particular deprivation," *ibid.*—should not be altered simply because the First Amendment claimants are incarcerated.

The Court today rejects this analytic framework, at least as it applies to the right of prisoners to associate in something called a prison "union." [2] In testing restrictions on the exercise of that right the Court asks only whether the restrictions are "rationally related to the . . . objectives of prison administration," *ante,* at 129, and whether the reasons offered in defense of the restrictions have been "conclusively shown to be wrong," *ante,* at 132. While proclaiming faithfulness to the teaching of *Pell* v. *Procunier,* 417 U. S. 817, 822 (1974), that " 'a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner,' " *ante,* at 125, the Court ultimately upholds the challenged regulations

[2] That the First Amendment protects the right to associate is by now well established. See, *e. g., Kusper* v. *Pontikes,* 414 U. S. 51 (1973); *NAACP* v. *Alabama,* 357 U. S. 449 (1958).

on a ground that would apply to any restriction on inmate freedom: they "are consistent with the inmates' status as prisoners," *ante,* at 130.

Nothing in the Court's opinion justifies its wholesale abandonment of traditional principles of First Amendment analysis. I realize, of course, that "the realities of running a penal institution are complex and difficult," *ante,* at 126, and that correctional officers possess considerably more " 'professional expertise,' " *ante,* at 128, in prison management than do judges. I do not in any way minimize either the seriousness of the problems or the significance of the expertise. But it does seem to me that "the realities of running" a school or a city are also "complex and difficult," and that those charged with these tasks—principals, college presidents, mayors, councilmen, and law enforcement personnel—also possess special "professional expertise," [3] Yet in no First Amendment case of which I am aware has the Court deferred to the judgment of such officials simply because their judgment was "rational." Cf. *Healy* v. *James,* 408 U. S. 169 (1972); *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503 (1969); *Cox* v. *Louisiana,* 379 U. S. 536, 544–551 (1965); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963). I do not understand why a different rule should apply simply because prisons are involved.

The reason courts cannot blindly defer to the judgment of prison administrators—or any other officials for that matter—is easily understood. Because the prison administrator's business is to maintain order, "there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." *Freedman* v. *Maryland,* 380 U. S. 51, 57–58 (1965). A warden seldom will find himself subject to public criticism or dismissal because he

[3] Similarly, prison administrators, principals, college presidents, and the like "must be permitted to act before the time when they can compile a dossier on the eve of a riot." *Ante,* at 132–133.

needlessly repressed free speech; indeed, neither the public nor the warden will have any way of knowing when repression was unnecessary. But a warden's job can be jeopardized and public criticism is sure to come should disorder occur. Consequently, prison officials inevitably will err on the side of too little freedom. That this has occurred in the past is made clear by the recent report of the American Bar Association Joint Committee on the Legal Status of Prisoners:

> "All organizations including correctional organizations overreact to suggested changes, whether sweeping or merely incremental. . . . [M]any of the fears voiced by prison officials in the 1960s to the growing tide of court determinations invalidating prison regulations have simply not come to pass; indeed, in several instances . . . those groups feared by the prisons in the 1960s have become stablilizing influences in the 1970s." [4]

I do not mean to suggest that the views of correctional officials should be cavalierly disregarded by courts called upon to adjudicate constitutional claims of prisoners. Far from it. The officials' views " 'constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning . . . and all those factors which give it power to persuade . . . ,' " *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 142 (1976), quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). My point is simply that the ultimate responsibility for evaluating the prison officials' testimony, as well as any other expert testimony, must rest with the courts, which are required to reach an independent judg-

[4] ABA Joint Committee on the Legal Status of Prisoners, The Legal Status of Prisoners (Tent. Draft 1977), in 14 Am. Crim. L. Rev. 377, 419 (1977) (hereafter ABA Joint Committee report).

ment concerning the constitutionality of any restriction on expressive activity.

The approach I advocate is precisely the one this Court has followed in other cases involving the rights of prisoners. In *Johnson* v. *Avery,* 393 U. S. 483 (1969), for example, the Court expressly acknowledged the rationality of the rule at issue which prohibited inmate writ writers from aiding fellow prisoners in preparing legal papers, *id.,* at 488. We nevertheless concluded that the rule was unconstitutional because of its impact on prisoners' right of access to the courts. In *Lee* v. *Washington,* 390 U. S. 333 (1968), we did not even inquire whether segregating prisoners by race was rational, although it could be argued that integration in a southern prison would lead to disorder among inmates; we held that in any event segregation was prohibited by the Fourteenth Amendment. And in *Bounds* v. *Smith,* 430 U. S. 817 (1977); *Wolff* v. *McDonnell,* 418 U. S. 539 (1974); and *Cruz* v. *Beto,* 405 U. S. 319 (1972), we followed the approach of *Lee.* By word and deed, then, we have repeatedly reaffirmed that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims . . . . When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez,* 416 U. S., at 405.

II

Once it is established that traditional First Amendment principles are applicable in prisoners'-rights cases, the dispute here is easily resolved. The three-judge court not only found that there was "not one scintilla of evidence to suggest that the Union had been utilized to disrupt the operation of the penal institutions," 409 F. Supp. 937, 944 (EDNC 1976), as the Court acknowledges, *ante,* at 127 n. 5, it also found no evidence "that the inmates intend to operate [the Union] to

hamper and interfere with the proper interests of government," 409 F. Supp., at 944, or that the Union posed a "present danger to security and order," *id.*, at 945. In the face of these findings, it cannot be argued that the restrictions on the Union are "imperatively justif[ied]."

The regulation barring inmates from soliciting fellow prisoners to join the Union is particularly vulnerable to attack. As the late Judge Craven stated for the court below: "To permit an inmate to join a union and forbid his inviting others to join borders on the irrational." *Id.*, at 943. The irrationality of the regulation is perhaps best demonstrated by the fact that the Court does not defend it; rather, as my Brother STEVENS suggests, *ante*, at 138–139, the Court defends some hypothetical regulation banning " 'an invitation to collectively engage in a legitimately prohibited activity.' *Ante*, at 132"; see also *ante*, at 129 (discussing ban on "concerted group activity, or solicitation therefor"). Because the actual regulation at issue here needlessly bars solicitation for an activity—joining the Union—which is not and presumably could not be prohibited,[5] I would hold it unconstitutional.

Once the rule outlawing solicitation is invalidated, the prohibition on bulk mailing by the Union must fall with it. Since North Carolina allows the Union to mail its newsletters to prisoners individually, the State cannot claim that the bulk mail rule serves to keep "subversive material" out of the prison. Rather, the primary purpose of the rule must be to supplement the ban on solicitation;[6] overturning that ban

[5] I express no view concerning the extent to which orderly, concerted activities are protected in prison. This issue has been addressed at length by the ABA Joint Committee report, Standard § 6.4 and Commentary.

[6] The only other justification offered for the rule is to prevent contraband from being smuggled into the prisons. Nothing in the record remotely suggests that the outside personnel associated with the Union would use bulk mailing for this purpose. Moreover, the solution to the

would sap all force from the rationale for excluding bulk mailings. The exclusion would then be left as one that unnecessarily increases the cost to the Union of exercising its First Amendment rights [7] while allowing other inmate groups such as the Jaycees to exercise their rights at a lower price. It would, therefore, be plainly unconstitutional.

The regulation prohibiting the Union from holding meetings within the prison is somewhat more justifiable than the regulations previously considered. Once the Union is permitted to hold meetings it will become operational within the prisons. Appellants' fears that the leaders of an operating union "would be in a position to misuse their influence" and that the Union itself could engage in disruptive, concerted activities or increase tension within the prisons, App. 121, are not entirely fanciful. It is important to note, however, that appellee's two expert witnesses, both correctional officers who had dealt with inmate reform organizations, testified that such groups actually play a constructive role in their prisons, *id.*, at 38, 90–95. The weight of professional opinion seems to favor recognizing such groups.[8] Moreover, the risks appellants fear are inherent in any inmate organization, no matter how innocuous its stated goals; indeed, even without any organizations some inmates inevitably will become leaders capable

---

alleged contraband danger is to inspect the bulk mailings, not to prohibit them.

[7] Contrary to the Court's assertion, *ante*, at 130–131, free speech values most definitely are implicated by a regulation whose purpose and effect is to make the exercise of First Amendment rights costly. Cf., *e. g.*, *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936).

[8] See ABA Joint Committee report, Standard § 6.4 and Commentary; S. Krantz, R. Bell, J. Brant, & M. Magruder, Model Rules and Regulations on Prisoners' Rights and Responsibilities, Rules IA–1b, IA–5 and Commentary (1973); National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 2.15 and Commentary, pp. 58–61 (1973).

of "misus[ing] their influence," *id.*, at 84–86, 102–103,[9] and some concerted activity can still occur, *id.*, at 118–119.

But even if the risks posed by the Union were unique to it, and even if appellants' fear of the Union were more widely shared by other professionals, the prohibition on Union meetings still could not survive constitutional attack. The central lesson of over a half century of First Amendment adjudication is that freedom is sometimes a hazardous enterprise, and that the Constitution requires the State to bear certain risks to preserve our liberty. See, *e. g.*, *Whitney* v. *California*, 274 U. S. 357, 375–378 (1927) (Brandeis, J., concurring); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969). As the ABA Joint Committee, *supra*, put it: "The doubts and risks raised by creating a humane and open prison must be accepted as a cost of our society; democracy is self-definitionally a risk-taking form of government." [10] To my mind, therefore, the fact that appellants have not acted wholly irrationally in banning Union meetings is not dispositive. Rather, I believe that where, as here, meetings would not pose an immediate and substantial threat to the security or rehabilitative functions of the prisons, the First Amendment guarantees Union members the right to associate freely, and the Fourteenth Amendment guarantees them the right to be treated as favorably as members of other inmate organizations. The State can surely regulate the time, place, and manner of the meetings, and perhaps can monitor them to assure that disruptions are not planned, but the State cannot outlaw such assemblies altogether.

---

[9] See also Note, Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority, 81 Yale L. J. 726 (1972). The concern over inmate leadership has been advanced to oppose numerous prison reforms. *E. g.*, *Johnson* v. *Avery*, 393 U. S. 483, 499 (1969) (WHITE, J., dissenting); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 866–869 (1974) (POWELL, J., dissenting) (rejecting argument).

[10] ABA Joint Committee report 419.

III

If the mode of analysis adopted in today's decision were to be generally followed, prisoners eventually would be stripped of all constitutional rights, and would retain only those privileges that prison officials, in their "informed discretion," deigned to recognize. The sole constitutional constraint on prison officials would be a requirement that they act rationally. Ironically, prisoners would be left with a right of access to the courts, see *Bounds* v. *Smith,* 430 U. S. 817 (1977); *Johnson* v. *Avery,* 393 U. S. 483 (1969), but no substantive rights to assert once they get there. I cannot believe that the Court that decided *Bounds* and *Johnson*—the Court that has stated that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff* v. *McDonnell,* 418 U. S., at 555–556, and that "[a] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner," *Pell* v. *Procunier,* 417 U. S., at 822—intends to allow this to happen. I therefore believe that the tension between today's decision and our prior cases ultimately will be resolved, not by the demise of the earlier cases, but by the recognition that the decision today is an aberration, a manifestation of the extent to which the very phrase "prisoner union" is threatening to those holding traditional conceptions of the nature of penal institutions.

I respectfully dissent.

COMMISSIONER OF INTERNAL REVENUE *v.* STANDARD LIFE & ACCIDENT INSURANCE CO.

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

No. 75-1771. Argued March 30, 1977—Decided June 23, 1977

The "net valuation" portion of unpaid life insurance premiums (the portion state law requires a life insurance company to add to its reserves), but not the "loading" portion (the portion to be used to pay salesmen's commissions, other expenses such as state taxes and overhead, and profits), *held* required to be included in a life insurance company's assets and gross premium income, as well as in its reserves, for purposes of computing its federal income tax liability, notwithstanding such computation necessitates making a fictional assumption that the "net valuation" portion has been paid but that the "loading" portion has not. This treatment of unpaid premiums is in accordance with § 818 (a) of the Internal Revenue Code of 1954 (as added by the Life Insurance Company Income Tax Act of 1959), which requires computations of a life insurance company's income taxes to be made "in a manner consistent with the manner required for purposes of the annual statement approved by the National Association of Insurance Commissioners," unless the NAIC procedures are inconsistent with accrual accounting rules, and to the extent that the Treasury Regulations require different treatment of unpaid premiums they are inconsistent with § 818 (a) and therefore invalid. Pp. 152-163.

525 F. 2d 786, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 163. STEWART, J., took no part in the consideration or decision of the case.

Stuart A. Smith argued the cause for petitioner. With him on the briefs were former *Solicitor General Bork, Acting Solicitor General Friedman, Acting Assistant Attorney General Baum, Stephen M. Gelber,* and *Jeanne L. Dobres.*

Vester T. Hughes, Jr., argued the cause for respondent. With him on the brief were *Gene A. Castleberry* and *W. John Glancy*.

Matthew J. Zinn argued the cause for the American Council of Life Insurance as *amicus curiae*. With him on the brief were *William B. Harman, Jr.*, *Kenneth L. Kimble*, and *Francis A. Goodhue, Jr.**

MR. JUSTICE STEVENS delivered the opinion of the Court.

In this case, for the second time this Term, we are required to construe the complex portion of the Internal Revenue Code concerning life insurance companies.[1] The issue in this case is the extent to which deferred and uncollected life insurance premiums are includable in "reserves," "assets," and "gross premium income," as those concepts are used in the Life Insurance Company Income Tax Act of 1959.[2]

I

Premiums on respondent's policies are often payable in installments. If an installment is not paid when due, the policy will lapse, generally after a grace period. However, there is no legally enforceable duty to pay the premiums. An installment falling due between the end of the tax year and the policy's anniversary date is called a "deferred premium." In 1961, the most recent year in issue, respondent had $1,572,763 of deferred premiums. Pet. for Cert. 4a. An installment which is overdue at the end of the tax year is called an "uncollected premium" if the policy has not yet lapsed. In 1961, respondent had $231,969 of uncollected premiums. *Ibid.* For convenience, we shall refer to both deferred and uncollected premiums simply as "unpaid premiums."

**Edward J. Schmuck* and *Carolyn P. Chiechi* filed a brief for the Lincoln National Life Insurance Co. as *amicus curiae*.

[1] See *United States* v. *Consumer Life Ins. Co.*, 430 U. S. 725.

[2] 26 U. S. C. §§ 801–820.

The amount charged a policyholder—the "gross premium"—includes two components. Under state law, the company must add part of the premium to its reserves to ensure that it will have sufficient funds to pay death benefits. This amount, the "net valuation premium," is determined under mortality and interest assumptions. The rest of the gross premium is called "loading," and covers profits and expenses such as salesmen's commissions, state taxes, and overhead.

Under normal accounting rules, unpaid premiums would simply be ignored. They would not be properly accruable since the company has no legal right to collect them. Nevertheless, for the past century, insurance companies have added an amount equal to the net valuation portion of unpaid premiums to their reserves, with an offsetting addition to assets. State law uniformly requires this treatment of unpaid premiums, as does the accounting form issued by the National Association of Insurance Commissioners (NAIC). This national organization of state regulatory officials, which acts on behalf of the various state insurance departments, performs audits on insurance companies like respondent which do business in many States. The NAIC accounting form, known in the industry as the "Annual Statement," is used by respondent for its financial reporting. In effect, in calculating its reserves, the company must treat these premiums to some extent as if they had been paid.

This case involves the tax treatment of respondent's unpaid premiums for the years 1958, 1959, and 1961. In its returns for each of those years, it included the net unpaid premiums in reserves, just as it did in its annual NAIC statement. In 1959 and 1961, it also followed the NAIC statement by including the net premiums in assets and premium income. In 1958, however, it excluded the entire unpaid premium from assets. The Commissioner assessed a deficiency because respondent did not, in any of these years, include the entire

unpaid premium—loading as well as net premium—in calculating assets and income. In his view, if reserves are calculated on the fictional assumption that these premiums have been paid, the same assumption should apply to the calculation of assets and gross premium income. The Tax Court upheld the deficiency; but the Court of Appeals reversed.[3] It held that respondent's reserve calculation was correct because it was required by state law. The court further held that in accord with normal accounting practices, the premiums could not be considered as either assets or income before they were actually collected.

The Courts of Appeals have taken varying approaches to this problem. The position taken by the Tenth Circuit in this case conflicts with decisions of four other Circuits.[4] For this reason, and because the question is important to the revenue,[5] we granted certiorari. 429 U. S. 814.

Although the problem is a perplexing one, as indicated by the diversity of opinion among the Circuits, we find guidance in 26 U. S. C. § 818 (a), which governs the method of accounting by life insurance companies. In our view, § 818 (a) requires deference in this case to the established accounting procedures of the NAIC. In accordance with the NAIC procedures, we therefore hold that the net valuation portion of unpaid premiums, but not the loading, must be included in assets and gross premium income, as well as in reserves.

Resolution of the problem before us requires some understanding of how reserves, assets, and premium income enter

---

[3] 525 F. 2d 786 (CA10 1975).

[4] See *Jefferson Standard Life Ins. Co.* v. *United States,* 408 F. 2d 842 (CA4 1969), cert. denied, 396 U. S. 828; *Western Nat. Life Ins. Co. of Texas* v. *Commissioner,* 432 F. 2d 298 (CA5 1970); *Western & Southern Life Ins. Co.* v. *Commissioner,* 460 F. 2d 8 (CA6 1972), cert. denied, 409 U. S. 1063; *Franklin Life Ins. Co.* v. *United States,* 399 F. 2d 757 (CA7 1968), cert denied, 393 U. S. 1118.

[5] We are informed that substantially more than $100 million is in dispute. Pet. for Cert. 8.

into the calculation of a life insurance company's taxable income. We therefore begin with a summary of past legislation and of the method by which the tax is now calculated. We then turn to a discussion of § 818 (a) and its application to this case.

II

Throughout the history of the federal income tax, Congress has taken the view that life insurance companies should not be taxed on the amounts collected for the purpose of paying death benefits. This basic theme has been implemented in different ways.

A

From 1913 to 1920, life insurance companies, like other companies, were taxed on their entire income, but were allowed a deduction for "the net addition . . . required by law to be made within the year to reserve funds . . . ."[6] In that period the Government first challenged, but then accepted, the industry practice of deducting additions to reserves based on unpaid premiums without taking those premiums into income.[7]

---

[6] See, *e. g.*, Tariff Act of 1913, § II (G) (b), 38 Stat. 173; Revenue Act of 1916, § 12 (a) Second, 39 Stat. 768; Revenue Act of 1918, § 234 (a) (10), 40 Stat. 1079.

[7] In *Prudential Ins. Co. of America* v. *Herold*, 247 F. 681 (NJ 1918), the Government argued that the taxpayer was not entitled to credit for the full value of its reserves because the deferred and uncollected premiums had not been included in its taxable income. The court examined and rejected the argument:

"The question to be decided, therefore, is whether the plaintiff, in figuring its net addition to the reserve funds which it was required by law to make, was justified in including the value of such policies. The argument upon which the defendant's contention in this respect is based seems to be that as part of the assets making up the plaintiff's 'reserve' consisted of these uncollected and deferred premiums, and as they are not included in the plaintiff's gross income (as, clearly, they should not be so included, Mutual Benefit Life Ins. Co. v. Herold [198 F. 199

Beginning with the Revenue Act of 1921, Congress taxed only the investment income of life insurance companies; premium income was not included in their gross income.[8] The companies were allowed to deduct a fixed percentage of their total reserves from their total investment income.[9] The

---

(NJ 1912)]; Conn. Gen. Life Ins. Co. v. Eaton [218 F. 188 (Conn. 1914)]), that the value of such policies should not be included, for purposes of taxation, in its net addition to reserve funds. But this argument, I think, begs the question, which is, as clearly defined by the Supreme Court in McCoach v. Insurance Co. of North America, 244 U. S. 585, . . . what sum or sums in the aggregate did the state laws require the plaintiff to maintain as a reserve fund, not the character of the assets making up the actual 'reserve funds'. No matter what their character, they were as effectively withdrawn from the plaintiff's use as if they had been expended. If therefore the law of New Jersey, or any other state in which it did business, made it obligatory on the part of the plaintiff to maintain a 'reserve' on account of the policies of the character in question, it is of no materiality what the 'reserve funds' actually consisted of, whether cash, securities, real estate, or due and uncollected premiums." *Id.*, at 685–686.

Subsequently, the Bureau of Internal Revenue acquiesced. In a bulletin issued to its employees the Bureau said: "The legal reserves . . . can not be reduced by the net uncollected and deferred premiums." Treas. Dept., Bureau of Internal Revenue, Bulletin H, Income Tax Rulings Peculiar to Insurance Companies (1921), Ruling 14, p. 9. See also Ruling 8, p. 7.

[8] See, *e. g.*, Revenue Act of 1921, §244 (a), 42 Stat. 261.

[9] The tax was levied only on *net* investment income, that is, the excess over the amount deemed necessary to pay death claims. If, for example, the amount of the net valuation premium had been calculated on the assumption that the company would receive a 4% return on its investment of premiums between the time of its payment and the death of the policyholder, and it actually realized 5%, the tax applied to the net of 1%. This deduction reflects the assumption that interest on net premiums, as well as the premiums themselves, would be needed to satisfy death claims, and that only investment income greater than the amount projected in the determination of net premiums should be taxed. Revenue Act of 1921, § 245 (a)(2), 42 Stat. 261; Revenue Act of 1924, § 245 (a)(2), 43 Stat. 289; Revenue Act of 1926, § 245 (a)(2), 44 Stat. (pt. 2) 47;

computation of this deduction was based on the company's entire policy reserves, including the portion attributed to unpaid premiums. This use of this portion of the reserves apparently was not questioned during that period. There was no occasion to consider whether unpaid premiums should be treated as "income" since all premium income was exempt from tax in this period.

The 1959 statute applies to all tax years after 1957. It preserves the basic concept of taxing only that portion of the life insurance company's income which is not required to meet policyholder obligations. It makes two important changes, however, in the method of computing that amount. First, whereas the preceding statutes assumed an industrywide rate of return for the purpose of calculating the reserve deduction, the 1959 Act requires a calculation based on each company's own earnings record. Second, in addition to imposing a tax on investment income, the new Act also taxes a portion of the company's premium income. Although the computations are more complex, the basic approach of the 1959 Act is therefore somewhat comparable to the pre-1921 "total income" concept.

B

In order to understand the implications of the Commissioner's argument that unpaid premiums should be consistently treated in calculating "assets" and "gross premium income," as well as "reserves," it is necessary to explain how these concepts are employed in the present statute.[10]

Revenue Act of 1928, § 203 (a)(2), 45 Stat. 843; Revenue Act of 1932, § 203 (a)(2), 47 Stat. 224; Revenue Act of 1934, § 203 (a)(2), 48 Stat. 732; Revenue Act of 1936, § 203 (a)(2), 49 Stat. 1711; Revenue Act of 1938, § 203 (a)(2), 52 Stat. 523; Internal Revenue Code of 1939, § 203 (a), 26 U. S. C. § 203 (a) (1952 ed.).

[10] Like the parties, we will emphasize the role of these concepts in the relevant calculations. Other factors involved in the calculations, such as pension plan reserves and real estate transactions, have little significance for the purpose of decision of this case.

The 1959 Act adds §§ 801 through 820 to the Internal Revenue Code of 1954 (26 U. S. C.). Section 802 (b) defines three components of "life insurance company taxable income," of which only the first two are relevant to this case.[11] Generally, the taxable income is the sum of (1) the company's "taxable investment income" and (2) 50% of its other income (defined as the difference between its total "gain from operations" and its taxable investment income).[12]

A company's total investment income is regarded as including a share for the company, which is taxable, and a "policyholders' share," which is not.[13] The policyholders' share is a

[11] Section 802 (b) provides:

"*Life insurance company taxable income defined.*

"For purposes of this part, the term 'life insurance company taxable income' means the sum of—

"(1) the taxable investment income (as defined in section 804) or, if smaller, the gain from operations (as defined in section 809),

"(2) if the gain from operations exceeds the taxable investment income, an amount equal to 50 percent of such excess, plus

"(3) the amount subtracted from the policyholders surplus account for the taxable year, as determined under section 815."

[12] For the purpose of this discussion, we assume that the gain from operations is greater than investment income. As the statute makes clear, § 802 (b) (1), only the gain from operations is taxed if that figure is less than the taxable investment income, a situation which would probably arise only if the company lost money on its noninvestment operations.

[13] "The 1959 Act defines life insurance company reserves, provides a rather intricate method for establishing the amount which for tax purposes is deemed to be added each year to these reserves and in § 804 prescribes a division of the investment income of an insurance company into two parts, the policyholders' share and the company's share. More specifically, the total amount to be added to the reserve—the policy and other contract liability requirements—is divided by the total investment yield and the resulting percentage is used to allocate each item of investment income, including tax-exempt interest, partly to the policyholders and partly to the company. In this case, approximately 85% of each item of income was assigned to the policyholders and was, as the Act provides, excluded from the company's taxable income." *United States* v. *Atlas Ins. Co.*, 381 U. S. 233, 236–237 (footnotes omitted).

percentage which is essentially determined by the ratio of the company's reserves to its assets.[14] An increase in reserves will therefore reduce the company's taxable investment income, whereas an increase in its assets will increase its tax.

The company's "gain from operations" includes, in addition to its share of investment income,[15] the "gross amount of premiums," § 809 (c)(1). Obviously, if unpaid premiums are regarded as part of this gross amount, the company's gain from operations will be increased to that extent. Moreover, since a deduction is allowed for the net increase in reserves, § 809 (d)(2), the contribution of unpaid premiums to the reserves diminishes the company's gain.

---

[14] Actually, the computation is made in two steps. An earnings rate is determined by dividing the company's investment yield by its assets (§ 805 (b)(2)). This earnings rate must be derived from a four-year average of earnings if such an average is lower than the current earnings rate (§ 805 (b)(1) and (3)). The adjusted life insurance reserves are determined by comparing the company's actual earnings rate with the rate which was assumed when the reserves were calculated; for each one point of additional earnings rate there is a 10% decrease in the value of the reserve account, and vice versa (§ 805 (c)(1)). The earnings rate is multiplied by the adjusted life insurance reserve (§ 805 (a)(1)), and added with some other factors not germane here to yield the "policy and other contract liability requirements" (§ 805 (a)).

In the second step of the computation, the "policy and other contract liability requirements" are divided by the investment yield to determine the percentage which is the policyholders' share (§ 804 (a)(1)). The investment yield is the gross investment income less deductible expenses, depreciation and depletion (§ 804 (c)).

[15] For purposes of determining gain from operations, the company's share is determined under §§ 809 (a) and (b)(3). Section 809 (a) defines the policyholder's share as the percentage obtained by dividing the required interest (the rate of interest used to calculate the reserves, multiplied by the amount of the reserves) by the investment yield. This formula is somewhat simpler than that used in §§ 804 and 805 for purposes of caculating taxable investment income.

III

In a sense the case presents a question of timing. Respondent claims the right to treat unpaid premiums as creating reserves, and therefore a tax deduction, in one year, but wishes not to recognize the unfavorable tax consequences of increased "assets" and "premium income" until the year in which the premiums are actually paid.[16] As the Commissioner forcefully argues, the respondent's position lacks symmetry and the lack thereof redounds entirely to its benefit.

A

We start from the premise that unpaid premiums must be reflected in a life insurance company's reserves.[17] This has been the consistent and unbroken practice since the inception of the federal income tax on life insurance companies in 1913. Moreover, the uniform practice of the States since before 1913 has been to require that reserves reflect unpaid premiums. State law is relevant to the statutory definition of reserves, since life insurance reserves generally must be required by state law in order to be recognized for tax purposes. § 801 (b)(2). As a matter of state law, a genuine contingent liability exists and must be reflected on the company's financial records. This liability has effects on the company's business which transcend its income tax consequences.[18] In view of the critical importance of the definition of reserves in the entire statutory scheme,[19] as well as in the

---

[16] In this case, although the Commissioner recomputed respondent's tax for the entire period from 1958 through 1961, the adjustments resulted in no deficiency for 1960.

[17] We therefore reject the Commissioner's alternative position, that unpaid premiums should be ignored in calculating reserves, assets, and gross premium income.

[18] The Commissioner does not contend otherwise. Tr. of Oral Arg. 19.

[19] For example, the definition is also controlling on the question whether

conduct of the company's business, the practice of including net unpaid premiums in reserves cannot have been unknown to Congress. It is clear, we think, that no radical departure from past law was intended.

Having decided that unpaid premiums must be treated to some extent as though they had actually been paid, the more difficult question is how far to apply this fictional assumption. Since this is essentially an accounting problem, our inquiry is governed by § 818. As its title indicates, § 818 contains the "Accounting provisions" relating to this portion of the Code. Section 818 (a) provides:

> "(a) *Method of accounting.*
>
> "All computations entering into the determination of the taxes imposed by this part shall be made—
>
> "(1) under an accrual method of accounting, or
>
> "(2) to the extent permitted under regulations prescribed by the Secretary or his delegate, under a combination of an accrual method of accounting with any other method permitted by this chapter (other than the cash receipts and disbursements method).
>
> "Except as provided in the preceding sentence, all such computations shall be made in a manner consistent with the manner required for purposes of the annual statement approved by the National Association of Insurance Commissioners."

The legislative history makes it clear that the accounting procedures established by the NAIC apply if they are "not inconsistent" with accrual accounting rules.[20] In other words,

---

a company qualifies as a "life insurance company" within the meaning of the statute. See *United States* v. *Consumer Life Ins. Co.*, 430 U. S. 725.

[20] The Senate Report describes the provision as follows:

"(a) *Method of accounting.*—Subsection (a) of section 818, which is identical with the House bill, provides the general rule that all computations entering into the determination of taxes imposed by the new part I

except when the rules of accrual accounting dictate a contrary result, NAIC procedures "shall" apply.[21]

With the statutory test in mind, we consider the various proposed solutions to this accounting problem.

B

Essentially, the problem in this case is to decide the scope to be given a fictional assumption. Four solutions have been proposed.

First, as the company argues, the assumption of prepayment could be applied in calculating the reserves, but ignored when calculating assets and income. This was the position taken by the Court of Appeals in this case. That position

---

of subchapter L shall be made under an accrual method of accounting. This subsection further provides that, to the extent permitted under regulations prescribed by the Secretary or his delegate, a life insurance company may determine its taxes under a combination of an accrual method of accounting with any other method permitted by chapter 1 (other than the cash receipts and disbursements method). For example, the Secretary or his delegate may determine that the use of the installment method for reporting sales of realty and casual sales of personalty (see sec. 453 (b)) may, in combination with an accrual method of accounting, properly reflect life insurance company taxable income. To the extent not inconsistent with the provision of the 1954 Code and an accrual method of accounting, all computations entering into the determination of taxes imposed by the new part I shall be made in a manner consistent with the manner required for purposes of the annual statement approved by the National Association of Insurance Commissioners." S. Rep. No. 291, 86th Cong., 1st Sess., 72–73 (1959).

The same language is used in the House Report. H. R. Rep. No. 34, 86th Cong., 1st Sess., 42 (1959).

[21] The mandatory language contained in the provision requiring consistency with the NAIC statement is to be contrasted with the permissive language used to describe accounting methods covered by the Secretary's regulations. Section 818 (a) (2) merely allows the Secretary to permit deviations from accrual accounting. Since this case does not concern any optional method allowed by the Secretary, this provision does not concern us here.

significantly distorts the tax equation in favor of the taxpayer and against the Government. Although we do not accept the notion that there must be perfect symmetry in the tax laws, there should be a measure of consistency in the accounting treatment of an item affecting interrelated elements in a formula such as that used to calculate the policyholders' share of investment income. We think the Commissioner, and the other Courts of Appeals, see n. 4, *supra,* properly rejected the entirely one-sided use of the fictional assumption proposed by the taxpayer in this case.

Second, we could assume that the entire premium has been paid, but that none of the associated expenses have been incurred. Thus, the fictional assumption would be applied when determining reserves, assets, and gross premium income, but not when determining expenses. This is the position taken by the Commissioner. See Treas. Regs. §§ 1.805, 1.809–4, 26 CFR §§ 1.805–5, 1.809–4 (1976).[22] It is obvious that requiring the companies to treat the premium (including loading) as an asset and as income would improperly accelerate their tax payments; for a major share of loading is applied, when it is received, to deductible items such as sales commissions. Thus, to tax the entire loading portion of an unpaid premium is doubly objectionable: It imposes a tax on income the company has not received; and it treats the entire loading

---

[22] These Regulations cite unpaid premiums as examples of assets (§ 1.805–5, Example (1)) and include these premiums as part of the "gross premiums" used in calculating gain from operations (§ 1.809–4 (a)(1)).

In addition, § 1.801–4 (f) provides that "[i]n the event it is determined on the basis of the facts of a particular case that [unpaid premiums] are not properly accruable for the taxable year . . . and, accordingly, are not properly includible under assets . . . appropriate reduction shall be made in the life insurance reserves." Based on the latter Regulation, the Commissioner makes an alternative argument that unpaid premiums should be disregarded for all purposes, including computations of reserves. We reject this argument for the reasons stated in Part III–A.

as income even though most of it will be disbursed for deductible expenses. The result of accepting the Commissioner's position would be that the insurance company would have a greater tax liability on unpaid premiums than if the premiums had actually been paid. This result is also unacceptable.

Third, some Courts of Appeals have extended the fiction somewhat further to include an assumption that certain expenses associated with the unpaid premiums have been incurred.[23] These courts allow a deduction for some expenses such as salesmen's commissions, which are payable upon receipt of the premium. It is not clear, however, precisely what expenses would receive this treatment. The approach adopted by these courts eliminates much of the unfairness of the Commissioner's position. But their approach would take us far from the statute. Since there is nothing in the statute directing that any portion of unpaid loading be treated as an asset or as income, the statute obviously cannot provide guidance in fashioning a set of deductions to be credited against the fictional assumption that such loading is income.

The fourth approach, in contrast, does have support in the statute. This approach has been adopted by the NAIC for the purpose of preparing the Annual Statement, and therefore is firmly anchored in the text of § 818 (a) which establishes a preference for NAIC accounting methods.[24] Under this view, the net valuation portion of the unpaid

---

[23] *Great Commonwealth Life Ins. Co.* v. *United States,* 491 F. 2d 109 (CA5 1974); *Federal Life Ins. Co.* v. *United States,* 527 F. 2d 1096 (CA7 1975); *North American Life & Cas. Co.* v. *Commissioner,* 533 F. 2d 1046 (CA8 1976).

[24] Evidence of congressional respect for NAIC accounting methods is not limited to the portion of the Code concerning life insurance companies. In defining "gross income" and "expenses incurred" for purposes of taxing certain other insurance companies, Congress expressly requires computations to follow "the annual statement approved by the National Convention of Insurance Commissioners." 26 U. S. C. §§ 832 (b)(1)(A), (b)(6).

premiums is included in reserves, assets, and gross premium income, while the loading portion is entirely excluded.[25] This approach might be described as adopting the fictional assumption that the net valuation portion of the premium has been paid, but that the loading portion has not. This accounting treatment has been consistently applied throughout the industry for decades, and was regarded as the correct approach by the Tax Court when it first confronted this problem area. *Western Nat. Life Ins. Co. of Texas* v. *Commissioner*, 51 T. C. 824 (1969), modifying 50 T. C. 285 (1968), rev'd, 432 F. 2d 298 (CA5 1970). By including the net valuation portion of the unpaid premium—and only that portion—on both sides of the relevant equations, it satisfies in large measure the Commissioner's quest for symmetry. It also avoids the uncertainty and confusion that would attend any attempt to segregate unpaid loading into deductible and nondeductible parts. Finally, it provides a practical rule which should minimize the likelihood of future disputes.

Under § 818 (a), rejection of the NAIC approach would be justified only if it were found inconsistent with the dictates of accrual accounting. But the general rules of accrual accounting simply do not speak to the question of the scope to be given the entirely fictional assumption required by this statute. Any one of the four approaches has an equally good—or equally bad—claim to being "an accrual method." Since general accounting rules are not controlling, the statute requires use of the NAIC approach to fill the gap.[26]

---

[25] The American Council of Life Insurance has filed a brief as *amicus curiae* and made oral argument urging adoption of this position.

[26] The first Court of Appeals to consider this argument rejected it on the ground that Congress would not have intended "to relegate the substantive matter of offsetting or excluding loading on deferred and uncollected premiums, with its concomitant impact on the resulting tax, to the NAIC." *Franklin Life Ins. Co.* v. *United States*, 399 F. 2d, at 760. We think that § 818 (a) gives the NAIC precisely this role of filling the gaps in the statutory treatment of accounting problems like this one.

Accordingly, we conclude that unpaid premiums must be reflected in the computation of respondent's tax liabilities "in a manner consistent with the manner required for purposes of the annual statement approved by the National Association of Insurance Commissioners." To the extent that the Secretary's regulations require different treatment of unpaid premiums, we hold that they are inconsistent with § 818 (a) and therefore invalid.

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 STEWART took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

Regretfully, I cannot join the Court's opinion. The Tax Court's position, which the Court of Appeals rejected, was mandated by the applicable Treasury Regulations, 26 CFR §§ 1.805–5 (a)(4)(ii) and 1.809–4 (a), (i) (1976). These Regulations, invalidated by the Court of Appeals and now partially by this Court, appear to me to represent a wholly defensible construction of the statute, and we should not refuse to follow it simply because we prefer an alternative reading.

The first sentence of § 818 (a) provides that all computations shall be pursuant to the accrual method of accounting or, to the extent permitted by the Secretary, under a combination of the accrual method and any other method permitted by the chapter. The second sentence of the section provides that *except as provided in the first sentence,* all computations shall be consistent with the method required by the annual statement provided by the National Association of Insurance Commissioners (NAIC). As the majority recognizes, under

normal accrual accounting methods "unpaid premiums would simply be ignored"; because "the company has no legal right to collect them," *ante,* at 150, they are mere expectancies and could not be accrued. It is thus a departure from the accrual method of accounting to reflect any part of unpaid premiums in reserves, assets, or income. Under § 818, it seems to me that if there is to be a variance from the accrual method, it is the Secretary who is empowered to say to what extent other methods should be recognized. The section does authorize resort to the NAIC approach in some circumstances, but I do not understand the statute, as the majority does, to prefer the NAIC approach to that of the Secretary. As I understand the statute, the Secretary's regulations are valid and should be followed in this case. As the Tax Court held, all of the unpaid premium, not just the premium less "load," should be reflected in assets and gross premium income. Hence, although I agree that the judgment of the Court of Appeals should be reversed, I cannot join the Court's opinion.

Syllabus

PUYALLUP TRIBE, INC., ET AL. *v.* DEPARTMENT OF GAME OF WASHINGTON ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 76–423. Argued April 18, 1977—Decided June 23, 1977

After protracted litigation the Washington Superior Court entered a judgment against petitioner Puyallup Tribe reciting that the court possessed jurisdiction to regulate the Tribe's fishing activities both off and on its reservation, and limiting the number of steelhead trout that tribal members might net in the Puyallup River each year, and the Tribe was directed to file a list of members authorized to exercise treaty fishing rights, and to report to respondent Washington Department of Game and to the court the number of steelhead caught by the treaty fishermen each week. The Washington Supreme Court affirmed, with a slight modification. The Tribe contends that the doctrine of sovereign immunity requires that the judgment be vacated; that the state courts have no jurisdiction to regulate fishing activities on the reservation; and that, in any event, the limitation on the steelhead catch is not a necessary conservation measure. *Held:*

1. Absent an effective waiver or consent, a state court may not exercise jurisdiction over a recognized Indian tribe, but tribal sovereign immunity here does not impair the Superior Court's authority to adjudicate the rights of individual tribal members over whom it properly obtained personal jurisdiction, *Puyallup Tribe* v. *Washington Game Dept.*, 391 U. S. 392 (*Puyallup I*), and hence only those portions of the judgment that involve relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity. Pp. 168–173.

2. Neither the Tribe nor its members have an exclusive right, under the Treaty of Medicine Creek, to take steelhead passing through the reservation. It not only appears that the Tribe, pursuant to Acts of Congress passed after the treaty was entered into, alienated in fee simple absolute all areas of the reservation abutting on the Puyallup River, but, moreover, the Tribe's treaty right to fish "at all usual and accustomed places" is to be exercised "in common with all citizens of the Territory," *Puyallup I, supra,* at 398, and is subject to reasonable regulation by the State pursuant to its power to conserve an important natural resource. The fair apportionment of the steelhead catch between Indian net fishing and non-Indian sport fishing directed by *Washington Game Dept.* v. *Puyallup Tribe,* 414 U. S. 44 (*Puyallup II*),

could not be effective if the Indians retained the power to take an unlimited number of steelhead within the reservation. Pp. 173–177.

3. It appears that the state court complied with the mandate of *Puyallup II, supra,* at 48–49, and used a proper standard of conservation necessity in limiting the steelhead catch, where such limitation was based primarily on expert testimony for both parties. P. 177.

4. Although the Tribe properly resists the state courts' authority to order it to provide information with respect to the status of tribal members and the size of their catch, it may find that its members' interests are best served by voluntarily providing such information, but the state courts on remand must continue to respect the Tribe's right to participate in the proceedings without treating such participation as qualifying the Tribe's right to claim sovereign immunity. P. 178.

86 Wash. 2d 664, 548 P. 2d 1058, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 178. BRENNAN, J., filed an opinion dissenting in part, in which MARSHALL, J., joined, *post,* p. 179.

William H. Rodgers, Jr., argued the cause for petitioners. With him on the briefs was *John Sennhauser.*

Slade Gorton, Attorney General of Washington, argued the cause for respondent Department of Game of Washington. With him on the brief was *Edward B. Mackie,* Deputy Attorney General. *Don S. Willner* argued the cause and filed briefs for respondents Northwest Steelheaders Council of Trout Unlimited et al.

H. Bartow Farr III argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Friedman, Assistant Attorney General Taft, Edmund B. Clark,* and *George R. Hyde.**

**Joseph S. Fontana* filed a brief for the National Tribal Chairmen's Assn. as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed by *Mason D. Morisset, Alan C. Stay,* and *Michael Taylor* for the Colville Indian Tribe et al.; and by *Joseph T. Mijich* for the Purse Seine Vessel Owners Assn. et al.

MR. JUSTICE STEVENS delivered the opinion of the Court.

On April 8, 1975, after more than 12 years of litigation, including two decisions by this Court,[1] the Superior Court of the State of Washington for Pierce County entered a judgment against the Puyallup Tribe of Indians. That judgment recited that the court had jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation, and limited the number of steelhead trout that members of the Tribe may catch with nets in the Puyallup River each year. The Tribe was directed to file a list of members authorized to exercise treaty fishing rights, and to report to the Washington State Department of Game, and to the court, the number of steelhead caught by its treaty fishermen each week. The judgment, with a slight modification, was affirmed by the Supreme Court of Washington, 86 Wash. 2d 664, 548 P. 2d 1058 (1976).

The Tribe, supported by the United States as *amicus curiae,* contends in this Court that the doctrine of sovereign immunity requires that the judgment be vacated, and that the state courts of Washington are without jurisdiction to regulate fishing activities on its reservation. The Tribe also argues that the limitation of the steelhead catch imposed by those courts is not, in any event, a necessary conservation measure. We hold that insofar as the claim of sovereign immunity is

[1] In *Puyallup Tribe* v. *Washington Game Dept.,* 391 U. S. 392 (*Puyallup I*), the Court held that Art. III of the Treaty of Medicine Creek, 10 Stat. 1133, did not foreclose reasonable state regulation, in the interest of conservation, of fishing by the Indians "in common with" fishing by others; the Court remanded the case to the state court to determine whether a total ban on net fishing was justified by the interest in conservation.

In *Washington Game Dept.* v. *Puyallup Tribe,* 414 U. S. 44 (*Puyallup II*), the Court held that a complete ban on net fishing for steelhead trout by the Indians was precluded by the treaty, and remanded for a determination of the number of catchable fish that should be apportioned to an Indian net fishery.

advanced on behalf of the Tribe, rather than the individual defendants, it is well founded, but we reject petitioner Tribe's other contentions.

I

The complaint as originally filed by respondent Department of Game of the State of Washington (hereafter respondent),[2] named 41 individuals, including "John Doe and Jane Doe, members [of the Tribe]," [3] as defendants. It alleged that the defendants, claiming to be immune from the State's conservation laws, were fishing extensively in the Puyallup River with set nets and drift nets in a manner which would virtually exterminate the anadromous fishery if not enjoined. Anadromous fish are those which spend most of their life in the open sea, but which return as adults to freshwater streams, such as the Puyallup River, to spawn. The steelhead is an anadromous fish. The prayer of the complaint sought a declaration that the defendants were bound to obey the State's conservation laws and an injunction against netting the runs of anadromous fish.

The trial court entered a temporary restraining order enjoining each of the defendants from netting fish in the Puyallup River, and directing that service be made on each defendant.

In response, a "Return on Temporary Restraining Order and Answer to Complaint" was filed by "the PUYALLUP TRIBE of INDIANS, by and through the Chairman of the Tribal Council, MR. JEROME MATHESON." App. in

---

[2] Respondent regulates steelhead fishing in the State of Washington. The Washington Department of Fisheries was a coplaintiff with respondent in the original complaint by virtue of its responsibility for salmon fishing. After this Court's decision in *Puyallup I*, the Department of Fisheries amended its regulation to allow members of the Tribe to use a net fishery for salmon. No issue relating to salmon fishing remains in the case.

[3] Three of the named individuals were further identified as tribal officers.

Puyallup I, O. T. 1967, No. 247, p. 8 (hereafter App. in *Puyallup I*). The return and answer used the term "tribe" in two senses, first as a collective synonym for the individual defendant-members,[4] and also as referring to a sovereign Indian nation.[5] It asserted an exclusive right to the fish in the Puyallup River, describing that right somewhat ambiguously as a "property right which belongs to the Tribe and is exercised by the Tribe members under the Treaty of Medicine Creek." *Ibid.* Therefore, while filed in the name of the Tribe, the return and answer was also tendered on behalf of the individual defendants.[6]

Throughout this long litigation the Tribe has continued to participate in the dual capacity of a sovereign entity[7] and as

---

[4] *I. e.,* "Answering Paragraph No. 1 these defendants being a tribe of Indians . . . ," App. in *Puyallup I,* p. 8; "the defendants have suffered numerous arrests, jailing and other indignities at the hands of the plaintiffs who knowingly and wilfully badger, abuse and degrade the defendants . . . ," *id.,* at 9; "[t]hat the plaintiffs are recklessly using the power of the State of Washington to deprive the defendant [*sic*] and each of them of their means of making a livelihood . . . ," *id.,* at 10.

[5] *I. e.,* "this Tribe of Indians signed a treaty with the United States of America as a sovereign nation of Indians . . ."; "the Puyallup Tribe of Indians own the fish in the river . . . ." *Ibid.*

[6] The trial court so found: "Defendants answered and alleged that they were members of the Puyallup Tribe of Indians . . . ." *Id.,* at 31, Finding of Fact I.

[7] The Tribe has been described several ways in the captions which have been filed over the years. In this Court this Term the Tribe has described itself as "Puyallup Tribe, Inc." The Washington Supreme Court has thrice noted that there is no such entity, see 86 Wash. 2d 664, 666 n. 1, 548 P. 2d 1058, 1062 n. 1 (1975). In *Puyallup I* the trial court held that the Tribe had ceased to exist; this holding was reversed by the Washington Supreme Court, 70 Wash. 2d 245, 252–253, 422 P. 2d 754, 758–759 (1967). It has therefore been settled in this case that, whatever its correct name may be, the Tribe is still in existence and is clearly recognized as such by the United States.

In this Court Ramona Bennett is a copetitioner with the Tribe. She

a representative of its members who were individual defendants.[8] The Tribe has repeatedly asserted its sovereign immunity from suit, arguing that neither it nor Congress has waived that immunity.[9]

In *Puyallup I*, we addressed the problems of tribal immunity and state-court jurisdiction in a footnote:

> "Petitioners in No. 247 argue that the Washington courts lacked jurisdiction to entertain an action against

---

appears in her capacity as chairwoman of the Puyallup Tribal Council. Accordingly, we treat this case as though the Tribe itself is the only petitioner in this Court and hereafter use the term "petitioner" to refer to the Tribe.

[8] On a few occasions individual tribal members have been represented by attorneys who filed appearances in the Superior Court for Pierce County. On at least two occasions attorneys have filed appearances in the Washington Supreme Court in this capacity. No such appearance has been filed since the decision in *Puyallup II* in 1973. No appearance on behalf of an individual defendant was ever filed in this Court. Nor does the record reveal any instance of an objection to the Tribe's representation of the individual defendants. It is clear from the record that the major responsibility for the defense of the litigation has been assumed by the Tribe.

[9] It has relied on *Worcester* v. *Georgia*, 6 Pet. 515, and *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506. Only twice in this litigation has petitioner failed to clearly raise the issue of its tribal sovereign immunity. The first time was in its first return and answer, *supra*, at 168–169. The immunity issue was later presented to the trial court, however, and the court, in the course of concluding that the Puyallup Tribe had ceased to exist, held in its memorandum decision that "this argument about the tribe being a sovereign nation is without merit." App. in *Puyallup I*, p. 18. As already noted, n. 7, *supra*, the trial court's holding that the Tribe had ceased to exist was reversed by the Washington Supreme Court. Second, during the representation of the Tribe by the Solicitor General before this Court in *Puyallup II*, no mention was made of tribal sovereign immunity. Congress has not given the Solicitor General authority to waive the immunity of an Indian tribe. *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, at 513; cf. *Ford Motor Co.* v. *Dept. of Treasury of Indiana*, 323 U. S. 459, 466–470.

> the tribe without the consent of the tribe or the United States Government (citing *United States* v. *United States Fidelity & Guaranty Co.,* 309 U. S. 506, and *Turner* v. *United States,* 248 U. S. 354), viewing the suit as one to 'extinguish a Tribal communal fishing right guaranteed by federal Treaty.' This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts." 391 U. S. 392, 396–397, n. 11.

Thus, *Puyallup I* settled an important threshold question in this case—regardless of tribal sovereign immunity, individual defendant-members of the Puyallup Tribe remain amenable to the process of the Washington courts in connection with fishing activities occurring off their reservation. That conclusion was predicated on two separate propositions worthy of restatement here.

First, even though the individual defendants were members of the Tribe and therefore entitled to the benefits of the Treaty of Medicine Creek, that treaty as construed by this Court does not confer the complete individual immunity they claim. The State may qualify the Indians' right to fish "at all usual and accustomed places." Specifically, we held that the "manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Id.,* at 398.

Second, whether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible. The doctrine of sovereign immunity which was

applied in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, does not immunize the individual members of the Tribe.[10]

Although only the Tribe had entered an appearance in this Court in *Puyallup I*, because of its representation of its individual members, jurisdiction over the individuals existed. And since the state court's jurisdiction over the individual members was settled by *Puyallup I*, neither in that review nor in *Puyallup II* was any further consideration given to the status of the Tribe itself as a sovereign. It was after our decision in *Puyallup II*, when the trial court was required to determine the portion of the steelhead run that could be allocated to net fishing by the members of the Tribe, that the state court first entered an order which, in terms, is directed to the Tribe rather than to the individual defendants. That order places a limit on the number of steelhead which all members of the Tribe may catch with nets, and also directs the Tribe to identify the members engaged in the steelhead fishery and to report the number of fish they catch each week. In the trial court, in the Supreme Court of Washington, and in this Court, the Tribe has attacked that order as an infringement on its sovereign immunity to which neither it nor Congress has consented.

The attack is well founded. Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe. This Court,

---

[10] That case involved an action brought in a federal court by the United States on behalf of the Choctaw and Chickasaw Nations to recover royalties under a mineral lease; defendant was the lessee's surety. In an earlier bankruptcy proceeding, the lessee had obtained a judgment for $9,060.90 pursuant to a cross-claim against the same tribes. In the *Fidelity* case the lessee's surety pleaded the earlier judgment as a bar to recovery in the action for royalties. We held that the earlier judgment was void in the absence of congressional authorization for a suit, 309 U. S., at 512–513. There were no individual parties to the proceeding.

United States v. *United States Fidelity & Guaranty Co., supra;* the Washington Supreme Court, see, *e. g., State ex rel. Adams* v. *Superior Court,* 57 Wash. 2d 181, 182–185, 356 P. 2d 985, 987–988 (1960); and the commentators, see, *e. g.,* U. S. Dept. of Interior, Federal Indian Law 491–494 (1958), all concur. Respondent does not argue that either the Tribe or Congress has waived its claim of immunity or consented to the entry of an order against it. And certainly, the mere fact that the Tribe has appeared on behalf of its individual members does not effect a waiver of sovereign immunity for the Tribe itself.

On the other hand, the successful assertion of tribal sovereign immunity in this case does not impair the authority of the state court to adjudicate the rights of the individual defendants over whom it properly obtained personal jurisdiction. That court had jurisdiction to decide questions relating to the allocation between the hatchery fish and the natural run, the size of the catch the tribal members may take in their nets, their right to participate in hook-and-line fishing without paying state license fees and without having fish so caught diminish the size of their allowable net catch, and like questions. Only the portions of the state-court order that involve relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity.

II

The Tribe vigorously argues that the majority of its members' netting of steelhead takes place inside its reservation,[11]

[11] The continued existence of the Puyallup Reservation has been a matter of dispute on which we express no opinion. The Ninth Circuit, relying on our decision in *Mattz* v. *Arnett,* 412 U. S. 481, held that the reservation did still exist, *United States* v. *Washington,* 496 F. 2d 620 (1974), cert. denied, 419 U. S. 1032. That decision predates our consideration of *DeCoteau* v. *District County Court,* 420 U. S. 425, and *Rosebud Sioux Tribe* v. *Kneip,* 430 U. S. 584.

and that, while our prior adjudications settled respondent's right to regulate off-reservation fishing in the interest of conservation, neither respondent nor the state court has jurisdiction over on-reservation fishing. The Tribe relies on both the Treaty of Medicine Creek, 10 Stat. 1132, and federal pre-emption of on-reservation Indian affairs, see *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, 147–148.

Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was to be "set apart, and, so far as necessary, surveyed and marked out for their exclusive use" and that no "white man [was to] be permitted to reside upon the same without permission of the tribe and the superintendent or agent." It is argued that these words amount to a reservation of a right to fish free of state interference. Such an interpretation clashes with the subsequent history of the reservation and the facts of this case. Pursuant to two Acts of Congress, 27 Stat. 633, and c. 1816, 33 Stat. 565, the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000 acre reservation. None of the 22 acres abuts on the Puyallup River.[12] Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their "exclusive use." On the contrary, it is undisputed that non-Indian licensees of respondent fish in great numbers within the reservation, and under the close supervision of respondent's wardens.[13]

---

[12] 70 Wash. 2d, at 253, 422 P. 2d, at 759 (*Puyallup I*). Counsel for petitioner intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr. of Oral Arg. 10. This contention is at odds with the otherwise uncontradicted findings below.

[13] The tribal members' right to fish "at all usual and accustomed grounds and stations," secured by Art. III of the treaty, continues to protect their right to fish on ceded lands within the confines of the reservation.

Although it is conceded that the State of Washington exercises civil and criminal jurisdiction within the reservation for most purposes, petitioner contends that it may not do so with respect to fishing.[14] Again with particular reference to the facts of this case, we also reject this contention.

Our construction of the Treaty of Medicine Creek in *Puyallup I* makes it perfectly clear that although the State may not deny the Indians their right to fish "at all usual and accustomed" places, the treaty right is to be exercised "in common with all citizens of the Territory." We squarely held that "the right to fish at those respective places is not an exclusive one." 391 U. S., at 398. Rather, the exercise of that right was subject to reasonable regulation by the State pursuant to its power to conserve an important natural resource.

In *Puyallup II* we directed the Washington State courts to devise a formula pursuant to which the steelhead catch could be "fairly apportioned" between Indian net fishing and non-Indian sport fishing. No such fair apportionment could be effective if the Indians retained the power to take an unlimited number of anadromous fish within the reservation. Speaking for the Court, Mr. Justice Douglas plainly stated that the power of the State is adequate to assure the survival of the steelhead:

> "We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until

---

[14] Washington has acquired "Pub. L. 280" jurisdiction over the Puyallup Reservation, much of which coexists with the city of Tacoma. Pub. L. No. 280, § 7, 67 Stat. 590; Wash. Rev. Code §§ 37.12.010–37.12.070 (1974). A provision of Pub. L. 280 exempts treaty fishing rights from state jurisdiction, however, 18 U. S. C. § 1162 (b).

the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." 414 U. S., at 49.

The resource being regulated is indigenous to the Puyallup River. Virtually all adult steelhead in the river have returned after being spawned or planted by respondent upstream from the boundaries of the original Puyallup Reservation, which encompass the lowest seven miles of the river. Though it would be decidedly unwise, if Puyallup treaty fishermen were allowed untrammeled on-reservation fishing rights, they could interdict completely the migrating fish run and "pursue the last living [Puyallup River] steelhead until it enters their nets." *Ibid.*[15] In this manner the treaty fishermen could totally frustrate both the jurisdiction of the Washington courts and the rights of the non-Indian citizens of Washington recognized in the Treaty of Medicine Creek.[16] In practical effect, therefore, the petitioner is reasserting the right to exclusive

---

[15] The original complaint in this case alleged that, "[a]s a result of the defendants' fishery, the anadromous fish runs of the Puyallup River will be virtually exterminated if said fishery is permitted to continue." App. in *Puyallup I*, p. 6.

The ability of the on-reservation activity to completely destroy the resource in question has not been a factor in other cases which have rejected regulation, *Arnett* v. *Five Gill Nets*, 48 Cal. App. 3d 454, 463–464, 121 Cal. Rptr. 906, 912–913 (1975), cert. denied, 425 U. S. 907 (on remand from this Court, *Mattz* v. *Arnett*, *supra*, where the on-reservation fishing regulation question was reserved, 412 U. S., at 485); *People* v. *Jondreau*, 384 Mich. 539, 185 N. W. 2d 375 (1971); *State* v. *Arthur*, 74 Idaho 251, 261 P. 2d 135 (1953), cert. denied, 347 U. S. 937; *State* v. *McConville*, 65 Idaho 46, 139 P. 2d 485 (1943).

[16] "Article III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory." 10 Stat. 1133. As to the treaty fishermen,

control of the steelhead run that was unequivocally rejected in both *Puyallup I* and *Puyallup II*. At this stage of this protracted litigation, we are unwilling to re-examine those unanimous decisions or to render their holdings virtually meaningless. We therefore reject petitioner's claim to an exclusive right to take steelhead while passing through its reservation.

III

Finally, petitioner states that the courts below have failed to apply a standard of conservation necessity in fashioning relief. We disagree. The trial court, on remand from our decision in *Puyallup II*, conducted a two-week trial which was dominated by expert testimony for both parties. From the testimony and accompanying exhibits the court determined the number of steelhead in the river and how many could be taken without diminishing the number in future years; the court then allocated 45% of the annual natural steelhead run available for taking to the treaty fishermen's net fishery.[17] The Washington Supreme Court affirmed, 86 Wash. 2d, at 684–687, 548 P. 2d, at 1072–1073. This is precisely what we mandated in *Puyallup II*, 414 U. S., at 48–49. In the absence of a focused attack on some portion of the Washington courts' factual determinations, we find no ground for disagreeing with them.[18]

---

this sentence effects a reservation of a previously exclusive right. But that language also recognizes that the right is to be shared in common with the non-Indian "citizens of the Territory."

[17] The courts below also held that the run of hatchery fish introduced into the Puyallup by respondent was not available to the treaty fishermen. The issue was not presented in the petition for certiorari, nor was it argued in petitioner's brief. Respondent did attempt to raise the issue in its untimely cross-petition for certiorari, and by its brief arguing affirmance. Because the question has no bearing on our decision of the questions presented by petitioner, we decline to decide it.

[18] But for the direction of relief against the Tribe, the order of the Superior Court is admirably narrow in scope and well suited to effect a

A practical problem is presented by our disposition. The limitation on the size of the net catch applies to all members of the Tribe. The respondent has no interest in how the catch is allocated among the Indians; its concern is with the total number of steelhead netted during each season, with obtaining information to make it possible to recommend a proper allocation in succeeding years, and with enforcement against individuals who may net fish after the allowable limit has been reached. On the other hand, the Tribe has a separate interest in affording equitable treatment to its members and in protecting those members from any mistaken enforcement efforts. For that reason, although it properly resists the authority of the state court to order it to provide information with respect to the status of enrolled members of the Tribe and the size of their catch, it may find that its members' interests are best served by voluntarily providing such information to respondent and to the court in order to minimize the risk of an erroneous enforcement effort. The state courts must continue to accord full respect to the Tribe's right to participate in the proceedings on behalf of its members as it has in the past without treating such participation as qualifying its right to claim immunity as a sovereign.

The judgment is vacated, and the case is remanded to the Supreme Court of Washington for further proceedings not inconsistent with the opinion.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion. I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506 (1940).

---

minimum of intrusion upon the treaty fishermen's protected rights. The treaty fishermen are free to fish up to the limit imposed by the court without any restriction as to time, place, or method of fishing.

I am of the view that that doctrine may well merit re-examination in an appropriate case.

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

While I agree with the Court's resolution of the rather tangled sovereign immunity question in Part I of the opinion, I cannot agree with the Court's interpretation of the substantive rights of the Puyallup Indians under the Treaty of Medicine Creek.

When white settlers first began arriving in the western part of what is now Washington State, the Puyallup Indians, along with other tribes surrounding Puget Sound, were heavily dependent for their livelihoods on runs of salmon and steelhead that came up the rivers in great numbers to spawn. In the 1850's the first territorial Governor, Isaac I. Stevens, entered into a number of virtually identical treaties with representatives of these western Washington tribes to confine the Indians to reservation lands, and to open up the rest of the region to white settlers. One of these treaties was the Treaty of Medicine Creek, negotiated in 1854 by Governor Stevens with the Puyallups, the neighboring Nisqually Tribe, and other bands. That treaty gave the Puyallups a reservation at the southern end of Commencement Bay at the mouth of the Puyallup River.

The provisions for the Indians' all-important fishing rights stated:

> "Article II. There is . . . reserved for the present use and occupation of the said tribes and bands [reservation land which] shall be set apart, and, so far as necessary, surveyed and marked out *for their exclusive use* . . . .
> "Article III. The right of taking fish, at all usual and accustomed grounds and stations, *is further secured* to said Indians, in common with all citizens of the Territory . . . ." 10 Stat. 1132, 1133. (Emphasis supplied.)

As I understand the Court's reading of these provisions, with which I agree, Art. II guarantees *exclusive* use of the reservation, including *exclusive* fishing rights, to the Puyallups. Article III concerns fishing rights *off* the reservation, guaranteeing such rights at all "usual and accustomed grounds and stations," not, however, exclusively but "in common with all the citizens of the Territory."

The two questions presented are, *first,* what fishing rights do the Puyallup Indians have now, over 100 years after the signing of the treaty?; and, *second,* to what extent is the State of Washington empowered to limit those rights? We do not write on a clean slate as to either question in light of *Puyallup I,* 391 U. S. 392, decided in 1968, and *Puyallup II,* 414 U. S. 44, decided in 1973.

Puyallup I presented no question of the "extent of . . . reservation rights," but only the question of the power of the State "to enjoin violations of state [fishing regulations] by individual tribal members fishing off the reservation." 391 U. S., at 394, 397 n. 11.[1] *Puyallup I* held that Washington's power to regulate off-reservation fishing for salmon and steelhead by the Puyallups was limited to regulations necessary in the interest of conservation, *id.,* at 398, and remanded for a determination by the Washington State courts of reasonable and necessary conservation measures, and for an interpretation of the phrase "in common with all the citizens of the Territory" contained in Art. III of the treaty. The Washington Supreme Court's response on remand was to sustain a total ban on all net fishing for steelhead. 80 Wash. 2d 561, 497 P. 2d 171 (1972).[2] In consequence, the case returned here as *Puyallup II,* which held that the interpretation of Art. III as

---

[1] The question of whether the Puyallups' reservation continued to exist was not reached. 391 U. S., at 394 n. 1.

[2] The state court also sustained a regulation permitting some net fishing by the Puyallups for salmon. Review of that holding was not sought here.

permitting the total ban was erroneous. The Court again remanded the case, this time for a determination of a means of "fairly apportion[ing]" the steelhead run between the hook-and-line sports fishery and the Puyallups' net fishery. 414 U. S., at 48. It was again made explicit that only "off-reservation fishing," governed by Art. III of the treaty, was involved. *Id.*, at 45.

Before proceedings began on remand, the Court of Appeals for the Ninth Circuit decided a separate case in which the State of Washington challenged "the continued existence of the Puyallup Indian Reservation *and as a consequence, the right of the Puyallup Tribe of Indians to fish, free from state interference, on that part of the Puyallup River lying within the Reservation.*" Relying on *Mattz* v. *Arnett*, 412 U. S. 481 (1973), the Court of Appeals held "that the Puyallup Indian reservation continues to exist." *United States* v. *Washington*, 496 F. 2d 620, 621 (1974) (emphasis supplied). The Washington Supreme Court, referring to the "recently established, continuing existence of the Puyallup Reservation," accepted the holding of the Court of Appeals, but nevertheless concluded that the State was not foreclosed from exercising regulatory authority within the reservation. 86 Wash. 2d 664, 668–669, 548 P. 2d 1058, 1063–1064 (1976). The court construed Art. III of the treaty to require that the Puyallups be allocated 45% of the harvestable natural-run steelhead for their net fishery, and that the remaining 55% be allocated to the hook-and-line sports fishery. The court further held that none of the harvestable hatchery-bred steelhead should be allocated to the Puyallups' net fishery. Thus, despite its acceptance of the Court of Appeals' holding that the reservation still existed, the Washington Supreme Court applied Art. III of the treaty—limited by its terms to off-reservation fishing—to on-reservation fishing governed by Art. II.

Unlike either *Puyallup I* or *Puyallup II*, the case before

us must be determined under Art. II, which in plainest English provides for "exclusive" fishing rights for the Puyallups. Article II cannot be read, in my view, to sanction the apportionment of harvestable fish between the Puyallups and other fishermen. Nor has this Court ever decided whether a State has the power to regulate on-reservation fishing in the interest of conservation. See *Mattz* v. *Arnett, supra,* at 485.[3] I would therefore reverse. I would remand, as we did in *Mattz,* for a determination by the state courts in the first instance of what measures, if any, are necessary to regulate the Puyallups' on-reservation fishery for conservation purposes.[4]

---

[3] *Mattz* v. *Arnett* held that the Klamath River Reservation in California had not been extinguished, but intimated no view on the authority of California to regulate fishing on the reservation. 412 U. S., at 485. The Klamath River has an anadromous fishery comparable to that on the Puyallup River, in that fishermen allowed net fishing can prevent all fish in a given run from reaching their spawning grounds. On remand in *Mattz,* the California Court of Appeal expressed doubt that the State could regulate on-reservation fishing even in the interest of conservation, but did not decide the issue because the Indians' fishing activity was found not to be a sufficient threat to conservation to justify state regulation. *Arnett* v. *Five Gill Nets,* 48 Cal. App. 3d 454, 463–464, 121 Cal. Rptr. 906, 912–913 (1975), cert. denied, 425 U. S. 907 (1976).

[4] The degree of danger to the survival of the anadromous fishery in the Puyallup River posed by the Puyallups' net fishing has been a matter of dispute in this case from the beginning. The parties, even now, disagree about the willingness of the Puyallups to observe sound conservation practices. Compare Brief for Respondent 17–18 with Brief for Petitioners 11–12. The Puyallups apparently now carry on their off-reservation salmon net fishery under the supervision of the Federal District Court for the Western District of Washington. *United States* v. *Washington,* 384 F. Supp. 312, 420 (1974); Brief for Petitioners 12. District Judge Boldt in that case found that none of the fishing tribes of western Washington, including the Puyallups, have conducted their off-reservation fisheries in such a way as to endanger any species:

"With a single possible exception testified to by a highly interested witness . . . and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered

The Court tries to avoid the force of this analysis by denigrating the holding of the Court of Appeals for the Ninth Circuit. The Court states: "The continued existence of the Puyallup Reservation has been a matter of dispute on which we express no opinion. . . . [The Ninth Circuit's] decision predates our consideration of *DeCoteau* v. *District County Court,* 420 U. S. 425, and *Rosebud Sioux Tribe* v. *Kneip,* 430 U. S. 584." *Ante,* at 173 n. 11. This, to say the least, is a casual disregard of settled principles of res judicata and collateral estoppel. The United States and the State of Washington were parties to the action in the Court of Appeals, and surely we must assume, in the absence of any suggestion to the contrary, that the parties fully litigated their positions respecting reservation status. The Court of Appeals squarely held, contrary to the contention of the State of Washington, that the reservation continued to exist, and review here was denied. *Washington* v. *United States,* 419 U. S. 1032 (1974). The Supreme Court of Washington in the case now before us accepted the Ninth Circuit's holding as federal law binding on it. It is inappropriate now for the Court to denigrate the impact of that holding, particularly when the result is to vest authority in the State that lost on just that issue in the Court of Appeals.

The Court also questions whether on-reservation fishing is at issue in this case, relying on the fact that the Puyallups have alienated almost all of their land, and that only 22 acres of the reservation now remain in trust status. *Ante,* at 174. The Court does not go so far as to deny the existence of the reservation, and, of course, selling reservation land to non-Indians can be "completely consistent with continued reservation status," *Mattz* v. *Arnett, supra,* at 497; *Rosebud*

---

and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish." 384 F. Supp., at 338 n. 26.

Sioux Tribe v. *Kneip,* 430 U. S. 584, 586–587 (1977); *DeCoteau* v. *District County Court,* 420 U. S. 425, 432, 444 (1975). Nor does the Court, or indeed any party, contend that somehow the sale of most of the lands included the sale of the exclusive fishing rights the Puyallups were granted by Art. II. The Court's argument seems to be that since the Puyallups do not now "hold Puyallup River fishing grounds for their 'exclusive use' " they have forfeited any claim to enforce their exclusive fishing rights under Art. II. *Ante,* at 174. This analysis ignores the fact that the Puyallups do not now hold their fishing grounds for their exclusive use precisely because the State has relentlessly sought for many years to prevent their doing so. Indeed, this very suit was begun 14 years ago in an effort to prevent the Puyallups from exercising what they claimed to be their treaty rights on their old reservation.

Today's decision, ironically, is at odds with the position taken by the State in another case involving Indian fishing rights in Puget Sound. There the State agreed that on-reservation fishing is not subject to regulation by the State. In *United States* v. *Washington,* 384 F. Supp. 312, 332 (WD Wash. 1974), aff'd, 520 F. 2d 676 (CA9 1975), cert. denied, 423 U. S. 1086 (1976), District Judge Boldt, construed the language of Art. II of the Treaty of Medicine Creek and that of virtually identical treaties entered into by Governor Stevens with other western Washington tribes to mean that "[a]n *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations, wherein tribal members might make their homes if they chose to do so." (Footnote omitted; emphasis in original.) This proposition was apparently so self-evident to the parties, including the State of Washington, that "[a]ll parties in this case agree[d] that on reservation fishing is not subject to state regulation . . . ." 384 F. Supp., at 341.[5]

[5] This decision was handed down a month and a half before the Court of Appeals for the Ninth Circuit decided in *United States* v. *Washing-*

Doubtless 14 years of litigation have made the Court anxious to bring this case to an end, and this explains today's holding—just broad enough to dispose of the Puyallups' substantive claims but so narrowly fact-specific that it will probably have no significant impact on the Puget Sound Indian fishing rights case still pending in the District Court. This suggests that the result would not be the same were the case here for the first time instead of the third. For the language of the treaty is very clear: On-reservation fishing is governed by Art. II.

I respectfully dissent.

---

ton, 496 F. 2d 620 (1974), that the Puyallups' reservation continued to exist. On appeal from Judge Boldt's decision, the State challenged certain aspects of the calculation of the allocation under Art. III related to on-reservation catches, but it appears never to have asserted that it had authority to regulate the on-reservation fishery. The Court of Appeals affirmed Judge Boldt's decision in all relevant respects, 520 F. 2d 676, 690 (1975), and nowhere suggested that on-reservation fishing by the Puyallups was to be treated differently from that of any other tribe. The Court of Appeals affirmed Judge Boldt's decision over a year after it found that the Puyallups' reservation had never been extinguished.

SHAFFER ET AL. *v.* HEITNER

APPEAL FROM THE SUPREME COURT OF DELAWARE

No. 75–1812. Argued February 22, 1977—Decided June 24, 1977

Appellee, a nonresident of Delaware, filed a shareholder's derivative suit in a Delaware Chancery Court, naming as defendants a corporation and its subsidiary, as well as 28 present or former corporate officers or directors, alleging that the individual defendants had violated their duties to the corporation by causing it and its subsidiary to engage in actions (which occurred in Oregon) that resulted in corporate liability for substantial damages in a private antitrust suit and a large fine in a criminal contempt action. Simultaneously, appellee, pursuant to Del. Code Ann., Tit. 10, § 366 (1975), filed a motion for sequestration of the Delaware property of the individual defendants, all nonresidents of Delaware, accompanied by an affidavit identifying the property to be sequestered as stock, options, warrants, and various corporate rights of the defendants. A sequestration order was issued pursuant to which shares and options belonging to 21 defendants (appellants) were "seized" and "stop transfer" orders were placed on the corporate books. Appellants entered a special appearance to quash service of process and to vacate the sequestration order, contending that the *ex parte* sequestration procedure did not accord them due process; that the property seized was not capable of attachment in Delaware; and that they did not have sufficient contacts with Delaware to sustain jurisdiction of that State's courts under the rule of *International Shoe Co.* v. *Washington*, 326 U. S. 310. In that case the Court (after noting that the historical basis of *in personam* jurisdiction was a court's power over the defendant's person, making his presence within the court's territorial jurisdiction a prerequisite to its rendition of a personally binding judgment against him, *Pennoyer* v. *Neff*, 95 U. S. 714) held that that power was no longer the central concern and that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (and thus the focus shifted to the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* had rested). The Court of Chancery, rejecting appellants' arguments, upheld the § 366 procedure of compelling the

personal appearance of a nonresident defendant to answer and defend a suit brought against him in a court of equity, which is accomplished by the appointment of a sequestrator to seize and hold the property of the nonresident located in Delaware subject to court order, with release of the property being made upon the defendant's entry of a general appearance. The court held that the limitation on the purpose and length of time for which sequestered property is held comported with due process and that the statutory situs of the stock (under a provision making Delaware the situs of ownership of the capital stock of all corporations existing under the laws of that State) provided a sufficient basis for the exercise of *quasi in rem* jurisdiction by a Delaware court. The Delaware Supreme Court affirmed, concluding that *International Shoe* raised no constitutional barrier to the sequestration procedure because "jurisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital stock [in Delaware], not on prior contact by defendants with this forum." *Held:*

1. Whether or not a State can assert jurisdiction over a nonresident must be evaluated according to the minimum-contacts standard of *International Shoe Co.* v. *Washington, supra.* Pp. 207–212.

(a) In order to justify an exercise of jurisdiction *in rem,* the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in the thing." The presence of property in a State may bear upon the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation, as for example, when claims to the property itself are the source of the underlying controversy between the plaintiff and defendant, where it would be unusual for the State where the property is located not to have jurisdiction. Pp. 207–208.

(b) But where, as in the instant *quasi in rem* action, the property now serving as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action, the presence of the property alone, *i. e.,* absent other ties among the defendant, the State, and the litigation, would not support the State's jurisdiction. Pp. 208–209.

(c) Though the primary rationale for treating the presence of property alone as a basis for jurisdiction is to prevent a wrongdoer from avoiding payment of his obligations by removal of his assets to a place where he is not subject to an *in personam* suit, that is an insufficient justification for recognizing jurisdiction without regard to whether the property is in the State for that purpose. Moreover, the availability of attachment procedures and the protection of the Full Faith and Credit Clause, also militate against that rationale. Pp. 209–210.

(d) The fairness standard of *International Shoe* can be easily applied in the vast majority of cases. P. 211.

(e) Though jurisdiction based solely on the presence of property in a State has had a long history, "traditional notions of fair play and substantial justice" can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that do not comport with the basic values of our constitutional heritage. Cf. *Sniadach* v. *Family Finance Corp*, 395 U. S. 337, 340; *Wolf* v. *Colorado*, 338 U. S. 25, 27. Pp. 211–212.

2. Delaware's assertion of jurisdiction over appellants, based solely as it is on the statutory presence of appellants' property in Delaware, violates the Due Process Clause, which "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe*, *supra*, at 319. Pp. 213–217.

(a) Appellants' holdings in the corporation, which are not the subject matter of this litigation and are unrelated to the underlying cause of action, do not provide contacts with Delaware sufficient to support jurisdiction of that State's courts over appellants. P. 213.

(b) Nor is Delaware state-court jurisdiction supported by that State's interest in supervising the management of a Delaware corporation and defining the obligations of its officers and directors, since Delaware bases jurisdiction, not on appellants' status as corporate fiduciaries, but on the presence of their property in the State. Moreover, sequestration has been available in any suit against a nonresident whether against corporate fiduciaries or not. Pp. 213–215.

(c) Though it may be appropriate for Delaware law to govern the obligations of appellants to the corporation and stockholders, this does not mean that appellants have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State," *Hanson* v. *Denckla*, 357 U. S. 235, 253. Appellants, who were not required to acquire interests in the corporation in order to hold their positions, did not by acquiring those interests surrender their right to be brought to judgment in the States in which they had "minimum contacts." Pp. 215–216.

361 A. 2d 225, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined, and in Parts I–III of which BRENNAN, J., joined. POWELL, J., filed a concurring opinion, *post*, p. 217. STEVENS, J., filed an opinion concurring in the

judgment, *post,* p. 217. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post,* p. 219. REHNQUIST, J., took no part in the consideration or decision of the case.

John R. Reese argued the cause for appellants. With him on the briefs were *Edmund N. Carpenter II, R. Franklin Balotti,* and *Lynn H. Pasahow.*

Michael F. Maschio argued the cause for appellee. With him on the brief was *Joshua M. Twilley.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The controversy in this case concerns the constitutionality of a Delaware statute that allows a court of that State to take jurisdiction of a lawsuit by sequestering any property of the defendant that happens to be located in Delaware. Appellants contend that the sequestration statute as applied in this case violates the Due Process Clause of the Fourteenth Amendment both because it permits the state courts to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation, and the State of Delaware and because it authorizes the deprivation of defendants' property without providing adequate procedural safeguards. We find it necessary to consider only the first of these contentions.

I

Appellee Heitner, a nonresident of Delaware, is the owner of one share of stock in the Greyhound Corp., a business incorporated under the laws of Delaware with its principal place of business in Phoenix, Ariz. On May 22, 1974, he filed a shareholder's derivative suit in the Court of Chancery for New Castle County, Del., in which he named as defendants Greyhound, its wholly owned subsidiary Greyhound Lines, Inc.,[1] and 28 present or former officers or directors of one or

[1] Greyhound Lines, Inc., is incorporated in California and has its principal place of business in Phoenix, Ariz.

both of the corporations. In essence, Heitner alleged that the individual defendants had violated their duties to Greyhound by causing it and its subsidiary to engage in actions that resulted in the corporations being held liable for substantial damages in a private antitrust suit [2] and a large fine in a criminal contempt action.[3] The activities which led to these penalties took place in Oregon.

Simultaneously with his complaint, Heitner filed a motion for an order of sequestration of the Delaware property of the individual defendants pursuant to Del. Code Ann., Tit. 10, § 366 (1975).[4] This motion was accompanied by a supporting

---

[2] A judgment of $13,146,090 plus attorneys' fees was entered against Greyhound in *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 1972–3 Trade Cas. ¶ 74,824, aff'd, — F. 2d — (CA9 1977); App. 10.

[3] See *United States* v. *Greyhound Corp.*, 363 F. Supp. 525 (ND Ill. 1973) and 370 F. Supp. 881 (ND Ill.), aff'd, 508 F. 2d 529 (CA7 1974). Greyhound was fined $100,000 and Greyhound Lines $500,000.

[4] Section 366 provides:

"(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the

affidavit of counsel which stated that the individual defendants were nonresidents of Delaware. The affidavit identified the property to be sequestered as

> "common stock, 3% Second Cumulative Preferenced Stock and stock unit credits of the Defendant Greyhound Corporation, a Delaware corporation, as well as all options and all warrants to purchase said stock issued to said individual Defendants and all contractural [*sic*] obligations, all rights, debts or credits due or accrued to or for the benefit of any of the said Defendants under any type of written agreement, contract or other legal instrument of any kind whatever between any of the individual Defendants and said corporation."

The requested sequestration order was signed the day the motion was filed.[5] Pursuant to that order, the sequestrator[6]

---

cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

"(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

"(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."

[5] As a condition of the sequestration order, both the plaintiff and the sequestrator were required to file bonds of $1,000 to assure their compliance with the orders of the court. App. 24.

Following a technical amendment of the complaint, the original sequestration order was vacated and replaced by an alias sequestration order identical in its terms to the original.

[6] The sequestrator is appointed by the court to effect the sequestration. His duties appear to consist of serving the sequestration order on the

"seized" approximately 82,000 shares of Greyhound common stock belonging to 19 of the defendants,[7] and options belonging to another 2 defendants.[8] These seizures were accomplished by placing "stop transfer" orders or their equivalents on the books of the Greyhound Corp. So far as the record shows, none of the certificates representing the seized property was physically present in Delaware. The stock was considered to be in Delaware, and so subject to seizure, by virtue of Del. Code Ann., Tit. 8, § 169 (1975), which makes Delaware the situs of ownership of all stock in Delaware corporations.[9]

All 28 defendants were notified of the initiation of the suit by certified mail directed to their last known addresses and by publication in a New Castle County newspaper. The 21 defendants whose property was seized (hereafter referred to as appellants) responded by entering a special appearance for

---

named corporation, receiving from that corporation a list of the property which the order affects, and filing that list with the court. For performing those services in this case, the sequestrator received a fee of $100 under the original sequestration order and $100 under the alias order.

[7] The closing price of Greyhound stock on the day the sequestration order was issued was $14⅜. New York Times, May 23, 1974, p. 62. Thus, the value of the sequestered stock was approximately $1.2 million.

[8] Debentures, warrants, and stock unit credits belonging to some of the defendants who owned either stock or options were also sequestered. In addition, Greyhound reported that it had an employment contract with one of the defendants calling for payment of $250,000 over a 12-month period. Greyhound refused to furnish any further information on that debt on the ground that since the sums due constituted wages, their seizure would be unconstitutional. See *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). Heitner did not challenge this refusal.

The remaining defendants apparently owned no property subject to the sequestration order.

[9] Section 169 provides:

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

the purpose of moving to quash service of process and to vacate the sequestration order. They contended that the *ex parte* sequestration procedure did not accord them due process of law and that the property seized was not capable of attachment in Delaware. In addition, appellants asserted that under the rule of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), they did not have sufficient contacts with Delaware to sustain the jurisdiction of that State's courts.

The Court of Chancery rejected these arguments in a letter opinion which emphasized the purpose of the Delaware sequestration procedure:

> "The primary purpose of 'sequestration' as authorized by 10 *Del. C.* § 366 is not to secure possession of property pending a trial between resident debtors and creditors on the issue of who has the right to retain it. On the contrary, as here employed, 'sequestration' is a process used to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him in a court of equity. *Sands* v. *Lefcourt Realty Corp.,* Del. Supr., 117 A. 2d 365 (1955). It is accomplished by the appointment of a sequestrator by this Court to seize and hold property of the nonresident located in this State subject to further Court order. If the defendant enters a general appearance, the sequestered property is routinely released, unless the plaintiff makes special application to continue its seizure, in which event the plaintiff has the burden of proof and persuasion." App. 75–76.

This limitation on the purpose and length of time for which sequestered property is held, the court concluded, rendered inapplicable the due process requirements enunciated in *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972); and *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600 (1974). App. 75–76, 80, 83–85. The court also found no state-law or federal constitutional barrier to the sequestrator's reliance on Del. Code Ann., Tit. 8, § 169

(1975). App. 76–79. Finally, the court held that the statutory Delaware situs of the stock provided a sufficient basis for the exercise of *quasi in rem* jurisdiction by a Delaware court. *Id.*, at 85–87.

On appeal, the Delaware Supreme Court affirmed the judgment of the Court of Chancery. *Greyhound Corp.* v. *Heitner*, 361 A. 2d 225 (1976). Most of the Supreme Court's opinion was devoted to rejecting appellants' contention that the sequestration procedure is inconsistent with the due process analysis developed in the *Sniadach* line of cases. The court based its rejection of that argument in part on its agreement with the Court of Chancery that the purpose of the sequestration procedure is to compel the appearance of the defendant, a purpose not involved in the *Sniadach* cases. The court also relied on what it considered the ancient origins of the sequestration procedure and approval of that procedure in the opinions of this Court,[10] Delaware's interest in asserting jurisdiction to adjudicate claims of mismanagement of a Delaware corporation, and the safeguards for defendants that it found in the Delaware statute. 361 A. 2d, at 230–236.

---

[10] The court relied, 361 A. 2d, at 228, 230–231, on our decision in *Ownbey* v. *Morgan*, 256 U. S. 94 (1921), and references to that decision in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601, 610 (1975) (POWELL, J., concurring in judgment); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 679 n. 14 (1974); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 613 (1974); *Fuentes* v. *Shevin*, 407 U. S. 67, 91 n. 23 (1972); *Sniadach* v. *Family Finance Corp.*, *supra*, at 339. The only question before the Court in *Ownbey* was the constitutionality of a requirement that a defendant whose property has been attached file a bond before entering an appearance. We do not read the recent references to *Ownbey* as necessarily suggesting that *Ownbey* is consistent with more recent decisions interpreting the Due Process Clause.

Sequestration is the equity counterpart of the process of foreign attachment in suits at law considered in *Ownbey*. Delaware's sequestration statute was modeled after its attachment statute. See *Sands* v. *Lefcourt Realty Corp.*, 35 Del. Ch. 340, 344–345, 117 A. 2d 365, 367 (Sup. Ct. 1955); Folk & Moyer, Sequestration in Delaware: A Constitutional Analysis, 73 Colum. L. Rev. 749, 751–754 (1973).

Appellants' claim that the Delaware courts did not have jurisdiction to adjudicate this action received much more cursory treatment. The court's analysis of the jurisdictional issue is contained in two paragraphs:

> "There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. . . . The reason, of course, is that jurisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 Del. C. § 169 the 'situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . [is] in this State,' and that provides the initial basis for jurisdiction. Delaware may constitutionally establish situs of such shares here, . . . it has done so and the presence thereof provides the foundation for § 366 in this case. . . . On this issue we agree with the analysis made and the conclusion reached by Judge Stapleton in *U. S. Industries, Inc.* v. *Gregg,* D. Del., 348 F. Supp. 1004 (1972).[11]
>
> "We hold that seizure of the Greyhound shares is not invalid because plaintiff has failed to meet the prior contacts tests of *International Shoe.*" *Id.,* at 229.

We noted probable jurisdiction. 429 U. S. 813.[12] We reverse.

---

[11] The District Court judgment in *U. S. Industries* was reversed by the Court of Appeals for the Third Circuit. 540 F. 2d 142 (1976), cert. pending, No. 76–359. The Court of Appeals characterized the passage from the Delaware Supreme Court's opinion quoted in text as "cryptic conclusions." *Id.,* at 149.

[12] Under Delaware law, defendants whose property has been sequestered must enter a general appearance, thus subjecting themselves to *in personam* liability, before they can defend on the merits. See *Greyhound Corp.* v. *Heitner,* 361 A. 2d 225, 235–236 (1976). Thus, if the judgment below were considered not to be an appealable final judgment, 28 U. S. C. § 1257 (2), appellants would have the choice of suffering a default judgment or entering

II

The Delaware courts rejected appellants' jurisdictional challenge by noting that this suit was brought as a *quasi in rem* proceeding. Since *quasi in rem* jurisdiction is traditionally based on attachment or seizure of property present in the jurisdiction, not on contacts between the defendant and the State, the courts considered appellants' claimed lack of contacts with Delaware to be unimportant. This categorical analysis assumes the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer* v. *Neff*, 95 U. S. 714 (1878).

Pennoyer was an ejectment action brought in federal court under the diversity jurisdiction. Pennoyer, the defendant in that action, held the land under a deed purchased in a sheriff's sale conducted to realize on a judgment for attorney's fees obtained against Neff in a previous action by one Mitchell. At the time of Mitchell's suit in an Oregon State court, Neff was a nonresident of Oregon. An Oregon statute allowed service by publication on nonresidents who had property in the State,[13] and Mitchell had used that procedure to bring Neff

---

a general appearance and defending on the merits. This case is in the same posture as was *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 485 (1975):

"The [Delaware] Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the [Delaware] court erroneously upheld the statute, there should be no trial at all."

Accordingly, "consistent with the pragmatic approach that we have followed in the past in determining finality," *id.*, at 486, we conclude that the judgment below is final within the meaning of § 1257.

[13] The statute also required that a copy of the summons and complaint be mailed to the defendant if his place of residence was known to the plaintiff or could be determined with reasonable diligence. 95 U. S., at 718. Mitchell had averred that he did not know and could not determine Neff's address, so that the publication was the only "notice" given. *Id.*, at 717.

before the court. The United States Circuit Court for the District of Oregon, in which Neff brought his ejectment action, refused to recognize the validity of the judgment against Neff in Mitchell's suit, and accordingly awarded the land to Neff.[14] This Court affirmed.

Mr. Justice Field's opinion for the Court focused on the territorial limits of the States' judicial powers. Although recognizing that the States are not truly independent sovereigns, Mr. Justice Field found that their jurisdiction was defined by the "principles of public law" that regulate the relationships among independent nations. The first of those principles was "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." The second was "that no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.*, at 722. Thus, "in virtue of the State's jurisdiction over the property of the non-resident situated within its limits," the state courts "can inquire into that non-resident's obligations to its own citizens . . . to the extent necessary to control the disposition of the property." *Id.*, at 723. The Court recognized that if the conclusions of that inquiry were adverse to the nonresident property owner, his interest in the property would be affected. *Ibid.* Similarly, if the defendant consented to the jurisdiction of the state courts or was personally served within the State, a judgment could affect his interest in property outside the State. But any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power. A judgment resulting from such an attempt, Mr. Justice Field concluded, was not only unen-

[14] The Federal Circuit Court based its ruling on defects in Mitchell's affidavit in support of the order for service by publication and in the affidavit by which publication was proved. *Id.*, at 720. Mr. Justice Field indicated that if this Court had confined itself to considering those rulings, the judgment would have been reversed. *Id.*, at 721.

forceable in other States,[15] but was also void in the rendering State because it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment. *Id.*, at 732–733. See also, *e. g., Freeman* v. *Alderson,* 119 U. S. 185, 187–188 (1886).

This analysis led to the conclusion that Mitchell's judgment against Neff could not be validly based on the State's power over persons within its borders, because Neff had not been personally served in Oregon, nor had he consensually appeared before the Oregon court. The Court reasoned that even if Neff had received personal notice of the action, service of process outside the State would have been ineffectual since the State's power was limited by its territorial boundaries. Moreover, the Court held, the action could not be sustained on the basis of the State's power over property within its borders because that property had not been brought before the court by attachment or any other procedure prior to judgment.[16] Since the judgment which authorized the sheriff's sale was therefore invalid, the sale transferred no title. Neff regained his land.

From our perspective, the importance of *Pennoyer* is not its result, but the fact that its principles and corollaries derived from them became the basic elements of the constitu-

---

[15] The doctrine that one State does not have to recognize the judgment of another State's courts if the latter did not have jurisdiction was firmly established at the time of *Pennoyer*. See, *e. g., D'Arcy* v. *Ketchum,* 11 How. 165 (1851); *Boswell's Lessee* v. *Otis,* 9 How. 336 (1850); *Kibbe* v. *Kibbe,* 1 Kirby 119 (Conn. Super. Ct. 1786).

[16] Attachment was considered essential to the state court's jurisdiction for two reasons. First, attachment combined with substituted service would provide greater assurance that the defendant would actually receive notice of the action than would publication alone. Second, since the court's jurisdiction depended on the defendant's ownership of property in the State and could be defeated if the defendant disposed of that property, attachment was necessary to assure that the court had jurisdiction when the proceedings began and continued to have jurisdiction when it entered judgment. 95 U. S., at 727–728.

tional doctrine governing state-court jurisdiction. See, *e. g.*, Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241 (hereafter Hazard). As we have noted, under *Pennoyer* state authority to adjudicate was based on the jurisdiction's power over either persons or property. This fundamental concept is embodied in the very vocabulary which we use to describe judgments. If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated *"in personam"* and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called *"in rem"* or *"quasi in rem."* The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.[17] In *Pennoyer*'s terms, the owner is affected only "indirectly" by an *in rem* judgment adverse to his interest in the property subject to the court's disposition.

By concluding that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," 95 U. S., at 720, *Pennoyer* sharply limited the availability of *in personam* jurisdiction over defendants not resident in the forum State. If a nonresident defendant could not be found in a State, he could not be sued there. On the other hand, since the State in which property

---

[17] "A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. Restatement, Judgments, 5–9." *Hanson* v. *Denckla,* 357 U. S. 235, 246 n. 12 (1958).

As did the Court in *Hanson,* we will for convenience generally use the term *"in rem"* in place of *"in rem* and *quasi in rem."*

was located was considered to have exclusive sovereignty over that property, *in rem* actions could proceed regardless of the owner's location. Indeed, since a State's process could not reach beyond its borders, this Court held after *Pennoyer* that due process did not require any effort to give a property owner personal notice that his property was involved in an *in rem* proceeding. See, *e. g., Ballard* v. *Hunter,* 204 U. S. 241 (1907); *Arndt* v. *Griggs,* 134 U. S. 316 (1890); *Huling* v. *Kaw Valley R. Co.,* 130 U. S. 559 (1889).

The *Pennoyer* rules generally favored nonresident defendants by making them harder to sue. This advantage was reduced, however, by the ability of a resident plaintiff to satisfy a claim against a nonresident defendant by bringing into court any property of the defendant located in the plaintiff's State. See, *e. g.,* Zammit, Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?, 49 St. John's L. Rev. 668, 670 (1975). For example, in the well-known case of *Harris* v. *Balk,* 198 U. S. 215 (1905), Epstein, a resident of Maryland, had a claim against Balk, a resident of North Carolina. Harris, another North Carolina resident, owed money to Balk. When Harris happened to visit Maryland, Epstein garnished his debt to Balk. Harris did not contest the debt to Balk and paid it to Epstein's North Carolina attorney. When Balk later sued Harris in North Carolina, this Court held that the Full Faith and Credit Clause, U. S. Const., Art. IV, § 1, required that Harris' payment to Epstein be treated as a discharge of his debt to Balk. This Court reasoned that the debt Harris owed Balk was an intangible form of property belonging to Balk, and that the location of that property traveled with the debtor. By obtaining personal jurisdiction over Harris, Epstein had "arrested" his debt to Balk, 198 U. S., at 223, and brought it into the Maryland court. Under the structure established by *Pennoyer,* Epstein was then entitled to proceed against that debt to vindicate his claim against Balk, even though Balk himself was not subject to the juris-

diction of a Maryland tribunal.[18] See also, *e. g., Louisville & N. R. Co.* v. *Deer,* 200 U. S. 176 (1906); *Steele* v. *G. D. Searle & Co.,* 483 F. 2d 339 (CA5 1973), cert. denied, 415 U. S. 958 (1974).

Pennoyer itself recognized that its rigid categories, even as blurred by the kind of action typified by *Harris,* could not accommodate some necessary litigation. Accordingly, Mr. Justice Field's opinion carefully noted that cases involving the personal status of the plaintiff, such as divorce actions, could be adjudicated in the plaintiff's home State even though the defendant could not be served within that State. 95 U. S., at 733–735. Similarly, the opinion approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State. *Id.,* at 735–736; see *Lafayette Ins. Co.* v. *French,* 18 How. 404 (1856). This

---

[18] The Court in *Harris* limited its holding to States in which the principal defendant (Balk) could have sued the garnishee (Harris) if he had obtained personal jurisdiction over the garnishee in that State. 198 U. S., at 222–223, 226. The Court explained:

"The importance of the fact of the right of the original creditor to sue his debtor in the foreign State, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff, in such proceeding in the foreign State is able to sue out the attachment and attach the debt due from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee, and therefore if such creditor himself had the right to commence suit to recover the debt in the foreign State his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the State where the attachment was sued out permits it." *Id.,* at 226.

The problem with this reasoning is that unless the plaintiff has obtained a judgment establishing his claim against the principal defendant, see, *e. g., Baltimore & O. R. Co.* v. *Hostetter,* 240 U. S. 620 (1916), his right to "represent" the principal defendant in an action against the garnishee is at issue. See Beale, The Exercise of Jurisdiction *in Rem* to Compel Payment of a Debt, 27 Harv. L. Rev. 107, 118–120 (1913).

basis for *in personam* jurisdiction over foreign corporations was later supplemented by the doctrine that a corporation doing business in a State could be deemed "present" in the State, and so subject to service of process under the rule of *Pennoyer*. See, *e. g., International Harvester Co.* v. *Kentucky,* 234 U. S. 579 (1914); *Philadelphia & Reading R. Co.* v. *McKibbin,* 243 U. S. 264 (1917). See generally Note, Developments in the Law, State-Court Jurisdiction, 73 Harv. L. Rev. 909, 919–923 (1960) (hereafter Developments).

The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to *in personam* actions under *Pennoyer,* required further moderation of the territorial limits on jurisdictional power. This modification, like the accommodation to the realities of interstate corporate activities, was accomplished by use of a legal fiction that left the conceptual structure established in *Pennoyer* theoretically unaltered. Cf. *Olberding* v. *Illinois Central R. Co.,* 346 U. S. 338, 340–341 (1953). The fiction used was that the out-of-state motorist, who it was assumed could be excluded altogether from the State's highways, had by using those highways appointed a designated state official as his agent to accept process. See *Hess* v. *Pawloski,* 274 U. S. 352 (1927). Since the motorist's "agent" could be personally served within the State, the state courts could obtain *in personam* jurisdiction over the nonresident driver.

The motorists' consent theory was easy to administer since it required only a finding that the out-of-state driver had used the State's roads. By contrast, both the fictions of implied consent to service on the part of a foreign corporation and of corporate presence required a finding that the corporation was "doing business" in the forum State. Defining the criteria for making that finding and deciding whether they were met absorbed much judicial energy. See, *e. g., International Shoe*

Co. v. *Washington,* 326 U. S., at 317–319. While the essentially quantitative tests which emerged from these cases purported simply to identify circumstances under which presence or consent could be attributed to the corporation, it became clear that they were in fact attempting to ascertain "what dealings make it just to subject a foreign corporation to local suit." *Hutchinson* v. *Chase & Gilbert,* 45 F. 2d 139, 141 (CA2 1930) (L. Hand, J.). In *International Shoe,* we acknowledged that fact.

The question in *International Shoe* was whether the corporation was subject to the judicial and taxing jurisdiction of Washington. Mr. Chief Justice Stone's opinion for the Court began its analysis of that question by noting that the historical basis of *in personam* jurisdiction was a court's power over the defendant's person. That power, however, was no longer the central concern:

> "But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken* v. *Meyer,* 311 U. S. 457, 463." 326 U. S., at 316.

Thus, the inquiry into the State's jurisdiction over a foreign corporation appropriately focused not on whether the corporation was "present" but on whether there have been

> "such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *Id.,* at 317.

Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.*, at 319.[19]

Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.[20] The immediate effect of this departure from *Pennoyer*'s conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants. See, *e. g.*, Green, Jurisdictional Reform in California,

---

[19] As the language quoted indicates, the *International Shoe* Court believed that the standard it was setting forth governed actions against natural persons as well as corporations, and we see no reason to disagree. See also *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222 (1957) (*International Shoe* culmination of trend toward expanding state jurisdiction over "foreign corporations and other nonresidents"). The differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the other.

[20] Nothing in *Hanson* v. *Denckla*, 357 U. S. 235 (1958), is to the contrary. The *Hanson* Court's statement that restrictions on state jurisdiction "are a consequence of territorial limitations on the power of the respective States," *id.*, at 251, simply makes the point that the States are defined by their geographical territory. After making this point, the Court in *Hanson* determined that the defendant over which personal jurisdiction was claimed had not committed any acts sufficiently connected to the State to justify jurisdiction under the *International Shoe* standard.

21 Hastings L. J. 1219, 1231–1233 (1970); Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois, 1963 U. Ill. L. F. 533; Developments 1000–1008.

No equally dramatic change has occurred in the law governing jurisdiction *in rem*. There have, however, been intimations that the collapse of the *in personam* wing of *Pennoyer* has not left that decision unweakened as a foundation for *in rem* jurisdiction. Well-reasoned lower court opinions have questioned the proposition that the presence of property in a State gives that State jurisdiction to adjudicate rights to the property regardless of the relationship of the underlying dispute and the property owner to the forum. See, *e. g., U. S. Industries, Inc.* v. *Gregg,* 540 F. 2d 142 (CA3 1976), cert. pending, No. 76–359; *Jonnet* v. *Dollar Savings Bank,* 530 F. 2d 1123, 1130–1143 (CA3 1976) (Gibbons, J., concurring); *Camire* v. *Scieszka,* 116 N. H. 281, 358 A. 2d 397 (1976); *Bekins* v. *Huish,* 1 Ariz. App. 258, 401 P. 2d 743 (1965); *Atkinson* v. *Superior Court,* 49 Cal. 2d 338, 316 P. 2d 960 (1957), appeal dismissed and cert. denied *sub nom. Columbia Broadcasting System* v. *Atkinson,* 357 U. S. 569 (1958). The overwhelming majority of commentators have also rejected *Pennoyer*'s premise that a proceeding "against" property is not a proceeding against the owners of that property. Accordingly, they urge that the "traditional notions of fair play and substantial justice" that govern a State's power to adjudicate *in personam* should also govern its power to adjudicate personal rights to property located in the State. See, *e. g.,* Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121 (1966) (hereafter Von Mehren & Trautman); Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657 (1959) (hereafter Traynor); Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L. J. 289 (1956); Developments; Hazard.

Although this Court has not addressed this argument directly, we have held that property cannot be subjected to a court's judgment unless reasonable and appropriate efforts have been made to give the property owners actual notice of the action. *Schroeder* v. *City of New York,* 371 U. S. 208 (1962); *Walker* v. *City of Hutchinson,* 352 U. S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950). This conclusion recognizes, contrary to *Pennoyer,* that an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court. *Schroeder* v. *City of New York, supra,* at 213; cf. *Continental Grain Co.* v. *Barge FBL–585,* 364 U. S. 19 (1960) (separate actions against barge and barge owner are one "civil action" for purpose of transfer under 28 U. S. C. § 1404 (a)). Moreover, in *Mullane* we held that Fourteenth Amendment rights cannot depend on the classification of an action as *in rem* or *in personam,* since that is

> "a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." 339 U. S., at 312.

It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer.*[21] We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam.*

---

[21] Cf. Restatement (Second) of Conflict of Laws § 59, Comment a (possible inconsistency between principle of reasonableness which underlies field of judicial jurisdiction and traditional rule of *in rem* jurisdiction based solely on land in State); § 60, Comment a (same as to jurisdiction based solely on chattel in State); § 68, Comment c (rule of *Harris* v. *Balk* "might be thought inconsistent with the basic principle of reasonableness") (1971).

III

The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." Restatement (Second) of Conflict of Laws § 56, Introductory Note (1971) (hereafter Restatement).[22] This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem,* the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing."[23] The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe.*

This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant,[24] it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property

---

[22] "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected." *Tyler* v. *Court of Registration,* 175 Mass. 71, 76, 55 N. E. 812, 814 (Holmes, C. J.), appeal dismissed, 179 U. S. 405 (1900).

[23] It is true that the potential liability of a defendant in an *in rem* action is limited by the value of the property, but that limitation does not affect the argument. The fairness of subjecting a defendant to state-court jurisdiction does not depend on the size of the claim being litigated. Cf. *Fuentes* v. *Shevin,* 407 U. S., at 88–90; n. 32, *infra.*

[24] This category includes true *in rem* actions and the first type of *quasi in rem* proceedings. See n. 17, *supra.*

located in the State would normally [25] indicate that he expected to benefit from the State's protection of his interest.[26] The State's strong interests in assuring the marketability of property within its borders [27] and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.[28] The presence of property may also favor jurisdiction in cases, such as suits for injury suffered on the land of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership.[29]

It appears, therefore, that jurisdiction over many types of actions which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard.[30] For the type of *quasi in rem* action typified by *Harris* v. *Balk* and the present case, however, accepting the proposed analysis would result in significant change. These are cases where

---

[25] In some circumstances the presence of property in the forum State will not support the inference suggested in text. Cf., *e. g.*, Restatement § 60, Comments c, d; Traynor 672–673; Note, The Power of a State to Affect Title in a Chattel Atypically Removed to It, 47 Colum. L. Rev. 767 (1947).

[26] Cf. *Hanson* v. *Denckla*, 357 U. S., at 253.

[27] See, *e. g.*, *Tyler* v. *Court of Registration*, *supra*.

[28] We do not suggest that these illustrations include all the factors that may affect the decision, nor that the factors we have mentioned are necessarily decisive.

[29] Cf. *Dubin* v. *Philadelphia*, 34 Pa. D. & C. 61 (1938). If such an action were brought under the *in rem* jurisdiction rather than under a long-arm statute, it would be a *quasi in rem* action of the second type. See n. 17, *supra*.

[30] Cf. Smit, The Enduring Utility of In Rem Rules: A Lasting Legacy of *Pennoyer* v. *Neff*, 43 Brooklyn L. Rev. 600 (1977). We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness. See, *e. g.*, Traynor 660–661.

the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.

Since acceptance of the *International Shoe* test would most affect this class of cases, we examine the arguments against adopting that standard as they relate to this category of litigation.[31] Before doing so, however, we note that this type of case also presents the clearest illustration of the argument in favor of assessing assertions of jurisdiction by a single standard. For in cases such as *Harris* and this one, the only role played by the property is to provide the basis for bringing the defendant into court.[32] Indeed, the express purpose of the Delaware sequestration procedure is to compel the defendant to enter a personal appearance.[33] In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible.

---

[31] Concentrating on this category of cases is also appropriate because in the other categories, to the extent that presence of property in the State indicates the existence of sufficient contacts under *International Shoe*, there is no need to rely on the property as justifying jurisdiction regardless of the existence of those contacts.

[32] The value of the property seized does serve to limit the extent of possible liability, but that limitation does not provide support for the assertion of jurisdiction. See n. 23, *supra*. In this case, appellants' potential liability under the *in rem* jurisdiction exceeds $1 million. See nn. 7, 8, *supra*.

[33] See *supra*, at 193, 194. This purpose is emphasized by Delaware's refusal to allow any defense on the merits unless the defendant enters a general appearance, thus submitting to full *in personam* liability. See n. 12, *supra*.

The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not have jurisdiction if *International Shoe* applied is that a wrongdoer

> "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit." Restatement § 66, Comment a.

Accord, Developments 955. This justification, however, does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations. Nor does it support jurisdiction to adjudicate the underlying claim. At most, it suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures,[34] as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*. See, *e. g.*, Von Mehren & Trautman 1178; Hazard 284–285; Beale, *supra*, n. 18, at 123–124. Moreover, we know of nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him.[35] The Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in all other States.[36]

---

[34] See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969).

[35] The role of *in rem* jurisdiction as a means of preventing the evasion of obligations, like the usefulness of that jurisdiction to mitigate the limitations *Pennoyer* placed on *in personam* jurisdiction, may once have been more significant. Von Mehren & Trautman 1178.

[36] Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where

It might also be suggested that allowing *in rem* jurisdiction avoids the uncertainty inherent in the *International Shoe* standard and assures a plaintiff of a forum.[37] See Folk & Moyer, *supra,* n. 10, at 749, 767. We believe, however, that the fairness standard of *International Shoe* can be easily applied in the vast majority of cases. Moreover, when the existence of jurisdiction in a particular forum under *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of "fair play and substantial justice." That cost is too high.

We are left, then, to consider the significance of the long history of jurisdiction based solely on the presence of property in a State. Although the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined, we have never held that the presence of property in a State does not automatically confer jurisdiction over the owner's interest in that property.[38] This history must be

---

the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter. Cf. n. 18, *supra.*

[37] This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff.

[38] To the contrary, in *Pennington* v. *Fourth Nat. Bank,* 243 U. S. 269, 271 (1917), we said:

"The Fourteenth Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a State possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example—is property within the State. *Chicago, Rock Island & Pacific Ry. Co.* v. *Sturm,* 174 U. S. 710. It is, indeed, the species of property which courts of the several States have most frequently applied in satisfaction of the obligations of absent debtors. *Harris* v. *Balk,* 198 U. S. 215. Substituted service on a non-resident by publication furnishes no legal basis for a judgment *in personam. Pennoyer* v. *Neff,* 95 U. S. 714. But garnishment or foreign attachment is a proceeding *quasi in rem. Freeman* v. *Alderson,* 119 U. S. 185, 187. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The

considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process, cf. *Ownbey* v. *Morgan*, 256 U. S. 94, 111 (1921), but it is not decisive. "[T]raditional notions of fair play and substantial justice" can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U. S., at 340; *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949). The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.[39]

Federal Constitution presents no obstacle to the full exercise of this power."

See also *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 193 (1941).

More recent decisions, however, contain no similar sweeping endorsements of jurisdiction based on property. In *Hanson* v. *Denckla*, 357 U. S., at 246, we noted that a state court's *in rem* jurisdiction is "[f]ounded on physical power" and that "[t]he basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State." We found in that case, however, that the property which was the basis for the assertion of *in rem* jurisdiction was not present in the State. We therefore did not have to consider whether the presence of property in the State was sufficient to justify jurisdiction. We also held that the defendant did not have sufficient contact with the State to justify *in personam* jurisdiction.

[39] It would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled.

IV

The Delaware courts based their assertion of jurisdiction in this case solely on the statutory presence of appellants' property in Delaware. Yet that property is not the subject matter of this litigation, nor is the underlying cause of action related to the property. Appellants' holdings in Greyhound do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State's courts over appellants. If it exists, that jurisdiction must have some other foundation.[40]

Appellee Heitner did not allege and does not now claim that appellants have ever set foot in Delaware. Nor does he identify any act related to his cause of action as having taken place in Delaware. Nevertheless, he contends that appellants' positions as directors and officers of a corporation chartered in Delaware [41] provide sufficient "contacts, ties, or relations," *International Shoe Co.* v. *Washington,* 326 U. S., at

---

[40] Appellants argue that our determination that the minimum-contacts standard of *International Shoe* governs jurisdiction here makes unnecessary any consideration of the existence of such contacts. Brief for Appellants 27; Reply Brief for Appellants 9. They point out that they were never personally served with a summons, that Delaware has no long-arm statute which would authorize such service, and that the Delaware Supreme Court has authoritatively held that the existence of contacts is irrelevant to jurisdiction under Del. Code Ann., Tit. 10, § 366 (1975). As part of its sequestration order, however, the Court of Chancery directed its clerk to send each appellant a copy of the summons and complaint by certified mail. The record indicates that those mailings were made and contains return receipts from at least 19 of the appellants. None of the appellants has suggested that he did not actually receive the summons which was directed to him in compliance with a Delaware statute designed to provide jurisdiction over nonresidents. In these circumstances, we will assume that the procedures followed would be sufficient to bring appellants before the Delaware courts, if minimum contacts existed.

[41] On the view we take of the case, we need not consider the significance, if any, of the fact that some appellants hold positions only with a subsidiary of Greyhound which is incorporated in California.

319, with that State to give its courts jurisdiction over appellants in this stockholder's derivative action. This argument is based primarily on what Heitner asserts to be the strong interest of Delaware in supervising the management of a Delaware corporation. That interest is said to derive from the role of Delaware law in establishing the corporation and defining the obligations owed to it by its officers and directors. In order to protect this interest, appellee concludes, Delaware's courts must have jurisdiction over corporate fiduciaries such as appellants.

This argument is undercut by the failure of the Delaware Legislature to assert the state interest appellee finds so compelling. Delaware law bases jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the State. Although the sequestration procedure used here may be most frequently used in derivative suits against officers and directors, *Hughes Tool Co.* v. *Fawcett Publications, Inc.*, 290 A. 2d 693, 695 (Del. Ch. 1972), the authorizing statute evinces no specific concern with such actions. Sequestration can be used in any suit against a nonresident,[42] see, *e. g., U. S. Industries, Inc.* v. *Gregg*, 540 F. 2d 142 (CA3 1976), cert. pending, No. 76–359 (breach of contract); *Hughes Tool Co.* v. *Fawcett Publications, Inc., supra* (same), and reaches corporate fiduciaries only if they happen to own interests in a Delaware corporation, or other property in the State. But as Heitner's failure to secure jurisdiction over seven of the defendants named in his complaint demonstrates, there is no necessary relationship between holding a position as a corporate fiduciary and owning stock or other interests in the corporation.[43] If Delaware perceived its interest in securing jurisdiction over corporate fiduciaries

---

[42] Sequestration is an equitable procedure available only in equity actions, but a similar procedure may be utilized in actions at law. See n. 10, *supra*.

[43] Delaware does not require directors to own stock. Del. Code Ann., Tit. 8, § 141 (b) (Supp. 1976).

to be as great as Heitner suggests, we would expect it to have enacted a statute more clearly designed to protect that interest.

Moreover, even if Heitner's assessment of the importance of Delaware's interest is accepted, his argument fails to demonstrate that Delaware is a fair forum for this litigation. The interest appellee has identified may support the application of Delaware law to resolve any controversy over appellants' actions in their capacities as officers and directors.[44] But we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.

> "[The State] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants]." *Hanson* v. *Denckla,* 357 U. S. 235, 254 (1958).[45]

Appellee suggests that by accepting positions as officers or directors of a Delaware corporation, appellants performed the acts required by *Hanson* v. *Denckla.* He notes that Delaware law provides substantial benefits to corporate officers and directors,[46] and that these benefits were at least in part

---

[44] In general, the law of the State of incorporation is held to govern the liabilities of officers or directors to the corporation and its stockholders. See Restatement § 309. But see Cal. Corp. Code § 2115 (West Supp. 1977). The rationale for the general rule appears to be based more on the need for a uniform and certain standard to govern the internal affairs of a corporation than on the perceived interest of the State of incorporation. Cf. *Koster* v. *Lumbermens Mutual Casualty Co.,* 330 U. S. 518, 527–528 (1947).

[45] Mr. Justice Black, although dissenting in *Hanson,* agreed with the majority that "the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment . . . ." 357 U. S., at 258.

[46] See, *e. g.,* Del. Code Ann., Tit. 8, §§ 143, 145 (1975 ed. and Supp. 1976).

the incentive for appellants to assume their positions. It is, he says, "only fair and just" to require appellants, in return for these benefits, to respond in the State of Delaware when they are accused of misusing their power. Brief for Appellee 15.

But like Heitner's first argument, this line of reasoning establishes only that it is appropriate for Delaware law to govern the obligations of appellants to Greyhound and its stockholders. It does not demonstrate that appellants have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State," *Hanson* v. *Denckla, supra,* at 253, in a way that would justify bringing them before a Delaware tribunal. Appellants have simply had nothing to do with the State of Delaware. Moreover, appellants had no reason to expect to be haled before a Delaware court. Delaware, unlike some States,[47] has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State. And "[i]t strains reason . . . to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to subject himself to Delaware's . . . jurisdiction on any cause of action." Folk & Moyer, *supra,* n. 10, at 785. Appellants, who were not required to acquire interests in Greyhound in order to hold their positions, did not by acquiring those interests surrender their right to be brought to judgment only in States with which they had had "minimum contacts."

The Due Process Clause

> "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co.* v. *Washington,* 326 U. S., at 319.

Delaware's assertion of jurisdiction over appellants in this case is inconsistent with that constitutional limitation on

[47] See, *e. g.,* Conn. Gen. Stat. Rev. § 33–322 (1976); N. C. Gen. Stat. § 55–33 (1975); S. C. Code Ann. § 33–5–70 (1977).

state power. The judgment of the Delaware Supreme Court must, therefore, be reversed.

It is so ordered.

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

MR. JUSTICE POWELL, concurring.

I agree that the principles of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), should be extended to govern assertions of *in rem* as well as *in personam* jurisdiction in a state court. I also agree that neither the statutory presence of appellants' stock in Delaware nor their positions as directors and officers of a Delaware corporation can provide sufficient contacts to support the Delaware courts' assertion of jurisdiction in this case.

I would explicitly reserve judgment, however, on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State to the extent of the value of the property. In the case of real property, in particular, preservation of the common-law concept of *quasi in rem* jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard without significant cost to "'traditional notions of fair play and substantial justice.'" *Id.,* at 316, quoting *Milliken* v. *Meyer,* 311 U. S. 457, 463 (1940).

Subject to the foregoing reservation, I join the opinion of the Court.

MR. JUSTICE STEVENS, concurring in the judgment.

The Due Process Clause affords protection against "judgments without notice." *International Shoe Co.* v. *Washington,* 326 U. S. 310, 324 (opinion of Black, J.). Throughout our history the acceptable exercise of *in rem* and *quasi in rem*

jurisdiction has included a procedure giving reasonable assurance that actual notice of the particular claim will be conveyed to the defendant.* Thus, publication, notice by registered mail, or extraterritorial personal service has been an essential ingredient of any procedure that serves as a substitute for personal service within the jurisdiction.

The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. If I visit another State, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to predictable risks.

Perhaps the same consequences should flow from the purchase of stock of a corporation organized under the laws of a foreign nation, because to some limited extent one's property and affairs then become subject to the laws of the nation of domicile of the corporation. As a matter of international law, that suggestion might be acceptable because a foreign investment is sufficiently unusual to make it appropriate to require the investor to study the ramifications of his decision. But a purchase of securities in the domestic market is an entirely different matter.

One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction. As a practical matter, the Delaware sequestration statute creates an unacceptable risk of judgment without notice. Unlike the 49 other States, Delaware treats the place of incorporation as the situs of the stock, even though both the owner and the custodian of the shares are elsewhere. Moreover, Delaware denies the defend-

*"To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." *McDonald* v. *Mabee*, 243 U. S. 90, 92.

ant the opportunity to defend the merits of the suit unless he subjects himself to the unlimited jurisdiction of the court. Thus, it coerces a defendant either to submit to personal jurisdiction in a forum which could not otherwise obtain such jurisdiction or to lose the securities which have been attached. If its procedure were upheld, Delaware would, in effect, impose a duty of inquiry on every purchaser of securities in the national market. For unless the purchaser ascertains both the State of incorporation of the company whose shares he is buying, and also the idiosyncrasies of its law, he may be assuming an unknown risk of litigation. I therefore agree with the Court that on the record before us no adequate basis for jurisdiction exists and that the Delaware statute is unconstitutional on its face.

How the Court's opinion may be applied in other contexts is not entirely clear to me. I agree with MR. JUSTICE POWELL that it should not be read to invalidate *quasi in rem* jurisdiction where real estate is involved. I would also not read it as invalidating other long-accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and the fact that their local activities might subject them to suit. My uncertainty as to the reach of the opinion, and my fear that it purports to decide a great deal more than is necessary to dispose of this case, persuade me merely to concur in the judgment.

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

I join Parts I–III of the Court's opinion. I fully agree that the minimum-contacts analysis developed in *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoyer* v. *Neff,* 95 U. S. 714 (1878). It is precisely because

the inquiry into minimum contacts is now of such overriding importance, however, that I must respectfully dissent from Part IV of the Court's opinion.

I

The primary teaching of Parts I–III of today's decision is that a State, in seeking to assert jurisdiction over a person located outside its borders, may only do so on the basis of minimum contacts among the parties, the contested transaction, and the forum State. The Delaware Supreme Court could not have made plainer, however, that its sequestration statute, Del. Code Ann., Tit. 10, § 366 (1975), does not operate on this basis, but instead is strictly an embodiment of *quasi in rem* jurisdiction, a jurisdictional predicate no longer constitutionally viable:

> "[J]urisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum." *Greyhound Corp.* v. *Heitner,* 361 A. 2d 225, 229 (1976).

This state-court ruling obviously comports with the understanding of the parties, for the issue of the existence of minimum contacts was never pleaded by appellee, made the subject of discovery, or ruled upon by the Delaware courts. These facts notwithstanding, the Court in Part IV reaches the minimum-contacts question and finds such contacts lacking as applied to appellants. Succinctly stated, once having properly and persuasively decided that the *quasi in rem* statute that Delaware admits to having enacted is invalid, the Court then proceeds to find that a minimum-contacts law that Delaware expressly *denies* having enacted also could not be constitutionally applied in this case.

In my view, a purer example of an advisory opinion is not to be found. True, appellants do not deny having received actual notice of the action in question. *Ante,* at 213 n. 40.

However, notice is but one ingredient of a proper assertion of state-court jurisdiction. The other is a statute authorizing the exercise of the State's judicial power along constitutionally permissible grounds—which henceforth means minimum contacts. As of today, § 366 is not such a law.[1] Recognizing that today's decision fundamentally alters the relevant jurisdictional ground rules, I certainly would not want to rule out the possibility that Delaware's courts might decide that the legislature's overriding purpose of securing the personal appearance in state courts of defendants would best be served by reinterpreting its statute to permit state jurisdiction on the basis of constitutionally permissible contacts rather than stock ownership. Were the state courts to take this step, it would then become necessary to address the question of whether minimum contacts exist here. But in the present posture of this case, the Court's decision of this important issue is purely an abstract ruling.

My concern with the inappropriateness of the Court's action is highlighted by two other considerations. First, an inquiry into minimum contacts inevitably is highly dependent on creating a proper factual foundation detailing the contacts between the forum State and the controversy in question. Because neither the plaintiff-appellee nor the state courts viewed such an inquiry as germane in this instance, the Court today is unable to draw upon a proper factual record in reaching its conclusion; moreover, its disposition denies appellee the normal opportunity to seek discovery on the contacts issue. Second, it must be remembered that the Court's ruling is a constitutional one and necessarily

---

[1] Indeed the Court's decision to proceed to the minimum-contacts issue treats Delaware's sequestration statute as if it were the equivalent of Rhode Island's long-arm law, which specifically authorizes its courts to assume jurisdiction to the limit permitted by the Constitution, R. I. Gen. Laws Ann. § 9–5–33 (1970), thereby necessitating judicial consideration of the frontiers of minimum contacts in every case arising under that statute.

will affect the reach of the jurisdictional laws of all 50 States. Ordinarily this would counsel restraint in constitutional pronouncements. *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring). Certainly it should have cautioned the Court against reaching out to decide a question that, as here, has yet to emerge from the state courts ripened for review on the federal issue.

II

Nonetheless, because the Court rules on the minimum-contacts question, I feel impelled to express my view. While evidence derived through discovery might satisfy me that minimum contacts are lacking in a given case, I am convinced that as a general rule a state forum has jurisdiction to adjudicate a shareholder derivative action centering on the conduct and policies of the directors and officers of a corporation chartered by that State. Unlike the Court, I therefore would not foreclose Delaware from asserting jurisdiction over appellants were it persuaded to do so on the basis of minimum contacts.

It is well settled that a derivative lawsuit as presented here does not inure primarily to the benefit of the named plaintiff. Rather, the primary beneficiaries are the corporation and its owners, the shareholders. "The cause of action which such a plaintiff brings before the court is not his own but the corporation's. . . . Such a plaintiff often may represent an important public and stockholder interest in bringing faithless managers to book." *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518, 522, 524 (1947).

Viewed in this light, the chartering State has an unusually powerful interest in insuring the availability of a convenient forum for litigating claims involving a possible multiplicity of defendant fiduciaries and for vindicating the State's substantive policies regarding the management of its domestic corporations. I believe that our cases fairly establish that

the State's valid substantive interests are important considerations in assessing whether it constitutionally may claim jurisdiction over a given cause of action.

In this instance, Delaware can point to at least three interrelated public policies that are furthered by its assertion of jurisdiction. First, the State has a substantial interest in providing restitution for its local corporations that allegedly have been victimized by fiduciary misconduct, even if the managerial decisions occurred outside the State. The importance of this general state interest in assuring restitution for its own residents previously found expression in cases that went outside the then-prevailing due process framework to authorize state-court jurisdiction over nonresident motorists who injure others within the State. *Hess* v. *Pawloski,* 274 U. S. 352 (1927); see *Olberding* v. *Illinois Central R. Co.,* 346 U. S. 338, 341 (1953). More recently, it has led States to seek and to acquire jurisdiction over nonresident tortfeasors whose purely out-of-state activities produce domestic consequences. *E. g., Gray* v. *American Radiator & Standard Sanitary Corp.,* 22 Ill. 2d 432, 176 N. E. 2d 761 (1961). Second, state courts have legitimately read their jurisdiction expansively when a cause of action centers in an area in which the forum State possesses a manifest regulatory interest. *E. g., McGee* v. *International Life Ins. Co.,* 355 U. S. 220 (1957) (insurance regulation); *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643 (1950) (blue sky laws). Only this Term we reiterated that the conduct of corporate fiduciaries is just such a matter in which the policies and interests of the domestic forum are ordinarily presumed to be paramount. *Santa Fe Industries, Inc.* v. *Green,* 430 U. S. 462, 478–480 (1977); see *Cort* v. *Ash,* 422 U. S. 66, 84–85 (1975). Finally, a State like Delaware has a recognized interest in affording a convenient forum for supervising and overseeing the affairs of an entity that is purely the creation of that State's law. For example, even following our decision in

International Shoe, New York courts were permitted to exercise complete judicial authority over nonresident beneficiaries of a trust created under state law, even though, unlike appellants here, the beneficiaries personally entered into no association whatsoever with New York. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 313 (1950); [2] cf. *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662, 671 (1915) (litigation concerning management of mortuary fund operated by locally chartered corporation rests in court of that State); *Bernheimer* v. *Converse,* 206 U. S. 516, 533 (1907) (state courts can oversee liquidation of state-chartered corporation). I, of course, am not suggesting that Delaware's varied interests would justify its acceptance of jurisdiction over any transaction touching upon the affairs of its domestic corporations. But a derivative action which raises allegations of abuses of the basic management of an institution whose existence is created by the State and whose powers and duties are defined by state law fundamentally implicates the public policies of that forum.

To be sure, the Court is not blind to these considerations. It notes that the State's interests "may support the application of Delaware law to resolve any controversy over appellants' actions in their capacities as officers and directors." *Ante,* at 215. But this, the Court argues, pertains to choice of law, not jurisdiction. I recognize that the jurisdictional and choice-of-law inquiries are not identical. *Hanson* v. *Denckla,* 357 U. S. 235, 254 (1958). But I would not compartmentalize thinking in this area quite so rigidly as it seems to me the Court does today, for both inquiries "are

---

[2] The *Mullane* Court held: "[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." 339 U. S., at 313.

often closely related and to a substantial degree depend upon similar considerations." *Id.*, at 258 (Black, J., dissenting). In either case an important linchpin is the extent of contacts between the controversy, the parties, and the forum State. While constitutional limitations on the choice of law are by no means settled, see, *e. g., Home Ins. Co.* v. *Dick,* 281 U. S. 397 (1930), important considerations certainly include the expectancies of the parties and the fairness of governing the defendants' acts and behavior by rules of conduct created by a given jurisdiction. See, *e. g.,* Restatement (Second) of Conflict of Laws § 6 (1971) (hereafter Restatement). These same factors bear upon the propriety of a State's exercising jurisdiction over a legal dispute. At the minimum, the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy.

Furthermore, I believe that practical considerations argue in favor of seeking to bridge the distance between the choice-of-law and jurisdictional inquiries. Even when a court would apply the law of a different forum,[3] as a general rule it will feel less knowledgeable and comfortable in interpretation, and less interested in fostering the policies of that foreign jurisdiction, than would the courts established by the State that provides the applicable law. See, *e. g., Gulf Oil Co.* v. *Gilbert,* 330 U. S. 501, 509 (1947); Restatement § 313, p. 347; Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657, 664 (1959). Obviously, such choice-of-law problems cannot entirely be avoided in a diverse legal system such as our own. Nonetheless, when a suitor

[3] In this case the record does not inform us whether an actual conflict is likely to arise between Delaware law and that of the likely alternative forum. Pursuant to the general rule, I assume that Delaware law probably would obtain in the foreign court. Restatement § 309.

seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction.

This case is not one where, in my judgment, this preference for jurisdiction is adequately answered. Certainly nothing said by the Court persuades me that it would be unfair to subject appellants to suit in Delaware. The fact that the record does not reveal whether they "set foot" or committed "act[s] related to [the] cause of action" in Delaware, *ante,* at 213, is not decisive, for jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum State. *E. g., McGee* v. *International Life Ins. Co., supra; Gray* v. *American Radiator & Standard Sanitary Corp., supra;* Restatement § 37. I have little difficulty in applying this principle to nonresident fiduciaries whose alleged breaches of trust are said to have substantial damaging effect on the financial posture of a resident corporation.[4] Further, I cannot understand how the existence of minimum contacts in a constitutional sense is at all affected by Delaware's failure statutorily to express an interest in controlling corporate fiduciaries. *Ante,* at 214. To me this simply demonstrates that Delaware

[4] I recognize, of course, that identifying a corporation as a resident of the chartering State is to build upon a legal fiction. In many respects, however, the law acts as if state chartering of a corporation has meaning. *E. g.,* 28 U. S. C. § 1332 (c) (for diversity purposes, a corporation is a citizen of the State of incorporation). And, if anything, the propriety of treating a corporation as a resident of the incorporating State seems to me particularly appropriate in the context of a shareholder derivative suit, for the State realistically may perceive itself as having a direct interest in guaranteeing the enforcement of its corporate laws, in assuring the solvency and fair management of its domestic corporations, and in protecting from fraud those shareholders who placed their faith in that state-created institution.

did not elect to assert jurisdiction to the extent the Constitution would allow.[5] Nor would I view as controlling or even especially meaningful Delaware's failure to exact from appellants their consent to be sued. *Ante,* at 216. Once we have rejected the jurisdictional framework created in *Pennoyer* v. *Neff,* I see no reason to rest jurisdiction on a fictional outgrowth of that system such as the existence of a consent statute, expressed or implied.[6]

I, therefore, would approach the minimum-contacts analysis differently than does the Court. Crucial to me is the fact that appellants[7] voluntarily associated themselves with the

---

[5] In fact, it is quite plausible that the Delaware Legislature never felt the need to assert direct jurisdiction over corporate managers precisely because the sequestration statute heretofore has served as a somewhat awkward but effective basis for achieving such personal jurisdiction. See, *e. g., Hughes Tool Co.* v. *Fawcett Publications, Inc.,* 290 A. 2d 693, 695 (Del. Ch. 1972): "Sequestration is most frequently resorted to in suits by stockholders against corporate directors in which recoveries are sought for the benefit of the corporation on the ground of claimed breaches of fiduciary duty on the part of directors."

[6] Admittedly, when one consents to suit in a forum, his expectation is enhanced that he may be haled into that State's courts. To this extent, I agree that consent may have bearing on the fairness of accepting jurisdiction. But whatever is the degree of personal expectation that is necessary to warrant jurisdiction should not depend on the formality of establishing a consent law. Indeed, if one's expectations are to carry such weight, then appellants here might be fairly charged with the understanding that Delaware would decide to protect its substantial interests through its own courts, for they certainly realized that in the past the sequestration law has been employed primarily as a means of securing the appearance of corporate officials in the State's courts. N. 5, *supra.* Even in the absence of such a statute, however, the close and special association between a state corporation and its managers should apprise the latter that the State may seek to offer a convenient forum for addressing claims of fiduciary breach of trust.

[7] Whether the directors of the out-of-state subsidiary should be amenable to suit in Delaware may raise additional questions. It may well require further investigation into such factors as the degree of independ-

State of Delaware, "invoking the benefits and protections of its laws," *Hanson* v. *Denckla,* 357 U. S., at 253; *International Shoe Co.* v. *Washington,* 326 U. S., at 319, by entering into a long-term and fragile relationship with one of its domestic corporations. They thereby elected to assume powers and to undertake responsibilities wholly derived from that State's rules and regulations, and to become eligible for those benefits that Delaware law makes available to its corporations' officials. *E. g.,* Del. Code Ann., Tit. 8, § 143 (1975) (interest-free loans); § 145 (1975 ed. and Supp. 1976) (indemnification). While it is possible that countervailing issues of judicial efficiency and the like might clearly favor a different forum, they do not appear on the meager record before us; [8] and, of course, we are concerned solely with "minimum" contacts, not the "best" contacts. I thus do not believe that it is unfair to insist that appellants make themselves available to suit in a competent forum that Delaware might create for vindication of its important public policies directly pertaining to appellants' fiduciary associations with the State.

---

ence in the operations of the two corporations, the interrelationship of the managers of parent and subsidiary in the actual conduct under challenge, and the reasonable expectations of the subsidiary directors that the parent State would take an interest in their behavior. Cf. *United States* v. *First Nat. City Bank,* 379 U. S. 378, 384 (1965). While the present record is not illuminating on these matters, it appears that all appellants acted largely in concert with respect to the alleged fiduciary misconduct, suggesting that overall jurisdiction might fairly rest in Delaware.

[8] And, of course, if a preferable forum exists elsewhere, a State that is constitutionally entitled to accept jurisdiction nonetheless remains free to arrange for the transfer of the litigation under the doctrine of *forum non conveniens.* See, *e. g., Broderick* v. *Rosner,* 294 U. S. 629, 643 (1935); *Gulf Oil Co.* v. *Gilbert,* 330 U. S. 501, 504 (1947).

Syllabus

WOLMAN ET AL. *v.* WALTER ET AL.

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

No. 76–496. Argued April 25, 1977—Decided June 24, 1977

Appellants, citizens and taxpayers of Ohio, brought this action against appellees, certain state officials and others, challenging the constitutionality of all but one of the provisions of Ohio Rev. Code Ann. § 3317.06 (Supp. 1976) authorizing various forms of aid to nonpublic schools, most of which are sectarian. The Ohio scheme authorizes funding for use of nonpublic schoolchildren within the district where the nonpublic school is located for the following purposes: (1) purchasing secular textbooks approved by the superintendent of public instruction for use in public schools for loan to the children or their parents, on the request of either, made to the nonpublic school (§ 3317.06 (A)); (2) supplying such standardized tests and scoring services as are used in the public schools, with nonpublic school personnel not being involved in the test drafting or scoring, and no financial aid being involved (§ 3317.06 (J)); (3) providing speech and hearing diagnostic services and diagnostic psychological services in the nonpublic schools, with the personnel (except for physicians) performing the services being local board of education employees, physicians being hired on a contract basis, and treatment to be administered on nonpublic school premises (§§ 3317.06 (D), (F)); (4) supplying to students needing specialized attention therapeutic, guidance, and remedial services by employees of the local board of education or the State Department of Health, the services to be performed only in public schools, public centers, or in mobile units located off nonpublic school premises (§§ 3317.06 (G), (H), (I), (K)); (5) purchasing and loaning to pupils or their parents upon individual request instructional materials and instructional equipment of the kind used in the public schools and that is "incapable of diversion to religious use" (§§ 3317.06 (B), (C)); and (6) providing field trip transportation and services such as are provided to public school students, special contract transportation being permissible if school district buses are unavailable (§ 3317.06 (L)). A three-judge District Court held the statute constitutional in all respects. *Held:* Those portions of § 3317.06 authorizing the State to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services are constitutional. Those por-

tions relating to instructional materials and equipment and field trip services are unconstitutional. Pp. 235–255; 255.

417 F. Supp. 1113, affirmed in part, reversed in part.

MR. JUSTICE BLACKMUN delivered the opinion of the Court with respect to Parts I, V, VI, VII, and VIII, finding that:

1. Providing diagnostic services on the nonpublic school premises will not create an impermissible risk of fostering ideological views; hence there is no need for excessive surveillance and there will not be impermissible church-state entanglement. The provision of health services to nonpublic as well as public school children does not have the primary effect of aiding religion, *Lemon* v. *Kurtzman,* 403 U. S. 602, 616–617; see also *Meek* v. *Pittenger,* 421 U. S. 349, 364, 368 n. 17. Appellants do not challenge that part of the statute authorizing physician, nursing, dental, and optometric services for nonpublic schools (§ 3317.06 (E)), and there is no basis for drawing a different conclusion with respect to diagnostic speech and hearing services and diagnostic psychological services. Diagnostic services, unlike teaching and counseling, have little or no educational content, and the limited contact that the diagnostician has with the child does not provide the same opportunity for transmitting sectarian views as does the teacher/counsel-student relationship. Sections 3317.06 (D) and (F) are constitutional. Pp. 241–244.

2. The therapeutic, guidance, and remedial services, which (including those rendered in mobile units) are to be offered only on sites that are not physically or educationally identified with the nonpublic school, will not have the impermissible effect of advancing religion. Since those services will be administered by public employees, no excessive entanglement is created. Sections 3317.06 (G), (H), (I), and (K) are constitutional. Pp. 244–248.

3. Even though the loan for instructional material and equipment is ostensibly limited to neutral and secular instructional material and equipment, it inescapably has the primary effect of providing a direct and substantial advancement of sectarian education, *Meek* v. *Pittenger, supra,* at 366. It is impossible to separate the secular education function from the sectarian, and hence the state aid in part inevitably supports the religious role of the schools. Sections 3317.06 (B) and (C) are unconstitutional. Pp. 248–251.

4. The nonpublic schools, which can control the timing and frequency of the field trips, are the recipients of the service rather than the children, and the funding of such trips (like the impermissible funding

of maps and charts in *Meek* v. *Pittenger*) is an impermissible direct aid to sectarian education, and the close supervision of nonpublic school teachers necessary to ensure secular use of field trip funds would involve excessive entanglement. *Lemon* v. *Kurtzman, supra,* at 619. Section 3317.06 (L) is unconstitutional. Pp. 252–255.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL, concluded:

1. In order to pass constitutional muster under the Establishment Clause a statute (1) must have a secular legislative purpose; (2) must have a principal or primary effect that neither advances nor inhibits religion; and (3) must not foster an excessive government entanglement with religion. See *Roemer* v. *Maryland Public Works Bd.,* 426 U. S. 736, 748; *Committee for Public Education* v. *Nyquist, supra,* at 772–773; *Lemon* v. *Kurtzman, supra,* at 612, 613. Pp. 235–236.

2. The textbook loan system is strikingly similar to the systems approved in *Board of Education* v. *Allen,* 392 U. S. 236, and *Meek* v. *Pittenger, supra,* which are followed. Section 3317.06 (A) is constitutional. Pp. 236–238.

3. The testing and scoring program, in which the State has a substantial interest to ensure that state educational standards are met, is not controlled by the nonpublic school and thus there is no direct aid to religion or need for supervision. *Levitt* v. *Committee for Public Education,* 413 U. S. 472, distinguished. Section 3317.06 (J) is constitutional. Pp. 238–241.

MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST concurred in the judgment with respect to textbooks and testing and scoring (as well as diagnostic and therapeutic services) for the reasons stated in *Meek* v. *Pittenger,* 421 U. S. 349, 387 (REHNQUIST, J., concurring in judgment in part, dissenting in part), and *Committee for Public Education* v. *Nyquist,* 413 U. S. 756, 813 (WHITE, J., dissenting). P. 255.

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, V, VI, VII, and VIII, in which STEWART and STEVENS, JJ., joined; in which as to Part I, BURGER, C. J., and BRENNAN, MARSHALL, and POWELL, JJ., also joined; in which as to Part V, BURGER, C. J., and MARSHALL and POWELL, JJ., also joined; in which as to Part VI, BURGER, C. J., and POWELL, J., also joined; in which as to Parts VII and VIII, BRENNAN and MARSHALL, JJ., also joined; and an opinion with respect to Parts II, III, and IV, in which BURGER, C. J., and STEWART and POWELL, JJ., joined. BURGER, C. J., dissented in part. BRENNAN, J., *post,* p. 255, MARSHALL, J., *post,* p. 256, and STEVENS, J.,

post, p. 264, filed opinions concurring in part and dissenting in part. POWELL, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, *post*, p. 262. WHITE and REHNQUIST, JJ., filed a statement concurring in the judgment in part and dissenting in part, *post*, p. 255.

Joshua J. Kancelbaum argued the cause for appellants. With him on the briefs were *Nelson G. Karl, Donald M. Robiner,* and *Joel M. Gora.*

Thomas V. Martin, Assistant Attorney General of Ohio, argued the cause for the state appellees. With him on the brief were *William J. Brown,* Attorney General, and *Lawrence H. Braun. David J. Young* argued the cause for appellees Grit et al. With him on the brief was *David P. Hiller.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court (Parts I, V, VI, VII, and VIII), together with an opinion (Parts II, III, and IV), in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL joined.

This is still another case presenting the recurrent issue of the limitations imposed by the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, *Meek* v. *Pittenger,* 421 U. S. 349, 351 (1975), on state aid to pupils in church-related elementary and secondary schools. Appellants are citizens and taxpayers of Ohio. They challenge all but one of the provisions of Ohio

*Briefs of *amici curiae* urging reversal were filed by *Melvin L. Wulf, Arnold Forster,* and *Meyer Eisenberg* for the Anti-Defamation League of B'Nai B'rith; and by *Leo Pfeffer* for the National Coalition for Public Education and Religious Liberty.

Thomas A. Quintrell and *Thomas V. Chema* filed a brief for 21 Ohio Independent Schools as *amici curiae* urging affirmance.

Solicitor General McCree filed a memorandum for the United States as *amicus curiae.* Briefs of *amici curiae* were filed by *W. Bernard Richland* for the city of New York; and by *Leonard J. Schwartz, Andrew M. Fishman,* and *Philip Dunson* for the State Convention of Baptists in Ohio et al.

Rev. Code Ann. § 3317.06 (Supp. 1976) which authorize various forms of aid. The appellees are the State Superintendent of Public Instruction, the State Treasurer, the State Auditor, the Board of Education of the City School District of Columbus, Ohio, and, at their request, certain representative potential beneficiaries of the statutory program. A three-judge court was convened. It held the statute constitutional in all respects. *Wolman* v. *Essex,* 417 F. Supp. 1113 (ND Ohio 1976). We noted probable jurisdiction. 429 U. S. 1037 (1977).

I

Section 3317.06 was enacted after this Court's May 1975 decision in *Meek* v. *Pittenger, supra,* and obviously is an attempt to conform to the teachings of that decision.[1] The state appellees so acknowledged at oral argument. Tr. of Oral Arg. 21. In broad outline, the statute authorizes the State to provide nonpublic school pupils with books, instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation.

The initial biennial appropriation by the Ohio Legislature for implementation of the statute was the sum of $88,800,000.[2]

---

[1] At the time *Meek* was decided, an appeal was pending before us from a District Court judgment holding constitutional the predecessor Ohio statute providing for aid to nonpublic schools. *Wolman* v. *Essex,* No. 73–292 (SD Ohio, July 1, 1974). This Court vacated that judgment and remanded the case for further consideration in light of *Meek.* 421 U. S. 982 (1975).

On remand, the District Court entered a consent order, dated November 17, 1975, declaring the predecessor statute, which by then had been repealed, violative of the First and Fourteenth Amendments, but reserving decision on the constitutionality of the successor legislation. Appellants, who were plaintiffs in the original suit, then shifted their challenge to the present, successor statute.

[2] On December 10, 1975, a single judge of the District Court entered a temporary restraining order enjoining the defendants from expending any

App. 27. Funds so appropriated are paid to the State's public school districts and are then expended by them. All disbursements made with respect to nonpublic schools have their equivalents in disbursements for public schools, and the amount expended per pupil in nonpublic schools may not exceed the amount expended per pupil in the public schools.

The parties stipulated that during the 1974–1975 school year there were 720 chartered nonpublic schools in Ohio. Of these, all but 29 were sectarian. More than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools. *Id.*, at 28–29. It was also stipulated that, if they were called, officials of representative Catholic schools would testify that such schools operate under the general supervision of the bishop of their diocese; that most principals are members of a religious order within the Catholic Church; that a little less than one-third of the teachers are members of such religious orders; that "in all probability a majority of the teachers are members of the Catholic faith"; and that many of the rooms and hallways in these schools are decorated with a Christian symbol. *Id.*, at 30–33. All such schools teach the secular subjects required to meet the State's minimum standards. The state-mandated five-hour day is expanded to include, usually, one-half hour of religious instruction. Pupils who are not members of the Catholic faith are not required to attend religion classes or to participate in religious exercises or activities, and no teacher is required to teach religious doctrine as a part of the secular courses taught in the schools. *Ibid.*

The parties also stipulated that nonpublic school officials, if called, would testify that none of the schools covered by the statute discriminate in the admission of pupils or in the hiring

---

funds or otherwise implementing any aspect of § 3317.06. Record, Doc. 10. On February 13, 1976, by consent of the parties, the three-judge court modified the restraining order to permit the defendants to expend funds necessary to purchase textbooks and lend them to pupils or their parents pursuant to § 3317.06 (A). Record, Doc. 18.

of teachers on the basis of race, creed, color, or national origin. *Id.*, at 29.[3]

The District Court concluded:

> "Although the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in *Lemon* v. *Kurtzman,* 403 U. S. 602, 615–618 . . . (1971)." 417 F. Supp., at 1116.[4]

II

The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the

---

[3] We take this to be a reading of the command of § 3317.06 which, in somewhat less clear form, provides:

"Health and remedial services and instructional materials and equipment provided for the benefit of nonpublic school pupils pursuant to this section and the admission of pupils to such nonpublic schools shall be provided without distinction as to race, creed, color, or national origin of such pupils or of their teachers."

See also 417 F. Supp. 1113, 1116.

[4] The state appellees do not argue in this case that any differences between the schools involved here and those in *Lemon* are significant. The private appellees state that "the heretofore presumed differences between elementary, secondary and higher education may need reconsideration," Brief for Appellees Grit et al. 13, but do not point out in what way any differences might be relevant. They argue instead:

"However, since church-related schools in Ohio have a religious mission and intend to retain it, we urge that the constitutionality of the Ohio program be upheld because it provides secular, neutral and nonideological assistance rather than because the schools do not fit a standard religious profile." *Id.*, at 13–14.

The institutions aided under the Ohio statute are elementary and secondary schools. The Court said in *Lemon:*

"This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly." 403 U. S., at 616.

See also *Tilton* v. *Richardson,* 403 U. S. 672, 684–689 (plurality opinion); *Roemer* v. *Maryland Public Works Bd.,* 426 U. S. 736, 764–765 (1976).

Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion. See *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976); *Committee for Public Education* v. *Nyquist,* 413 U. S. 756, 772–773 (1973); *Lemon* v. *Kurtzman,* 403 U. S. 602, 612, 613 (1971).

In the present case we have no difficulty with the first prong of this three-part test. We are satisfied that the challenged statute reflects Ohio's legitimate interest in protecting the health of its youth and in providing a fertile educational environment for all the schoolchildren of the State.[5] As is usual in our cases, the analytical difficulty has to do with the effect and entanglement criteria.

We have acknowledged before, and we do so again here, that the wall of separation that must be maintained between church and state "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon,* 403 U. S., at 614. Nonetheless, the Court's numerous precedents "have become firmly rooted," *Nyquist,* 413 U. S., at 761, and now provide substantial guidance. We therefore turn to the task of applying the rules derived from our decisions to the respective provisions of the statute at issue.

III

Textbooks

Section 3317.06 authorizes the expenditure of funds:

> "(A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for

[5] Section 3317.06 explicitly provides:

"No school district shall provide services, materials, or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity."

use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such requests shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, 'textbook' means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends."

The parties' stipulations reflect operation of the textbook program in accord with the dictates of the statute. In addition, it was stipulated:

"The secular textbooks used in nonpublic schools will be the same as the textbooks used in the public schools of the state. Common suppliers will be used to supply books to both public and nonpublic school pupils." App. 35.

"Textbooks, including book substitutes, provided under this Act shall be limited to books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group." *Id.*, at 36.

This system for the loan of textbooks to individual students bears a striking resemblance to the systems approved in *Board of Education* v. *Allen,* 392 U. S. 236 (1968), and in

Meek v. *Pittenger*, 421 U. S. 349 (1975).[6] Indeed, the only distinction offered by appellants is that the challenged statute defines "textbook" as "any book or book substitute." Appellants argue that a "book substitute" might include auxiliary equipment and materials that, they assert, may not constitutionally be loaned. See Part VII, *infra*. We find this argument untenable in light of the statute's separate treatment of instructional materials and equipment in its subsections (B) and (C), and in light of the stipulation defining textbooks as "limited to books, reusable workbooks, or manuals." Appellants claim that the stipulation shows only the intent of the Department of Education, App. 49, and that the statute is so vague as to fail to insure against sectarian abuse of the assistance programs, citing *Meek*, 421 U. S., at 372, and *Lemon*, 403 U. S., at 619. We find no grounds, however, to doubt the Board of Education's reading of the statute, or to fear that the Board is using the stipulations as a subterfuge. As read, the statute provides the same protections against abuse as were provided in the textbook programs under consideration in *Allen* and in *Meek*.

In the alternative, appellants urge that we overrule *Allen* and *Meek*. This we decline to do. Accordingly, we conclude that § 3317.06 (A) is constitutional.

IV

Testing and Scoring

Section 3317.06 authorizes expenditure of funds:

> "(J) To supply for use by pupils attending nonpublic schools within the district such standardized tests and

[6] As was the case in *Meek*, the Ohio Code provides in separate sections for the loan of textbooks to public school children and to nonpublic school children. The former is covered by Ohio Rev. Code Ann. § 3329.06 (1972). The Court observed in *Meek*: "So long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two." 421 U. S., at 360 n. 8.

scoring services as are in use in the public schools of the state."

These tests "are used to measure the progress of students in secular subjects." App. 48. Nonpublic school personnel are not involved in either the drafting or scoring of the tests. 417 F. Supp., at 1124. The statute does not authorize any payment to nonpublic school personnel for the costs of administering the tests.[7]

In *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for the expenses of teacher-prepared testing. The reasoning behind that decision was straightforward. The system was held unconstitutional because "no means are available, to assure that internally prepared tests are free of religious instruction." [8] *Id.*, at 480.

---

[7] With respect to the tests the state appellees say:

"No financial aid is involved in Ohio. The tests themselves are provided." Brief for State Appellees 8.

As summarized by the private appellees:

"The new Ohio Act has nothing to do with teacher-prepared tests. It does not reimburse schools for costs incurred in testing. No money flows to the nonpublic school or parent. It simply permits the local public school districts to send the standardized achievement test to the nonpublic schools and to arrange for the grading of those tests by the commercial publishing organizations which prepare and grade standardized achievement tests." Brief for Appellees Grit et al. 53.

Further, the statute approves expenditures only for "such standardized tests and scoring services as are in use in the public schools of the state." We read this to mean that the school districts may not expend more per pupil in providing standardized testing to the nonpublic schools than they expend in providing such testing in the public schools.

[8] "Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.

"We cannot ignore the substantial risk that these examinations, pre-

There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. *Id.*, at 479–480, n. 7. The State may require that schools that are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction, *Allen,* 392 U. S., at 245, 246, and n. 7, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled. *Levitt,* 413 U. S., at 479–480, n. 7; *Lemon,* 403 U. S., at 614. See App. 28. Cf. *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534 (1925). Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt.* Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to

---

pared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not 'assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment.' *Lemon* v. *Kurtzman,* 403 U. S., at 618. But the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *id.,* at 617, 619. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities." *Levitt,* 413 U. S., at 480.

The New York system at issue in *Levitt* provided funding for both teacher-prepared and standardized testing. The Court did not reach any issue regarding the standardized testing, for it found its funding inseparable from the unconstitutional funding of teacher-prepared testing. *Id.,* at 481.

excessive entanglement. We therefore agree with the District Court's conclusion that § 3317.06 (J) is constitutional.

V

Diagnostic Services

Section 3317.06 authorizes expenditures of funds:

> "(D) To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service.
>
> . . . . . .
>
> "(F) To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service." [9]

It will be observed that these speech and hearing and psychological diagnostic services are to be provided within the nonpublic school. It is stipulated, however, that the personnel (with the exception of physicians) who perform the services are employees of the local board of education; that physicians may be hired on a contract basis; that the purpose of these services is to determine the pupil's deficiency or need of assistance; and that treatment of any defect so found would take place off the nonpublic school premises. App. 37–38. See Part VI, *infra*.

Appellants assert that the funding of these services is constitutionally impermissible. They argue that the speech and

---

[9] Section 3317.06 also provides:

"No school district shall provide health or remedial services to nonpublic school pupils as authorized by this section unless such services are available to pupils attending the public schools within the district."

We understand this restriction to impose a quantitative as well as a qualitative limit on the aid to nonpublic schools for health and remedial services.

hearing staff might engage in unrestricted conversation with the pupil and, on occasion, might fail to separate religious instruction from secular responsibilities. They further assert that the communication between the psychological diagnostician and the pupil will provide an impermissible opportunity for the intrusion of religious influence.

The District Court found these dangers so insubstantial as not to render the statute unconstitutional. 417 F. Supp., at 1121–1122. We agree. This Court's decisions contain a common thread to the effect that the provision of health services to all schoolchildren—public and nonpublic—does not have the primary effect of aiding religion. In *Lemon* v. *Kurtzman,* the Court stated:

> "Our decisions from *Everson* [v. *Board of Education,* 330 U. S. 1 (1947),] to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, *public health services,* and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause." 403 U. S., at 616–617 (emphasis added).

See also *Meek* v. *Pittenger,* 421 U. S., at 364, 368 n. 17. Indeed, appellants recognize this fact in not challenging subsection (E) of the statute that authorizes publicly funded physician, nursing, dental, and optometric services in nonpublic schools.[10] We perceive no basis for drawing a different conclusion with respect to diagnostic speech and hearing services and diagnostic psychological services.

In *Meek* the Court did hold unconstitutional a portion of a Pennsylvania statute at issue there that authorized certain

---

[10] Section 3317.06 authorizes the local school district to expend funds:

"(E) To provide physician, nursing, dental, and optometric services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the nonpublic school pupil receiving the service."

auxiliary services—"remedial and accelerated instruction, guidance counseling and testing, speech and hearing services"—on nonpublic school premises. *Id.*, at 367. The Court noted that the teacher or guidance counselor might "fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." *Id.*, at 371. The Court was of the view that the publicly employed teacher or guidance counselor might depart from religious neutrality because he was "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Ibid.* The statute was held unconstitutional on entanglement grounds, namely, that in order to insure that the auxiliary teachers and guidance counselors remained neutral, the State would have to engage in continuing surveillance on the school premises.[11] *Id.*, at 372. See also *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 29, 40 (NJ 1973), summarily aff'd, 417 U. S. 961 (1974). The Court in *Meek* explicitly stated, however, that the provision of diagnostic speech and hearing services by Pennsylvania seemed "to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools."

[11] The Court also mentioned that the auxiliary-services program had a serious potential for generating divisive and continuing political conflict over the issue of aid to religion. 421 U. S., at 372. The Ohio diagnostic-services program, in contrast, is unlikely to have a similar effect. First, as is discussed in the text, the Ohio program is quite unlike *Meek*'s auxiliary-services program in that it is not so susceptible to the intrusion of sectarian overtones. Since it is not likely to be seen as involving aid to religion, any controversy it provokes will not focus on religion. In fact, it is hard to believe that religious controversy would be generated by the offer of uniform health services for all schoolchildren. Second, the diagnostic-services program is much more modest than the *Meek* program. Its potential for arousing political controversy is thus correspondingly reduced.

421 U. S., at 371 n. 21. The provision of such services was invalidated only because it was found unseverable from the unconstitutional portions of the statute. *Ibid.*

The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

We conclude that providing diagnostic services on the nonpublic school premises will not create an impermissible risk of the fostering of ideological views. It follows that there is no need for excessive surveillance, and there will not be impermissible entanglement. We therefore hold that §§ 3317.06 (D) and (F) are constitutional.

VI

Therapeutic Services

Sections 3317.06 (G), (H), (I), and (K) authorize expenditures of funds for certain therapeutic, guidance, and remedial services for students who have been identified as having a need for specialized attention.[12] Personnel providing the serv-

[12] The sections authorize expenditures of funds:

"(G) To provide therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the

ices must be employees of the local board of education or under contract with the State Department of Health. The services are to be performed only in public schools, in public centers, or in mobile units located off the nonpublic school premises. App. 42. The parties have stipulated: "The determination as to whether these programs would be offered in the public school, public center, or mobile unit will depend on the distance between the public and nonpublic school, the safety factors involved in travel, and the adequacy of accommodations in public schools and public centers." *Ibid.*

---

state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

"(H) To provide guidance and counseling services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

"(I) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

. . . . .

"(K) To provide programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school, or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located."

The services for the public schools must be at least equal to those offered for the nonpublic schools. See n. 9, *supra.*

Appellants concede that the provision of remedial, therapeutic, and guidance services in public schools, public centers, or mobile units is constitutional if both public and nonpublic school students are served simultaneously. Brief for Appellants 41–42, 46.[13] Their challenge is limited to the situation where a facility is used to service only nonpublic school students. They argue that any program that isolates the sectarian pupils is impermissible because the public employee providing the service might tailor his approach to reflect and reinforce the ideological view of the sectarian school attended by the children. Such action by the employee, it is claimed, renders direct aid to the sectarian institution. Appellants express particular concern over mobile units because they perceive a danger that such a unit might operate merely as an annex of the school or schools it services.

At the outset, we note that in its present posture the case does not properly present any issue concerning the use of a public facility as an adjunct of a sectarian educational enterprise. The District Court construed the statute, as do we, to authorize services only on sites that are "neither physically

[13] We believe this concession reflects appellants' understanding that the programs are not intended to influence the classroom activities in the nonpublic schools. Our Brother MARSHALL argues that certain stipulations regarding paragraph (H) announce that guidance counseling will include planning and selection of particular courses. *Post*, at 261. We agree that such involvement with the day-to-day curriculum of the parochial school would be impermissible. We, however, do not so read the stipulations. Rather, we understand them to recognize that a guidance counselor will engage in broad-scale, long-term planning of a student's career choices and the general areas of study that will further those choices. Our Brother MARSHALL also argues that the stipulations reflect an understanding that remedial service teachers under paragraph (I) will plan courses of study for use in the classroom. *Ibid.* Such a provision would pose grave constitutional questions. The stipulations, however, provide only that the remedial service teacher will keep the classroom teacher informed of the action taken. App. 49. We do not understand the stipulations to approve planning of classroom activities.

nor educationally identified with the functions of the nonpublic school." 417 F. Supp., at 1123. Thus, the services are to be offered under circumstances that reflect their religious neutrality.

We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views. In *Meek* the Court acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction and advance religious beliefs in their activities. But, as discussed in Part V, *supra,* the Court emphasized that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. 421 U. S., at 371. See also *Lemon,* 403 U. S., at 618–619. The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise.

The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek*.[14] The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers

---

[14] The purpose of the program is to aid schoolchildren, and the use of convenient local centers is a sensible way to implement the program. Although the public schools may often be used, considerations of safety, distance, and the adequacy of accommodations on occasion will justify the use of public centers or mobile units near the nonpublic school premises. *Id.,* at 42. Certainly the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community.

perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils.

Accordingly, we hold that providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion. Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. Sections 3317.06 (G), (H), (I), and (K) are constitutional.

VII

Instructional Materials and Equipment

Sections 3317.06 (B) and (C) authorize expenditures of funds for the purchase and loan to pupils or their parents upon individual request of instructional materials and instructional equipment of the kind in use in the public schools within the district and which is "incapable of diversion to religious use." [15] Section 3317.06 also provides that the materials and equipment may be stored on the premises of a nonpublic school and that publicly hired personnel who

---

[15] The sections authorize expenditures of funds:

"(B) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

"(C) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents, upon individual request, such secular, neutral and nonideological instructional equipment as is in use in the public school within the district and which is incapable of diversion to religious use and to hire clerical personnel to administer such lending program."

administer the lending program may perform their services upon the nonpublic school premises when necessary "for efficient implementation of the lending program."

Although the exact nature of the material and equipment is not clearly revealed, the parties have stipulated: "It is expected that materials and equipment loaned to pupils or parents under the new law will be similar to such former materials and equipment except that to the extent that the law requires that materials and equipment capable of diversion to religious issues will not be supplied." App. 36.[16] Equipment provided under the predecessor statute, invalidated as set forth in n. 1, *supra,* included projectors, tape recorders, record players, maps and globes, science kits, weather forecasting charts, and the like. The District Court, 417 F. Supp., at 1117, found the new statute, as now limited, constitutional because the court could not distinguish the loan of material and equipment from the textbook provisions upheld in *Meek,* 421 U. S., at 359–362, and in *Allen,* 392 U. S., at 248.

In *Meek,* however, the Court considered the constitutional validity of a direct loan to nonpublic schools of instructional material and equipment, and, despite the apparent secular nature of the goods, held the loan impermissible. MR. JUSTICE STEWART, in writing for the Court, stated:

> "The very purpose of many of those schools is to provide an integrated secular and religious education; the teach-

[16] Counsel for the private appellees suggested at oral argument that the material and equipment were further limited to those items "lendable to a pupil for individual use." Tr. of Oral Arg. 31. This assertion, however, appears to be contrary to the stipulation, App. 36, to the representation of the state appellees, Tr. of Oral Arg. 21, and to the understanding of the District Court, 417 F. Supp., at 1118. In any event, a meaningful distinction cannot be drawn between equipment used on a collective basis and that used individually. All materials and equipment must be used to supplement courses, App. 37, and their value derives from the support they provide to the collective educational enterprise.

ing process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman,* 403 U. S., at 616–617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' *Id.,* at 657 (opinion of BRENNAN, J.)." 421 U. S., at 366.

Thus, even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise.

Appellees seek to avoid *Meek* by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek.* Before *Meek* was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of *Meek,* the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.

Indeed, this conclusion is compelled by the Court's prior consideration of an analogous issue in *Committee for Public Education* v. *Nyquist,* 413 U. S. 756 (1973). There the Court considered, among others, a tuition reimbursement program

whereby New York gave low-income parents who sent their children to nonpublic schools a direct and unrestricted cash grant of $50 to $100 per child (but no more than 50% of tuition actually paid). The State attempted to justify the program, as Ohio does here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that, unlike the bus program in *Everson* v. *Board of Education,* 330 U. S. 1 (1947), and the book program in *Allen,* there "has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.' " 413 U. S., at 783, quoting *Lemon* v. *Kurtzman,* 403 U. S., at 613. The Court thus found that the grant program served to establish religion. If a grant in cash to parents is impermissible, we fail to see how a grant in kind of goods furthering the religious enterprise can fare any better.[17] Accordingly, we hold §§ 3317.06 (B) and (C) to be unconstitutional.[18]

---

[17] In many respects, *Nyquist* was a more difficult case than the present one. First, it was at least arguable in *Nyquist* that the tuition grant did not end up in the hands of the religious schools since the parent was free to spend the grant money as he chose. 413 U. S., at 785–786. No similar argument could be made here since the parties have stipulated expressly that material and equipment must be used to supplement courses. App. 37. Second, since the grant in *Nyquist* was limited to 50% of tuition, it was arguable that the grant should be seen as supporting only the secular part of the church-school enterprise. 413 U. S., at 787. An argument of that kind also could not be made here, for *Meek* makes clear that the material and equipment are inextricably connected with the church-related school's religious function.

[18] There is, as there was in *Meek,* a tension between this result and *Board of Education* v. *Allen,* 392 U. S. 236 (1968). *Allen* was premised on the view that the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses. In *Nyquist* the Court explained:

"In *Everson,* the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. 330 U. S., at 17–18. Such

VIII

Field Trips

Section 3317.06 also authorizes expenditures of funds:

> "(L) To provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district. School districts may contract with commercial transportation companies for such transportation service if school district busses are unavailable."

There is no restriction on the timing of field trips; the only restriction on number lies in the parallel the statute draws to field trips provided to public school students in the district. The parties have stipulated that the trips "would consist of visits to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students."

---

services, provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' *id.*, at 18, that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses." 413 U. S., at 781–782.

Board of Education v. *Allen* has remained law, and we now follow as a matter of *stare decisis* the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes. In more recent cases, however, we have declined to extend that presumption of neutrality to other items in the lower school setting. See *Meek*, 421 U. S., at 362–366; *Levitt*, 413 U. S., at 481–482. Compare *Nyquist*, 413 U. S., at 774–780, with *Tilton* v. *Richardson*, 403 U. S. 672 (1971). It has been argued that the Court should extend *Allen* to cover all items similar to textbooks. See *Meek*, 421 U. S., at 385 (BURGER, C. J., concurring in judgment in part and dissenting in part); *id.*, at 390–391 (REHNQUIST, J., concurring in judgment in part and dissenting in part). When faced, however, with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles announced in our subsequent cases, we choose the latter course.

App. 49. The choice of destination, however, will be made by the nonpublic school teacher from a wide range of locations.

The District Court, 417 F. Supp., at 1124–1125, held this feature to be constitutionally indistinguishable from that with which the Court was concerned in *Everson* v. *Board of Education,* 330 U. S. 1 (1947). We do not agree. In *Everson* the Court approved a system under which a New Jersey board of education reimbursed parents for the cost of sending their children to and from school, public or parochial, by public carrier. The Court analogized the reimbursement to situations where a municipal common carrier is ordered to carry all schoolchildren at a reduced rate, or where the police force is ordered to protect all children on their way to and from school. *Id.,* at 17. The critical factors in these examples, as in the *Everson* reimbursement system, are that the school has no control over the expenditure of the funds and the effect of the expenditure is unrelated to the content of the education provided. Thus, the bus fare program in *Everson* passed constitutional muster because the school did not determine how often the pupil traveled between home and school—every child must make one round trip every day—and because the travel was unrelated to any aspect of the curriculum.

The Ohio situation is in sharp contrast. First, the nonpublic school controls the timing of the trips and, within a certain range, their frequency and destinations. Thus, the schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid. See *Lemon* v. *Kurtzman,* 403 U. S., at 621. Second, although a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest and stimulating the imagination; and it ends with a

discussion of the experience. The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct. See *Meek* v. *Pittenger,* 421 U. S., at 366. In *Lemon* the Court stated:

> "We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." 403 U. S., at 618.

Funding of field trips, therefore, must be treated as was the funding of maps and charts in *Meek* v. *Pittenger, supra,* the funding of buildings and tuition in *Committee for Public Education* v. *Nyquist, supra,* and the funding of teacher-prepared tests in *Levitt* v. *Committee for Public Education, supra;* it must be declared an impermissible direct aid to sectarian education.

Moreover, the public school authorities will be unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement:

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." *Lemon* v. *Kurtzman,* 403 U. S., at 619.

See also *Roemer* v. *Maryland Public Works Bd.,* 426 U. S., at 749.

We hold § 3317.06 (L) to be unconstitutional.

IX

In summary, we hold constitutional those portions of the Ohio statute authorizing the State to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services. We hold unconstitutional those portions relating to instructional materials and equipment and field trip services.

The judgment of the District Court is therefore affirmed in part and reversed in part.

It is so ordered.

THE CHIEF JUSTICE dissents from Parts VII and VIII of the Court's opinion.

For the reasons stated in MR. JUSTICE REHNQUIST's separate opinion in *Meek* v. *Pittenger,* 421 U. S. 349 (1975), and MR. JUSTICE WHITE's dissenting opinion in *Committee for Public Education* v. *Nyquist,* 413 U. S. 756 (1973), MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST concur in the judgment with respect to textbooks, testing and scoring, and diagnostic and therapeutic services (Parts III, IV, V and VI of the opinion) and dissent from the judgment with respect to instructional materials and equipment and field trips (Parts VII and VIII of the opinion).

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

I join Parts I, VII, and VIII of the Court's opinion, and the reversal of the District Court's judgment insofar as that judgment upheld the constitutionality of Ohio Rev. Code Ann. §§ 3317.06 (B), (C), and (L) (Supp. 1976).

I dissent however from Parts II, III, and IV (plurality opinion) and Parts V and VI of the Court's opinion and the affirm-

ance of the District Court's judgment insofar as it sustained the constitutionality of §§ 3317.06 (A), (D), (F), (G), (H), (I), (J), and (K). The Court holds that Ohio has managed in these respects to fashion a statute that avoids an effect or entanglement condemned by the Establishment Clause. But "[t]he [First] Amendment nullifies sophisticated as well as simple-minded . . ." attempts to avoid its prohibitions, *Lane* v. *Wilson,* 307 U. S. 268, 275 (1939), and, in any event, ingenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to $88,800,000 (less now the sums appropriated to finance §§ 3317.06 (B) and (C) which today are invalidated) just for the initial biennium. The Court nowhere evaluates this factor in determining the compatibility of the statute with the Establishment Clause, as that Clause requires, *Everson* v. *Board of Education,* 330 U. S. 1, 16 (1947). Its evaluation, even after deduction of the amount appropriated to finance §§ 3317.06 (B) and (C), compels in my view the conclusion that a divisive political potential of unusual magnitude inheres in the Ohio program. This suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment's prohibition against laws "respecting an establishment of religion." *Meek* v. *Pittenger,* 421 U. S. 349, 373–385 (1975) (BRENNAN, J., concurring); *Lemon* v. *Kurtzman,* 403 U. S. 602, 640–642 (1971) (Douglas, J., concurring); *Everson* v. *Board of Education, supra,* at 16.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I join Parts I, V, VII, and VIII of the Court's opinion. For the reasons stated below, however, I am unable to join the remainder of the Court's opinion or its judgment upholding the constitutionality of Ohio Rev. Code Ann. §§ 3317.06 (A), (G), (H), (I), (J), and (K) (Supp. 1976).

The Court upholds the textbook loan provision, § 3317.06 (A), on the precedent of *Board of Education* v. *Allen,* 392

U. S. 236 (1968). *Ante,* at 236–238. It also recognizes, however, that there is "a tension" between *Allen* and the reasoning of the Court in *Meek* v. *Pittenger,* 421 U. S. 349 (1975). I would resolve that tension by overruling *Allen.* I am now convinced that *Allen* is largely responsible for reducing the "high and impregnable" wall between church and state erected by the First Amendment, *Everson* v. *Board of Education,* 330 U. S. 1, 18 (1947), to "a blurred, indistinct, and variable barrier," *Lemon* v. *Kurtzman,* 403 U. S. 602, 614 (1971), incapable of performing its vital functions of protecting both church and state.

In *Allen,* we upheld a textbook loan program on the assumption that the sectarian school's twin functions of religious instruction and secular education were separable. 392 U. S., at 245–248. In *Meek,* we flatly rejected that assumption as a basis for allowing a State to loan secular teaching materials and equipment to such schools:

> "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . . Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' [*Lemon* v. *Kurtzman, supra,* at 657] (opinion of BRENNAN, J.)." 421 U. S., at 366.

Thus, although *Meek* upheld a textbook loan program on the strength of *Allen,* it left the rationale of *Allen* undamaged only if there is a constitutionally significant difference between a loan of pedagogical materials directly to a sectarian school and a loan of those materials to students for use in sectarian

schools. As the Court convincingly demonstrates, *ante,* at 249–250, there is no such difference.

Allen has also been undercut by our recognition in *Lemon* that "the divisive political potential" of programs of aid to sectarian schools is one of the dangers of entanglement of church and state that the First Amendment was intended to forestall. 403 U. S., at 622–624. We were concerned in *Lemon* with the danger that the need for annual appropriations of larger and larger sums would lead to "[p]olitical fragmentation and divisiveness on religious lines." *Id.,* at 623. This danger exists whether the appropriations are made to fund textbooks, other instructional supplies, or, as in *Lemon,* teachers' salaries. As MR. JUSTICE BRENNAN has noted, *Allen* did not consider the significance of the potential for political divisiveness inherent in programs of aid to sectarian schools. *Meek* v. *Pittenger, supra,* at 378 (concurring in part and dissenting in part).

It is, of course, unquestionable that textbooks are central to the educational process.[1] Under the rationale of *Meek,* therefore, they should not be provided by the State to sectarian schools[2] because "[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole." 421 U. S., at 366. It is

---

[1] See *Meek* v. *Pittenger,* 421 U. S., at 384 (BRENNAN, J., concurring in part and dissenting in part); *Board of Education* v. *Allen,* 392 U. S., at 252 (Black, J., dissenting).

[2] Although the texts are formally loaned to the students or their parents, the reality is that they are provided to the school. The school has the power to choose the books to be provided, since the statute defines "textbook" as " 'any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.' " *Ante,* at 237. The school will distribute "loan request" forms to the students, collect them, and submit them to the public authority which provides the books. The record is silent as to whether the books will be returned to the public authority or stored at the school during the summer recess.

also unquestionable that the cost of textbooks is certain to be substantial. Under the rationale of *Lemon,* therefore, they should not be provided because of the dangers of political "divisiveness on religious lines." I would, accordingly, overrule *Board of Education* v. *Allen* and hold unconstitutional § 3317.06 (A).[3]

By overruling *Allen,* we would free ourselves to draw a line between acceptable and unacceptable forms of aid that would be both capable of consistent application and responsive to the concerns discussed above. That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance.[4] General welfare programs, in contrast to programs of educational assistance, do not provide "[s]ubstantial aid to the educational function" of schools,[5] 421 U. S., at 366, whether secular or sectarian, and therefore do not provide the kind of assistance to the religious

---

[3] Our experience with *Allen* bears out the warning of THE CHIEF JUSTICE:

"[I]n constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop." *Lemon* v. *Kurtzman,* 403 U. S. 602, 624 (1971).

The tension between *Allen* and *Meek* indicates that we must soon either remove the platform or take the plunge into new realms of state assistance to sectarian institutions.

[4] This is the line advocated by Mr. Justice Black, dissenting in *Board of Education* v. *Allen, supra,* at 250–254. Mr. Justice Black was the author of the Court's opinion in *Everson* v. *Board of Education,* 330 U. S. 1 (1947), on which the opinion in *Allen* was based.

[5] To some extent, of course, any program that improves the general well-being of a student may assist his education. The distinction is between programs that help the school educate a student and welfare programs that may have the effect of making a student more receptive to being educated.

mission of sectarian schools we found impermissible in *Meek*. Moreover, because general welfare programs do not assist the sectarian functions of denominational schools, there is no reason to expect that political disputes over the merits of those programs will divide the public along religious lines.

In addition to § 3317.06 (A), which authorizes the textbook loan program, paragraphs (B), (C), and (L), held unconstitutional by the Court, clearly fall on the wrong side of the constitutional line I propose. Those paragraphs authorize, respectively, the loan of instructional materials and equipment and the provision of transportation for school field trips. There can be no contention that these programs provide anything other than educational assistance.

I also agree with the Court that the services authorized by paragraphs (D), (F), and (G) are constitutionally permissible. Those services are speech and hearing diagnosis, psychological diagnosis, and psychological and speech and hearing therapy. Like the medical, nursing, dental, and optometric services authorized by paragraph (E) and not challenged by appellants, these services promote the children's health and well-being, and have only an indirect and remote impact on their educational progress.[6]

The Court upholds paragraphs (H), (I), and (K), which it groups with paragraph (G), under the rubric of "therapeutic services." *Ante*, at 244–248. I cannot agree that the services

---

[6] Appellants argue that these programs are impermissible because the diagnostic and therapeutic personnel may be influenced to indoctrinate the pupils with whom they deal in the tenets of the sect that runs the sectarian school. I agree that if this danger were real, it would militate strongly against upholding these services. Appellants do not explain, however, why it is any more likely that a hearing test will become an occasion for indoctrination than that an eye chart will be used to deliver religious messages. (Appellants do not challenge the provision of diagnostic optometric services.) While constitutional adjudication must be sensitive to the danger of subtle abuses, it cannot be based on fear of imaginable but totally implausible evils.

authorized by these three paragraphs should be treated like the psychological services provided by paragraph (G). Paragraph (H) authorizes the provision of guidance and counseling services. The parties stipulated that the functions to be performed by the guidance and counseling personnel would include assisting students in "developing meaningful educational and career goals," and "planning school programs of study." In addition, these personnel will discuss with parents "their children's a) educational progress and needs, b) course selections, c) educational and vocational opportunities and plans, and d) study skills." The counselors will also collect and organize information for use by parents, teachers, and students. App. 45–46. This description makes clear that paragraph (H) authorizes services that would directly support the educational programs of sectarian schools. It is, therefore, in violation of the First Amendment.

Paragraphs (I) and (K) provide remedial services and programs for disabled children. The stipulation of the parties indicates that these paragraphs will fund specialized teachers who will both provide instruction themselves and create instructional plans for use in the students' regular classrooms. *Id.*, at 47–48. These "therapeutic services" are clearly intended to aid the sectarian schools to improve the performance of their students in the classroom. I would not treat them as if they were programs of physical or psychological therapy.

Finally, the Court upholds paragraph (J), which provides standardized tests and scoring services, on the ground that these tests are clearly nonideological and that the State has an interest in assuring that the education received by sectarian school students meets minimum standards. I do not question the legitimacy of this interest, and if Ohio required students to obtain specified scores on certain tests before being promoted or graduated, I would agree that it could administer those tests to sectarian school students to ensure that its standards were being met. The record indicates, however, only that the tests

"are used to measure the progress of students in secular subjects." *Id.*, at 48. It contains no indication that the measurements are taken to assure compliance with state standards rather than for internal administrative purposes of the schools. To the extent that the testing is done to serve the purposes of the sectarian schools rather than the State, I would hold that its provision by the State violates the First Amendment.

MR. JUSTICE POWELL, concurring in part, concurring in the judgment in part, and dissenting in part.

Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek* v. *Pittenger*, 421 U. S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek* itself would have to be overruled, along with *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and even perhaps *Everson* v. *Board of Education*, 330 U. S. 1 (1947). The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. See *Walz* v. *Tax Comm'n,* 397 U. S. 664, 668 (1970). The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable. Most of the Court's decision today follows in this tradition, and I join Parts I through VI of the opinion.

With respect to Part VII, I concur only in the judgment. I am not persuaded, nor did *Meek* hold, that all loans of secular instructional material and equipment "inescapably [have] the primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Ante,* at 250. If that were the case, then *Meek* surely would have overruled *Allen.* Instead the Court reaffirmed *Allen,* thereby necessarily holding that at least some such loans of materials helpful in the educational process are permissible—so long as the aid is incapable of diversion to religious uses, cf. *Committee for Public Education* v. *Nyquist,* 413 U. S. 756 (1973), and so long as the materials are lent to the individual students or their parents and not to the sectarian institutions. Here the statute is expressly limited to materials incapable of diversion. Therefore the relevant question is whether the materials are such that they are "furnished for the use of *individual* students and at their request." *Allen, supra,* at 244 n. 6 (emphasis added).

The Ohio statute includes some materials such as wall maps,

charts, and other classroom paraphernalia for which the concept of a loan to individuals is a transparent fiction. A loan of these items is indistinguishable from forbidden "direct aid" to the sectarian institution itself, whoever the technical bailee. See *Meek, supra,* at 362–366. Since the provision makes no attempt to separate these instructional materials from others meaningfully lent to individuals, I agree with the Court that it cannot be sustained under our precedents. But I would find no constitutional defect in a properly limited provision lending to the individuals themselves only appropriate instructional materials and equipment similar to that customarily used in public schools.

I dissent as to Part VIII, concerning field trip transportation. The Court writes as though the statute funded the salary of the teacher who takes the students on the outing. In fact only the bus and driver are provided for the limited purpose of physical movement between the school and the secular destination of the field trip. As I find this aid indistinguishable in principle from that upheld in *Everson, supra,* I would sustain the District Court's judgment approving this part of the Ohio statute.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

The distinction between the religious and the secular is a fundamental one. To quote from Clarence Darrow's argument in the *Scopes* case:

> "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve." [1]

---

[1] Tr. of Oral Arg. 7, *Scopes* v. *State,* 154 Tenn. 105, 289 S. W. 363 (1927) (on file with Clarence Darrow Papers, Library of Congress) (punctuation corrected).

The line drawn by the Establishment Clause of the First Amendment must also have a fundamental character. It should not differentiate between direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other. For that reason, rather than the three-part test described in Part II of the plurality's opinion, I would adhere to the test enunciated for the Court by Mr. Justice Black:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson* v. *Board of Education,* 330 U. S. 1, 16.

Under that test, a state subsidy of sectarian schools is invalid regardless of the form it takes. The financing of buildings, field trips, instructional materials, educational tests, and schoolbooks are all equally invalid.[2] For all give aid to the school's educational mission, which at heart is religious.[3] On the other hand, I am not prepared to exclude the possibility

---

[2] In view of the acknowledged tension, *ante,* at 251–252, n. 18, between *Board of Education* v. *Allen,* 392 U. S. 236, and *Meek* v. *Pittenger,* 421 U. S. 349, the doctrine of *stare decisis* cannot foreclose an eventual choice between two inconsistent precedents.

[3] It is the sectarian school itself, not the legislation, that is "entangled" with religion:

"The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman,* 403 U. S., at 616–617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' *Id.,* at 657 (opinion of BRENNAN, J.). See generally Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1688–1689." *Meek* v. *Pittenger, supra,* at 366.

that some parts of the statute before us may be administered in a constitutional manner. The State can plainly provide public health services to children attending nonpublic schools. The diagnostic and therapeutic services described in Parts V and VI of the Court's opinion may fall into this category.[4] Although I have some misgivings on this point, I am not prepared to hold this part of the statute invalid on its face.

This Court's efforts to improve on the *Everson* test have not proved successful. "Corrosive precedents" [5] have left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways of achieving forbidden ends. See *Committee for Public Education* v. *Nyquist,* 413 U. S. 756, 785, 797. What should be a "high and impregnable" wall between church and state,[6] has been reduced to a " 'blurred, indistinct, and variable barrier,' " *ante,* at 236. The result has been, as Clarence Darrow predicted, harm to "both the public and the religion that [this aid] would pretend to serve." [7]

Accordingly, I dissent from Parts II, III, and IV of the plurality's opinion.

---

[4] Like my Brother BRENNAN, *ante,* at 256, I am concerned by the amount of money appropriated under this statute. But since the Court has invalidated so much of the program, only a much smaller amount may still be involved.

[5] *Everson,* 330 U. S., at 63 (Rutledge, J., dissenting).

[6] *Id.,* at 18.

[7] In *Roemer* v. *Maryland Public Works Bd.,* 426 U. S. 736, 775, I spoke of "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it." This case presents an apt illustration. To qualify for aid, sectarian schools must relinquish their religious exclusivity. As the District Court noted, the statute provides aid "to pupils attending only those nonpublic schools whose admission policies make no distinction as to . . . creed . . . of either its pupils or of its teachers." *Wolman* v. *Essex,* 417 F. Supp. 1113, 1116. Similarly, sectarian schools will be under pressure to avoid textbooks which present a religious perspective on secular subjects, so as to obtain the free textbooks provided by the State.

Syllabus

MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.

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

No. 76–447. Argued March 22, 1977—Decided June 27, 1977

After this Court in *Milliken* v. *Bradley*, 418 U. S. 717 (*Milliken I*), determined that an interdistrict remedy for *de jure* segregation in the Detroit school system exceeded the constitutional violation, and remanded the case for formulation of a decree, the District Court promptly ordered submission of desegregation plans limited to the Detroit school system. After extensive hearings the court, in addition to a plan for student assignment, included in its decree educational components, proposed by the Detroit School Board, in the areas of reading, in-service teacher training, testing, and counseling. The court determined that these components were necessary to carry out desegregation, and directed that the costs were to be borne by the Detroit School Board and the State. The Court of Appeals affirmed the District Court's order concerning the implementation of and cost sharing for the four educational components. *Held:*

1. As part of a desegregation decree a district court can, if the record warrants, order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of *de jure* segregation. Here the District Court, acting on substantial evidence in the record, did not abuse its discretion in approving a remedial plan going beyond pupil assignments and adopting specific programs that had been proposed by local school authorities. Pp. 279–288.

(a) "In fashioning and effectuating [desegregation] decrees, the courts will be guided by equitable principles," *Brown* v. *Board of Education*, 349 U. S. 294, 300, and in applying such principles, federal courts are to focus on the nature and scope of the violation, the fact that the decree must be *remedial*, and the interests of state and local authorities in managing their own affairs. Pp. 280–281.

(b) Where, as here, a constitutional violation has been found, the remedy does not "exceed" the violation if the remedy is tailored to cure the "*condition* that offends the Constitution," *Milliken I*, *supra*, at 738, *i. e.*, Detroit's *de jure* segregated school system. Matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation, *United States* v. *Mont-*

gomery County Board of Education, 395 U. S. 225, and federal courts have, over the years, required inclusion of remedial programs in desegregation plans, when the record warrants, to remedy the direct consequences of dual school systems. Pp. 281–288.

2. The requirement that the state defendants pay one-half the additional costs attributable to the four educational components does not violate the Eleventh Amendment, since the District Court was authorized to provide prospective equitable relief, even though such relief requires the expenditure of money by the State. *Edelman* v. *Jordan,* 415 U. S. 651, 668. Pp. 288–290.

3. The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal court's judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment, nor are principles of federalism abrogated by the decree. P. 291.

540 F. 2d 229, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. MARSHALL, J., filed a concurring opinion, *post,* p. 291. POWELL, J., filed an opinion concurring in the judgment, *post,* p. 292.

Frank J. Kelley, Attorney General of Michigan, argued the cause for petitioners. With him on the briefs were *Robert A. Derengoski,* Solicitor General, and *Gerald F. Young, George L. McCargar,* and *Mary Kay Bottecelli,* Assistant Attorneys General.

Nathaniel R. Jones argued the cause for Bradley respondents. With him on the brief were *Paul R. Dimond, Louis R. Lucas, Robert A. Murphy, William E. Caldwell,* and *Richard S. Kohn. George T. Roumell, Jr.,* argued the cause for respondent Detroit Board of Education. With him on the brief were *Jane K. Souris* and *Thomas M. J. Hathaway.**

**Robert P. Kane,* Attorney General, and *Jeffrey Cooper* and *J. Justin Blewitt,* Deputy Attorneys General, filed a brief for the Commonwealth of Pennsylvania as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Acting Solicitor General Friedman, Assistant Attorney General Days, Deputy Solicitor General Wallace, Brian K. Landsberg,* and *Judith E. Wolf* for the United

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

We granted certiorari in this case to consider two questions concerning the remedial powers of federal district courts in school desegregation cases, namely, whether a District Court can, as part of a desegregation decree, order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of *de jure* segregation, and whether, consistent with the Eleventh Amendment, a federal court can require state officials found responsible for constitutional violations to bear part of the costs of those programs.

I

This case is before the Court for the second time, following our remand, *Milliken* v. *Bradley,* 418 U. S. 717 (1974) (*Milliken I*); it marks the culmination of seven years of litigation over *de jure* school segregation in the Detroit public school system. For almost six years, the litigation has focused exclusively on the appropriate remedy to correct official acts of racial discrimination committed by both the Detroit School Board and the State of Michigan. No challenge is now made by the State or the local school board to the prior findings of *de jure* segregation.[1]

States; and by *Herbert Teitelbaum, Robert Hermann,* and *Vilma Martinez* for Aspira of America, Inc., et al.

John L. Hill, Attorney General, *David M. Kendall,* First Assistant Attorney General, and *Thomas W. Choate,* Special Assistant Attorney General, filed a brief for the State of Texas as *amicus curiae.*

[1] The violations of the Detroit Board of Education, which included the improper use of optional attendance zones, racially based transportation of schoolchildren, improper creation and alteration of attendance zones, grade structures, and feeder school patterns, are described in the District Court's initial "Ruling on Issue of Segregation." 338 F. Supp. 582, 587–588 (ED Mich. 1971). The District Court further found that "[t]he State and its agencies . . . have acted directly to control and maintain the pattern of segregation in the Detroit schools." *Id.,* at 589. Indeed, when the Detroit School Board attempted to voluntarily

A

In the first stage of the remedy proceedings, which we reviewed in *Milliken I, supra,* the District Court, after reviewing several "Detroit-only" desegregation plans, concluded that an interdistrict plan was required to " 'achieve the greatest degree of actual desegregation . . . [so that] no school, grade or classroom [would be] substantially disproportionate to the overall pupil racial composition.' " 345 F. Supp. 914, 918 (ED Mich. 1972), quoted in *Milliken I, supra,* at 734. On those premises, the District Court ordered the parties to submit plans for "metropolitan desegregation" and appointed a nine-member panel to formulate a desegregation plan, which would encompass a "desegregation area" consisting of 54 school districts.

In June 1973, a divided Court of Appeals, sitting en banc, upheld, 484 F. 2d 215 (CA6), the District Court's determination that a metropolitanwide plan was essential to bring about what the District Court had described as "the greatest degree of actual desegregation . . . ." 345 F. Supp., at 918. We reversed, holding that the order exceeded appropriate limits of federal equitable authority as defined in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 24 (1971), by concluding that "as a matter of substantive constitutional right, [a] particular degree of racial balance" is required, and by subjecting other school districts, uninvolved with and unaffected by any constitutional violations, to the court's remedial powers. *Milliken I, supra.* Proceeding from the *Swann* standard "that the scope of the remedy is determined by the nature and extent of the constitutional violation," we held that, on the record before us, there was no interdistrict viola-

---

initiate an intradistrict remedy to ameliorate the effect of the past segregation practices, the Michigan Legislature enacted a law forbidding the carrying out of this remedy. Those conclusions as to liability were affirmed on appeal, 484 F. 2d 215, 221–241 (CA6 1973), and were not challenged in this Court. 418 U. S. 717 (1974) (*Milliken I*).

tion calling for an interdistrict remedy. Because the District Court's "metropolitan remedy" went beyond the constitutional violation, we remanded the case for further proceedings "leading to prompt formulation of a decree directed to eliminating the segregation found to exist in the Detroit city schools, a remedy which has been delayed since 1970." 418 U. S., at 753.[2]

B

Due to the intervening death of Judge Stephen J. Roth, who had presided over the litigation from the outset, the case on remand was reassigned to Judge Robert E. DeMascio. Judge DeMascio promptly ordered respondent Bradley and the Detroit Board to submit desegregation plans limited to the Detroit school system. On April 1, 1975, both parties submitted their proposed plans. Respondent Bradley's plan was limited solely to pupil reassignment; the proposal called for extensive transportation of students to achieve the plan's ultimate goal of assuring that every school within the district reflected, within 15 percentage points, the racial ratio of the school district as a whole.[3] In contrast to respondent Brad-

[2] Separate opinions were filed in *Milliken I*. MR. JUSTICE STEWART, concurring, stated that the metropolitanwide remedy contemplated by the District Court was "in error for the simple reason that the remedy . . . was not commensurate with the constitutional violation found." 418 U. S., at 754. Dissenting opinions were filed by Mr. Justice Douglas, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL. The dissenting opinions took the position, in brief, that the remedy was appropriate, given the State's undisputed constitutional violations, the control of local education by state authorities, and the manageability of any necessary administrative modifications to effectuate a metropolitanwide remedy.

[3] According to the then most recent statistical data, as of September 27, 1974, 257,396 students were enrolled in the Detroit public schools, a figure which reflected a decrease of 28,116 students in the system since the 1960–1961 school year. 402 F. Supp. 1096, 1106–1107 (1975). Of this total student population, 71.5% were Negro and 26.4% were white. The remaining 2.1% were composed of students of other ethnic groups. *Id.*, at 1106.

ley's proposal, the Detroit Board's plan provided for sufficient pupil reassignment to eliminate "racially identifiable white elementary schools," while ensuring that "every child will spend at least a portion of his education in either a neighborhood elementary school or a neighborhood junior and senior high school." 402 F. Supp. 1096, 1116 (1975). By eschewing racial ratios for each school, the Board's plan contemplated transportation of fewer students for shorter distances than respondent Bradley's proposal.[4]

In addition to student reassignments, the Board's plan called for implementation of 13 remedial or compensatory programs, referred to in the record as "educational components." These compensatory programs, which were proposed in addition to the plan's provisions for magnet schools and vocational high schools, included three of the four components at issue in this case—in-service training for teachers and administrators, guidance and counseling programs, and revised testing procedures.[5] Pursuant to the District Court's direction, the State Board of Education[6] on April 21, 1975,

[4] Under respondent Bradley's proposed plan in the remand proceedings, 71,349 students would have required transportation; the Detroit Board's plan, however, provided for transportation of 51,000 students, 20,000 less than the Bradley plan. The Board's plan, which the District Court found infirm because of an impermissible use of "arbitrary" racial quotas, contemplated achieving a 40%–60% representation of Negro students in the identifiably white schools, while leaving untouched in terms of pupil reassignment schools in three of the Detroit system's eight regions. Those three regions, which were located in the central city, were overwhelmingly Negro in racial composition.

[5] The fourth component, a remedial reading and communications skills program, was proposed later and was endorsed by the Bradley respondents in a critique of the Detroit Board's proposed plan. See n. 7, *infra*. The Board's plan also called for the following "educational components": school-community relations, parental involvement, student rights and responsibilities, accountability, curriculum design, bilingual education, multiethnic curriculum, and cocurricular activities. 402 F. Supp., at 1118.

[6] In addition to the State Board of Education, the state defendants

submitted a critique of the Detroit Board's desegregation plan; in its report, the State Board opined that, although "[i]t is possible that none of the thirteen 'quality education' components is essential . . . to correct the constitutional violation . . . ," 8 of the 13 proposed programs nonetheless deserved special consideration in the desegregation setting. Of particular relevance here, the State Board said:

> "Within the context of effectuating a pupil desegregation plan, the in-service training [and] guidance and counseling . . . components appear to deserve special emphasis." 4 Record, Doc. 591, pp. 38–39.[7]

After receiving the State Board's critique,[8] the District Court conducted extensive hearings on the two plans over a two-month period. Substantial testimony was adduced with respect to the proposed educational components, including testimony by petitioners' expert witnesses.[9] Based on this

---

include the Governor of Michigan, the Attorney General, the State Superintendent of Public Instruction, and the State Treasurer.

[7] Two months later, the Bradley respondents also submitted a critique of the Board's plan; while criticizing the Board's proposed educational components on several grounds, respondents nonetheless suggested that a remedial reading program was particularly needed in a desegregation plan. See n. 5, *supra*. The Bradley respondents claimed more generally that the Board's plan failed to inform the court of the then-current extent of such programs or components in the school system and that the plan failed to assess "the relatedness of the particular component to desegregation."

[8] The other state defendants likewise filed objections to the Detroit Board's plan on April 21, 1975. They contended, in brief, that the court's remedy was limited to pupil reassignment to achieve desegregation; hence, the proposed inclusion of educational components was, in their view, excessive.

[9] For example, Dr. Charles P. Kearney, Associate Superintendent for Research and School Administration for the Michigan Department of Education, gave the following testimony:

"[T]he State Board and the Superintendent indicated that guidance

evidence and on reports of court-appointed experts, the District Court on August 11, 1975, approved, in principle, the Detroit Board's inclusion of remedial and compensatory educational components in the desegregation plan.[10]

> "We find that the majority of the educational components included in the Detroit Board plan are essential for a school district undergoing desegregation. While it is true that the delivery of quality desegregated educational services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation." 402 F. Supp., at 1118.

The District Court expressly found that the two components of testing and counseling, as then administered in Detroit's

---

and counselling appeared to deserve special emphasis in a desegregation effort.

"We support the notion of a guidance and counselling effort. We think it certainly does have a relationship in the desegregation effort, we think it deserves special emphasis." 30 Record, Tr. 126, 129.

As to in-service training, Dr. Kearney testified that, in his opinion, such a program was required to implement effectively a desegregation plan in Detroit. *Id.*, at 179, 187. Finally, even though the State's critique did not deem testing as deserving of "special emphasis" in the desegregation plan, Dr. Kearney stated as follows:

"Q: [D]o you see a direct relationship between testing and desegregation?

"A: If test results were inappropriately used, . . . I think it would have certainly a discriminatory affect [*sic*] and it would have a negative affect [*sic*], I'm sure on any kind of desegregation plan being implemented." *Id.*, at 184.

[10] The District Court did not approve of all aspects of the Detroit Board's plan. With respect to educational components, the court said: "The plan as submitted . . . does not distinguish between those components that *are necessary to the successful implementation of a desegregation plan and those that are not.*" 402 F. Supp., at 1118. (Emphasis supplied.)

schools, were infected with the discriminatory bias of a segregated school system:

> "In a segregated setting many techniques deny equal protection to black students, such as discriminatory testing [and] discriminatory counseling . . . ." *Ibid.*

The District Court also found that, to make desegregation work, it was necessary to include remedial reading programs and in-service training for teachers and administrators:

> "In a system undergoing desegregation, teachers will require orientation and training for desegregation. . . . Additionally, we find that . . . comprehensive reading programs are essential . . . to a successful desegregative effort." *Ibid.*

Having established these general principles, the District Court formulated several "remedial guidelines" to govern the Detroit Board's development of a final plan. Declining "to substitute its authority for the authority of elected state and local officials to decide which educational components are beneficial to the school community," *id.*, at 1145, the District Judge laid down the following guidelines with respect to each of the four educational components at issue here:

(a) *Reading.* Concluding that "[t]here is no educational component more directly associated with the process of desegregation than reading," *id.*, at 1138, the District Court directed the General Superintendent of Detroit's schools to institute a remedial reading and communications skills program "[t]o eradicate the effects of past discrimination . . . ." *Ibid.* The content of the required program was not prescribed by the court; rather, formulation and implementation of the program was left to the Superintendent and to a committee to be selected by him.

(b) *In-Service Training.* The court also directed the Detroit Board to formulate a comprehensive in-service teacher

training program, an element "essential to a system undergoing desegregation." *Id.*, at 1139. In the District Court's view, an in-service training program for teachers and administrators, to train professional and instructional personnel to cope with the desegregation process in Detroit, would tend to ensure that all students in a desegregated system would be treated equally by teachers and administrators able, by virtue of special training, to cope with special problems presented by desegregation, and thereby facilitate Detroit's conversion to a unitary system.

(c) *Testing.* Because it found, based on record evidence, that Negro children "are especially affected by biased testing procedures," the District Court determined that, frequently, minority students in Detroit were adversely affected by discriminatory testing procedures. Unless the school system's tests were administered in a way "free from racial, ethnic and cultural bias," the District Court concluded that Negro children in Detroit might thereafter be impeded in their educational growth. *Id.*, at 1142. Accordingly, the court directed the Detroit Board and the State Department of Education to institute a testing program along the lines proposed by the local school board in its original desegregation plan. *Ibid.*

(d) *Counseling and Career Guidance.* Finally, the District Court addressed what expert witnesses had described as psychological pressures on Detroit's students in a system undergoing desegregation. Counselors were required, the court concluded, both to deal with the numerous problems and tensions arising in the change from Detroit's dual system, and, more concretely, to counsel students concerning the new vocational and technical school programs available under the plan through the cooperation of state and local officials.[11]

---

[11] In contrast to their position before the District Court with respect to the four educational components at issue here, the state defendants,

Nine months later, on May 11, 1976, the District Court entered its final order. Emphasizing that it had "been careful to order only what is essential for a school district undergoing desegregation," App. to Pet. for Cert. 117a, the court ordered the Detroit Board and the state defendants to institute comprehensive programs as to the four educational components by the start of the September 1976 school term. The cost of these four programs, the court concluded, was to be equally borne by the Detroit School Board and the State. To carry out this cost sharing, the court directed the local board to calculate its highest budget allocation in any prior year for the several educational programs and, from that base, any excess cost attributable to the desegregation plan was to be paid equally by the two groups of defendants responsible for prior constitutional violations, *i. e.*, the Detroit Board and the state defendants.

C

On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court's order concerning the implementation of and cost sharing for the four educational components.[12] 540 F. 2d 229 (1976). The Court of Appeals ex-

---

through the State Board of Education, voluntarily entered into a stipulation with the Detroit Board on February 24, 1976, under which the State agreed to provide 50% of the construction costs of five vocational centers which the District Court ordered to be established. App. to Pet. for Cert. 139a–141a.

[12] The Court of Appeals disapproved, however, of the District Court's failure to include three of Detroit's eight regions in the pupil assignment plan. See n. 4, *supra*. The Court of Appeals remanded the case to the District Court for further consideration of the three omitted regions, but declined to set forth guidelines, given the practicabilities of the situation, for the District Court's benefit. Further proceedings were deemed appropriate, however, particularly since the Bradley respondents had previously been granted leave to file a second amended complaint to allege interdistrict violations on the part of the state and local defendants.

pressly approved the District Court's findings as to the necessity for these compensatory programs:

> "This finding . . . is not clearly erroneous, but to the contrary is supported by ample evidence.
>
> "The need for in-service training of the educational staff and development of nondiscriminatory testing is obvious. The former is needed to insure that the teachers and administrators will be able to work effectively in a desegregated environment. The latter is needed to insure that students are not evaluated unequally because of built-in bias in the tests administered in formerly segregated schools.
>
> "We agree with the District Court that the reading and counseling programs are essential to the effort to combat the effects of segregation.
>
> . . . . .
>
> "Without the reading and counseling components, black students might be deprived of the motivation and achievement levels which the desegregation remedy is designed to accomplish." *Id.*, at 241.

After reviewing the record, the Court of Appeals confirmed that the District Court relied largely on the Detroit School Board in formulating the decree:

> "This is not a situation where the District Court 'appears to have acted solely according to its own notions of good educational policy unrelated to the demands of the Constitution.' " *Id.*, at 241–242, quoting *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 521 F. 2d 465, 483 (CA10 1975), cert. denied, 423 U. S. 1066 (1976).

After upholding the remedial-components portion of the plan, the Court of Appeals went on to affirm the District Court's allocation of costs between the state and local officials. Analyzing this Court's decision in *Edelman* v. *Jordan,* 415 U. S. 651 (1974), which reaffirmed the rule that the Eleventh

Amendment bars an ordinary suit for money damages against the State without its consent, the Court of Appeals held:

> "[The District Court's order] imposes no money judgment on the State of Michigan for past de jure segregation practices. Rather, the order is directed toward the State defendants as a part of a *prospective* plan to comply with a constitutional requirement to eradicate all vestiges of de jure segregation." 540 F. 2d, at 245. (Emphasis supplied.)

The Court of Appeals remanded the case for further consideration of the three central city regions untouched by the District Court's pupil reassignment plan. See n. 12, *supra.*

The state defendants then sought review in this Court, challenging only those portions of the District Court's comprehensive remedial order dealing with the four educational components and with the State's obligation to defray the costs of those programs. We granted certiorari, 429 U. S. 958 (1976), and we affirm.

II

This Court has not previously addressed directly the question whether federal courts can order remedial education programs as part of a school desegregation decree.[13] However, the general principles governing our resolution of this issue are well settled by the prior decisions of this Court. In the first case concerning federal courts' remedial powers in eliminating *de jure* school segregation, the Court laid down the basic rule which governs to this day: "In fashioning and

[13] In *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), the Court affirmed an order of the District Court which included a requirement of in-service training programs. 318 F. Supp. 786, 803 (WDNC 1970). However, this Court's opinion did not treat the precise point. In *Keyes* v. *School Dist. No. 1, Denver, Colo.,* 413 U. S. 189 (1973), the Court expressly avoided passing on the District Court's holding that called for, among other things, "compensatory education in an integrated environment." *Id.,* at 214 n. 18.

effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Brown* v. *Board of Education,* 349 U. S. 294, 300 (1955) (*Brown II*).

A

Application of those "equitable principles," we have held, requires federal courts to focus upon three factors. In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S., at 16. The remedy must therefore be related to "the *condition* alleged to offend the Constitution . . . ." *Milliken I,* 418 U. S., at 738.[14] Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.,* at 746.[15] Third, the federal courts in devising a remedy must

[14] Thus, the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more. *Pasadena Bd. of Education* v. *Spangler,* 427 U. S. 424, 434 (1976); *Milliken I,* 418 U. S., at 763 (WHITE, J., dissenting); *Swann, supra,* at 26. An order contemplating the " 'substantive constitutional right [to a] particular degree of racial balance or mixing' " is therefore infirm as a matter of law. *Spangler, supra,* at 434.

[15] Since the ultimate objective of the remedy is to make whole the victims of unlawful conduct, federal courts are authorized to implement plans that promise "realistically to work *now*." *Green* v. *County School Bd.,* 391 U. S. 430, 439 (1968). At the same time, the Court has carefully stated that, to ensure that federal-court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given to burdensome effects resulting from a decree that could "either risk the health of the children or significantly impinge on the educational process." *Swann, supra,* at 30–31. Our function, as stated by MR. JUSTICE WHITE, is "to desegregate an *educational* system in which the races have been kept apart, without, at the same time, losing sight of the central *educational* function of the schools." *Milliken I, supra,* at 764 (dissenting opinion). (Emphasis in original.) In a word,

take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. In *Brown II* the Court squarely held that "[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems . . . ." 349 U. S., at 299. (Emphasis supplied.) If, however, "school authorities fail in their affirmative obligations . . . judicial authority may be invoked." *Swann, supra,* at 15. Once invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Ibid.*

B

In challenging the order before us, petitioners do not specifically question that the District Court's mandated programs are designed, as nearly as practicable, to restore the schoolchildren of Detroit to the position they would have enjoyed absent constitutional violations by state and local officials. And, petitioners do not contend, nor could they, that the prerogatives of the Detroit School Board have been abrogated by the decree, since of course the Detroit School Board itself proposed incorporation of these programs in the first place. Petitioners' sole contention is that, under *Swann,* the District Court's order exceeds the scope of the constitutional violation. Invoking our holding in *Milliken I,* petitioners claim that, since the constitutional violation found by the District Court was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments. This contention misconceives the principle petitioners seek to invoke, and we reject their argument.

The well-settled principle that the nature and scope of

"[t]here are undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases." 418 U. S., at 763. Cf. *Austin Independent School Dist.* v. *United States,* 429 U. S. 990, 991 (1976) (POWELL, J., concurring).

the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, see *Pasadena Bd. of Education* v. *Spangler,* 427 U. S. 424 (1976), or if they are imposed upon governmental units that were neither involved in nor affected by the constitutional violation, as in *Milliken I, supra. Hills* v. *Gautreaux,* 425 U. S. 284, 292–296 (1976). But where, as here, a constitutional violation has been found, the remedy does not "exceed" the violation if the remedy is tailored to cure the " 'condition that offends the Constitution.' " *Milliken I, supra,* at 738. (Emphasis supplied.)

The "condition" offending the Constitution is Detroit's *de jure* segregated school system, which was so pervasively and persistently segregated that the District Court found that the need for the educational components flowed directly from constitutional violations by both state and local officials. These specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive *de jure* racial segregation.

In the first case invalidating a *de jure* system, a unanimous Court, speaking through Mr. Chief Justice Warren, held in *Brown* v. *Board of Education,* 347 U. S. 483, 495 (1954) (*Brown I*): "Separate educational facilities are inherently unequal." And in *United States* v. *Montgomery County Bd. of Educ.,* 395 U. S. 225 (1969), the Court concerned itself not with pupil assignment, but with the desegregation of faculty and staff as part of the process of dismantling a dual

system. In doing so, the Court, there speaking through Mr. Justice Black, focused on the reason for judicial concerns going beyond pupil assignment: "The dispute . . . deals with faculty and staff desegregation, a goal that we have recognized to be an important aspect of *the basic task of achieving a public school system wholly free from racial discrimination.*" *Id.*, at 231–232. (Emphasis supplied.)

Montgomery County therefore stands firmly for the proposition that matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation. Similarly, in *Swann* we reaffirmed the principle laid down in *Green* v. *County School Bd.*, 391 U. S. 430 (1968), that "existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system." 402 U. S., at 18. In a word, discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system.

C

In light of the mandate of *Brown I* and *Brown II*, federal courts have, over the years, often required the inclusion of remedial programs in desegregation plans to overcome the inequalities inherent in dual school systems. In 1966, for example, the District Court for the District of South Carolina directed the inclusion of remedial courses to overcome the effects of a segregated system:

> "Because the weaknesses of a dual school system may have already affected many children, the court would be remiss in its duty if any desegregation plan were approved which did not provide for remedial education courses. They shall be included in the plan." *Miller* v. *School*

District 2, Clarendon County, S. C., 256 F. Supp. 370, 377 (1966).

In 1967, the Court of Appeals for the Fifth Circuit, then engaged in overseeing the desegregation of numerous school districts in the South, laid down the following requirement in an en banc decision:

> "The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools *to overcome past inadequacies* in their education." *United States* v. *Jefferson County Board of Education,* 380 F. 2d 385, 394, cert. denied, 389 U. S. 840 (1967). (Emphasis supplied.)

See also *Stell* v. *Board of Public Education of Savannah,* 387 F. 2d 486, 492, 496–497 (CA5 1967); *Hill* v. *Lafourche Parish School Board,* 291 F. Supp. 819, 823 (ED La. 1967); *Redman* v. *Terrebonne Parish School Board,* 293 F. Supp. 376, 379 (ED La. 1967); *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458, 489 (MD Ala. 1967); *Graves* v. *Walton County Board of Education,* 300 F. Supp. 188, 200 (MD Ga. 1968), aff'd, 410 F. 2d 1153 (CA5 1969). Two years later, the Fifth Circuit again adhered to the rule that district courts could properly seek to overcome the built-in inadequacies of a segregated educational system:

> "The trial court concluded that the school board must establish remedial programs to assist students who previously attended all-Negro schools when those students transfer to formerly all-white schools . . . . The *remedial programs . . . are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged* by the inequities and discrimination inherent in the dual school system. The requirement that the School Board institute remedial programs so far as they are feasible is a proper exercise of the court's discretion." *Plaquemines Parish School Bd.* v.

United States, 415 F. 2d 817, 831 (1969). (Emphasis supplied.)

In the same year the United States District Court for the Eastern District of Louisiana required school authorities to come forward with a remedial educational program as part of a desegregation plan. " 'The defendants shall provide remedial education programs which permit students . . . who have previously attended all-Negro schools to overcome past inadequacies in their education.' " *Smith* v. *St. Tammany Parish School Board,* 302 F. Supp. 106, 110 (1969), aff'd, 448 F. 2d 414 (CA5 1971). See also *Moore* v. *Tangipahoa Parish School Board,* 304 F. Supp. 244, 253 (ED La. 1969); *Moses* v. *Washington Parish School Board,* 302 F. Supp. 362, 367 (ED La. 1969).

In the 1970's, the pattern has been essentially the same. The Fifth Circuit has, when the fact situation warranted, continued to call for remedial education programs in desegregation plans. *E. g., United States* v. *Texas,* 447 F. 2d 441, 448 (1971), stay denied *sub nom. Edgar* v. *United States,* 404 U. S. 1206 (1971) (Black, J., in chambers). To that end, the approved plan in *United States* v. *Texas* required:

> "[C]urriculum offerings and programs shall include specific educational programs designed to compensate minority group children for unequal educational opportunities resulting from past or present racial and ethnic isolation . . . ." 447 F. 2d, at 448.[16]

See also *George* v. *O'Kelly,* 448 F. 2d 148, 150 (CA5 1971). And, as school desegregation litigation emerged in other

[16] In denying the stay application, Mr. Justice Black was untroubled by the underlying order of the District Court:

"It would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch." 404 U. S., at 1207.

regions of the country, federal courts have likewise looked in part to remedial programs, when the record supported an order to that effect. See, *e. g., Morgan* v. *Kerrigan,* 401 F. Supp. 216, 235 (Mass. 1975), aff'd, 530 F. 2d 401 (CA1), cert. denied *sub nom. White* v. *Morgan,* 426 U. S. 935 (1976); *Hart* v. *Community School Board of Brooklyn,* 383 F. Supp. 699, 757 (EDNY 1974), aff'd, 512 F. 2d 37 (CA2 1975); cf. *Booker* v. *Special School Dist. 1, Minneapolis, Minn.,* 351 F. Supp. 799 (Minn. 1972).[17]

Finally, in addition to other remedial programs, which could, if circumstances warranted, include programs to remedy deficiencies, particularly in reading and communications skills, federal courts have expressly ordered special in-service training for teachers, see, *e. g., United States* v. *Missouri,* 523 F. 2d 885, 887 (CA8 1975); *Smith* v. *St. Tammany Parish School Board, supra,* at 110; *Moore* v. *Tangipahoa Parish School Board, supra,* at 253, and have altered or even suspended testing programs employed by school systems undergoing desegregation. See, *e. g., Singleton* v. *Jackson Municipal Separate School Dist.,* 419 F. 2d 1211, 1219 (CA5 1969), cert. denied, 396 U. S. 1032 (1970); *Lemon* v. *Bossier Parish School Board,* 444 F. 2d 1400, 1401 (CA5 1971); *Arvizu* v. *Waco Independent School Dist.,* 373 F. Supp. 1264 (WD Tex. 1973), rev'd in part on other issues, 495 F. 2d 499 (CA5 1974).

Our reference to these cases is not to be taken as necessarily approving holdings not reviewed by this Court. However, they demonstrate that the District Court in the case now

[17] We do not, of course, pass upon the correctness of the particular holdings of cases we did not review. We simply note that these holdings support the broader proposition that, when the record warrants, remedial programs may, in the exercise of equitable discretion, be appropriate remedies to treat the condition that offends the Constitution. Of course, it must always be shown that the constitutional violation caused the condition for which remedial programs are mandated.

before us did not break new ground in approving the School Board's proposed plan. Quite the contrary, acting on abundant evidence in this record, the District Court approved a remedial plan going beyond mere pupil assignments, as expressly approved by *Swann* and *Montgomery County.* In so doing, the District Court was adopting specific programs proposed by local school authorities, who must be presumed to be familiar with the problems and the needs of a system undergoing desegregation.[18]

We do not, of course, imply that the order here is a blueprint for other cases. That cannot be; in school desegregation cases, "[t]here is no universal answer to complex problems . . . ; there is obviously no one plan that will do the job in every case." *Green,* 391 U. S., at 439. On this record, however, we are bound to conclude that the decree before us was aptly tailored to remedy the consequences of the constitutional violation. Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. They are likely to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. This is not peculiar to race; in this setting, it can affect any children who, as a group, are isolated by force of law from the mainstream. Cf. *Lau* v. *Nichols,* 414 U. S. 563 (1974).

Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by inde-

[18] This Court has from the beginning looked to the District Courts in desegregation cases, familiar as they are with the local situations coming before them, to appraise the efforts of local school authorities to carry out their constitutionally required duties. "Because of their proximity to local conditions . . . the [federal district] courts which originally heard these cases can best perform this judicial appraisal." *Brown II,* 349 U. S., at 299.

pendent measures. In short, speech habits acquired in a segregated system do not vanish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task. This is what the District Judge in the case drew from the record before him as to the consequences of Detroit's *de jure* system, and we cannot conclude that the remedies decreed exceeded the scope of the violations found.

Nor do we find any other reason to believe that the broad and flexible equity powers of the court were abused in this case. The established role of local school authorities was maintained inviolate, and the remedy is indeed remedial. The order does not punish anyone, nor does it impair or jeopardize the educational system in Detroit.[19] The District Court, in short, was true to the principle laid down in *Brown II:*

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." 349 U. S., at 300 (footnotes omitted).

III

Petitioners also contend that the District Court's order, even if otherwise proper, violates the Eleventh Amendment. In their view, the requirement that the state defendants pay one-half the additional costs attributable to the four educa-

[19] Indeed, the District Judge took great pains to devise a workable plan with a minimum of pupil transportation. For example, he sought carefully to eliminate burdensome transportation of Negro children to predominantly Negro schools and to prevent the disruption, by massive pupil reassignment, of racially mixed schools in stable neighborhoods which had successfully undergone residential and educational change.

tional components is, "in practical effect, indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials." Brief for Petitioners 34. Arguing from this premise, petitioners conclude that the "award" in this case is barred under this Court's holding in *Edelman* v. *Jordan,* 415 U. S. 651 (1974).

Edelman involved a suit for money damages against the State, as well as for prospective injunctive relief.[20] The suit was brought by an individual who claimed that Illinois officials had improperly withheld disability benefit payments from him and from the members of his class. Applying traditional Eleventh Amendment principles, we held that the suit was barred to the extent the suit sought "the award of an *accrued* monetary liability . . ." which represented "retroactive payments." *Id.,* at 663–664. (Emphasis supplied.) Conversely, the Court held that the suit was proper to the extent it sought "payment of state funds . . . as a necessary consequence of compliance *in the future* with a substantive federal-question determination . . . ." *Id.,* at 668. (Emphasis supplied.)

The decree to share the future costs of educational components in this case fits squarely within the prospective-compliance exception reaffirmed by *Edelman.* That exception, which had its genesis in *Ex parte Young,* 209 U. S. 123 (1908), permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. 415 U. S., at 667. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a *de jure* segregated school system. More precisely, the burden of state officials is that set forth

---

[20] Although the complaint in *Edelman* ostensibly sought only equitable relief, the plaintiff expressly requested " 'a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all [disability] benefits wrongfully withheld.' " 415 U. S., at 656.

in *Swann*—to take the necessary steps "to eliminate from the public schools all vestiges of state-imposed segregation." 402 U. S., at 15. The educational components, which the District Court ordered into effect *prospectively*, are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit.[21]

These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money in *Edelman*.[22] Rather, by the nature of the antecedent violation, which on this record caused significant deficiencies in communications skills—reading and speaking—the victims of Detroit's *de jure* segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skills of specially trained teachers. That the programs are also "compensatory" in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment.[23]

---

[21] Unlike the award in *Edelman*, the injunction entered here could not instantaneously restore the victims of unlawful conduct to their rightful condition. Thus, the injunction here looks to the future, not simply to presently compensating victims for conduct and consequences completed in the past.

[22] In contrast to *Edelman*, there was no money award here in favor of respondent Bradley or any members of his class. This case simply does not involve individual citizens' conducting a raid on the state treasury for an accrued monetary liability. The order here is wholly prospective in the same manner that the decree mandates vocational schools and assignments, for example.

[23] Because of our conclusion, we do not reach either of the two alternative arguments in support of the District Court's judgment, namely,

Finally, there is no merit to petitioners' claims that the relief ordered here violates the Tenth Amendment and general principles of federalism. The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. Cf. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976). Nor are principles of federalism abrogated by the decree. The District Court has neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing. Cf. *San Antonio School Dist.* v. *Rodriguez,* 411 U. S. 1 (1973). The District Court has, rather, properly enforced the guarantees of the Fourteenth Amendment consistent with our prior holdings, and in a manner that does not jeopardize the integrity of the structure or functions of state and local government.

The judgment of the Court of Appeals is therefore

Affirmed.

MR. JUSTICE MARSHALL, concurring.

I wholeheartedly join THE CHIEF JUSTICE's opinion for the Court. My Brother POWELL's opinion prompts these additional comments.

What is, to me, most tragic about this case is that in all relevant respects it is in no way unique. That a northern school board has been found guilty of intentionally discriminatory acts is, unfortunately, not unusual. That the academic development of black children has been impaired by this wrongdoing is to be expected. And, therefore, that a program

---

that the State of Michigan expressly waived its Eleventh Amendment immunity by virtue of Mich. Stat. Ann. § 15.1023 (7) (1975), and that the Fourteenth Amendment, *ex proprio vigore,* works a *pro tanto* repeal of the Eleventh Amendment. Cf. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976). Neither question was addressed by the Court of Appeals, and we therefore do not pass on either issue.

of remediation is necessary to supplement the primary remedy of pupil reassignment is inevitable.

It is of course true, as MR. JUSTICE POWELL notes, that the Detroit School Board has belatedly recognized its responsibility for the injuries that Negroes have suffered, and has joined in the effort to remedy them. He may be right—although I hope not—that this makes the case "wholly different from any prior case," *post,* this page. But I think it worth noting that the legal issues would be no different if the Detroit School Board came to this Court on the other side. The question before us still would be the one posed by the State: Is the remedy tailored to fit the scope of the violation? And, as THE CHIEF JUSTICE convincingly demonstrates, that question would have to be answered in the affirmative in light of the findings of the District Court, supported by abundant evidence. Cf. *Dayton Board of Education* v. *Brinkman, post,* at 414.

MR. JUSTICE POWELL, concurring in the judgment.

The Court's opinion addresses this case as if it were conventional desegregation litigation. The wide-ranging opinion reiterates the familiar general principles drawn from the line of precedents commencing with *Brown* v. *Board of Education,* 347 U. S. 483 (1954), and including today's decision in *Dayton Board of Education* v. *Brinkman, post,* p. 406. One has to read the opinion closely to understand that the case, as it finally reaches us, is wholly different from any prior case. I write to emphasize its uniqueness, and the consequent limited precedential effect of much of the Court's opinion.

Normally, the plaintiffs in this type of litigation are students, parents, and supporting organizations that desire to desegregate a school system alleged to be the product, in whole or in part, of *de jure* segregative action by the public school authorities. The principal defendant is usually the

local board of education or school board. Occasionally the state board of education and state officials are joined as defendants. This protracted litigation commenced in 1970 in this conventional mold. In the intervening years, however, the posture of the litigation has changed so drastically as to leave it largely a friendly suit between the plaintiffs (respondents Bradley et al.) and the original principal defendant, the Detroit School Board. These parties, antagonistic for years, have now joined forces apparently for the purpose of extracting funds from the state treasury. As between the original principal parties—the plaintiffs and the Detroit School Board—no case or controversy remains on the issues now before us. The Board enthusiastically supports the entire desegregation decree even though the decree intrudes deeply on the Board's own decisionmaking powers. Indeed, the present School Board *proposed* most of the educational components included in the District Court's decree. The plaintiffs originally favored a desegregation plan that would have required more extensive transportation of pupils, and they did not initially propose or endorse the educational components. In this Court, however, the plaintiffs also support the decree of the District Court as affirmed by the Court of Appeals.[1]

Thus the only complaining party is the State of Michigan (acting through state officials) and its basic complaint concerns *money*, not desegregation. It has been ordered to pay about $5,800,000 to the Detroit School Board. This is one-half the estimated "excess cost" of 4 of the 11 educational components

[1] Until the case reached this Court the plaintiffs apparently did not view the educational components as necessary or even important elements of a desegregation plan. These components were not included in plans submitted by the plaintiffs, and in briefs filed below there were indications that the plaintiffs viewed some—if not all—of these components as being "wholly unrelated to desegregation of students and faculty in schools." Brief for Plaintiffs-Appellants 5 n. 6 in the Court of Appeals, No. 75–2018 (filed Dec. 29, 1975).

included in the desegregation decree: remedial reading, in-service training of teachers, testing, and counseling.[2] The State, understandably anxious to preserve the state budget from federal-court control or interference, now contests the decree on two grounds.

---

[2] In addition to these four components, there were some seven other educational directives that are not contested here. (The details are set forth in the opinions and decrees of August 15, 1975, November 4 and 20, 1975, and May 11, 1976, all of which are reproduced in full in the appendix to the petition for certiorari. The first two such opinions also have been published. 402 F. Supp. 1096; 411 F. Supp. 943.) Perhaps the most expansive component was the District Court's order that the city and state boards create five vocational centers "devoted to in-depth occupational preparation in the construction trades, transportation and health services." 402 F. Supp., at 1140. As noted in the text, *infra*, at 296, a compromise was reached as to these centers and the State entered into a stipulation obligating it to share the cost of providing them. See App. to Pet. for Cert. 139a–144a. The other educational components ordered by the District Court included: (i) "two new technical high schools in which business education will be the central part of the curriculum," App. 75a; (ii) a new curriculum for the vocational education courses in the Detroit schools, including the requirement that an additional "grade 13" be added to afford expanded educational opportunities, 402 F. Supp., at 1140; (iii) the inclusion of "multi-ethnic studies" in the curriculum, with a request for federal funds to support "in-service training for teachers involved in such programs," *id.*, at 1144, App. to Pet. for Cert. 147a; (iv) a "Uniform Code of Conduct," which the Board was ordered to develop pursuant to guidelines established by the court, 402 F. Supp., at 1142, App. to Pet. for Cert. 148a; (v) a specific plan for "cocurricular activities" with other artistic and educational institutions in the area, to be developed by the Board and submitted for court approval, 402 F. Supp., at 1143; and (vi) a "community relations program" prescribed in remarkable detail by the court. *Ibid.*, App. to Pet. for Cert. 131a–135a.

In most, if not all, instances the court ordered that each of these programs be "comprehensive," and that reports be made to the court. One may doubt whether there is any precedent for a federal court's exercising such extensive control over the purely educational responsibilities of a school board.

First, it is argued that the order to pay state funds violates the Eleventh Amendment and principles of federalism. Ordinarily a federal court's order that a State pay unappropriated funds to a locality would raise the gravest constitutional issues. See generally *San Antonio School Dist.* v. *Rodriguez,* 411 U. S. 1, 40–42 (1973); *National League of Cities* v. *Usery,* 426 U. S. 833 (1976). But here, in a finding no longer subject to review, the State has been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate.

The State's second argument is one that normally would be advanced vigorously by the school board. Relying on the established principle that the scope of the remedy in a desegregation case is determined and limited by the extent of the identified constitutional violations, *Dayton Board of Education, post,* at 419–420; *Hills* v. *Gautreaux,* 425 U. S. 284, 293–294 (1976); *Milliken* v. *Bradley,* 418 U. S. 717, 744 (1974); *Austin Independent School Dist.* v. *United States,* 429 U. S. 990, 991 (1976) (POWELL, J., concurring), the State argues that the District Court erred in ordering the system-wide expansion of the four educational components mentioned above. It contends that there has been no finding of a constitutional violation with respect to the past operation of any of these programs, and it insists that without more specifically focused findings of this sort, the decree exceeded the court's powers.

This argument is by no means a frivolous one. But the context in which it is presented is so unusual that it would be appropriate to dismiss the writ as improvidently granted. The argument is advanced by the State and not by the party primarily concerned. The educational programs at issue are standard and widely approved in public education. The State Board normally would be enthusiastic over enhancement of these programs so long as the local school board could

fund them without requiring financial aid from the State. It is equally evident that the State probably would resist a federal-court order requiring it to pay unappropriated state funds to the local school board regardless of whether violations by the local board justified the remedy. The State's interest in protecting its own budget—limited by legislative appropriations—is a genuine one. But it is not an interest that is related, except fortuitously, to a claim that the desegregation remedy may have exceeded the extent of the violations.

The State's reliance on the remedy issue contains a further weakness, emphasizing the unusual character of this case. There is no indication that the State objected—certainly, it does not object here—to the inclusion in the District Court's decree of the seven other educational components. See n. 2, *supra*. Indeed, the State expressly agreed to one of the most expensive components, the establishment of vocational education centers, in a stipulation obligating it to share the cost of construction equally with the Detroit Board. See App. to Pet. for Cert. 139a–144a. Furthermore, the District Court's decree largely embodies the original recommendation of the Detroit Board. Since local school boards "have the primary responsibility for elucidating, assessing, and solving [the] problems" generated by "[f]ull implementation of . . . constitutional principles" in the local setting, *Brown* v. *Board of Education*, 349 U. S. 294, 299 (1955), the State's limited challenge here is particularly lacking in force.

Moreover, the District Court was faced with a school district in exceptional disarray. It found the structure of the Detroit school system "chaotic and incapable of effective administration." App. to Pet. for Cert. 124a. The "general superintendent has little direct authority." *Ibid.* Each of the eight regional boards may be preoccupied with "distribut[ing] local board patronage." *Id.*, at 125a. The "local boards have diverted resources that would otherwise have been

available for educational purposes to build new offices and other facilities to house this administrative overload." *Ibid.* The District Court continued:

> "In addition to the administrative chaos, we know of no other school system that is so enmeshed in politics. . . .
>
> ". . . Rather than devoting themselves to the educational system and the desegregative process, board members are busily engaged in politics not only to assure their own re election but also to defeat others with whom they disagree." *Id.*, at 125a–126a (footnote omitted).

Referring again to the "political paralysis" and "inefficient bureaucracy" of the system, the court also noted—discouragingly—that the election then approaching "may well [result in] a board of education consisting of members possessing no experience in education." *Id.*, at 126a. In this quite remarkable situation, it is perhaps not surprising that the District Court virtually assumed the role of school superintendent and school board.[3]

---

[3] It merits emphasizing that the School Board invited this assumption of power. Indeed, the District Court had complimented the Board on its willingness to "implement any desegregation order the court may issue." 402 F. Supp., at 1125. But at one point there were serious second thoughts. In its brief in the Court of Appeals, the Board expressed grave concern as to what the District Court's assumption of the Board's powers could do to the school system financially:

"[O]n May 11, 1976 . . . the District Court ordered equalization of all school facilities and buildings preparatory to the 1976–77 school term; continuance of the comprehensive construction and renovation program; [and implementation of the educational components summarized in n. 2, *supra*]. . . .

"*Even without actual dollar figures, the financial impact of these orders could easily destroy the educational program of the Detroit school system.* The financing of these components by the Detroit school system would only mean a concomitant elimination of existing programs.

"It is virtually impossible for the Detroit Board of Education to re-order its priorities when it is already operating on a woefully inadequate budget that cannot provide a minimal quality educational program. *Any attempt*

Given the foregoing unique circumstances, it seems to me that the proper disposition of this case is to dismiss the writ of certiorari as improvidently granted. But as the Court has chosen to decide the case here, I join in the judgment as a result less likely to prolong the disruption of education in Detroit than a reversal or remand. Despite wide-ranging dicta in the Court's opinion, the only issue decided is that the District Court's findings as to specific constitutional violations justified the four remedial educational components included in the desegregation decree. In my view, it is at least arguable that the findings in this respect were too generalized to meet the standards prescribed by this Court. See *Dayton Board of Education, post,* p. 406. But the majority views the record as justifying the conclusion that "the need for educational components flowed directly from constitutional violations by both state and local officials." *Ante,* at 282.[4] On that view of the record, our settled doctrine requiring that the remedy be carefully tailored to fit identified constitutional violations is reaffirmed by today's result. I therefore concur in the judgment.

---

to redistribute available resources will cause further deterioration in ongoing educational programs and will merely result in robbing Peter to pay Paul." Reprinted in the Appendix to the opinion of the Court of Appeals, 540 F. 2d 229, 250–251 (CA6) (emphasis added).

To say the least, the financial impact of the court's decree was profoundly disturbing. But apparently the financially pressed Board was willing to surrender a substantial portion of its decisionmaking authority in return for the prospect of enhanced state funding. For by the time it made this statement to the Court of Appeals, the Board knew that the District Court had exercised its power to do what the state legislature had chosen not to do: appropriate funds from the state treasury for these particular programs of the Detroit schools.

[4] The Court's opinion states, for example, that the District Court "expressly found that the two components of testing and counseling, as then administered in Detroit's schools, were infected with the discriminatory bias of a segregated school system." *Ante,* at 274–275.

Syllabus

HAZELWOOD SCHOOL DISTRICT ET AL. *v.* UNITED STATES

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

No. 76–255. Argued April 27, 1977—Decided June 27, 1977

The United States brought this action against petitioners, the Hazelwood, Mo., School District, located in St. Louis County, and various officials, alleging that they were engaged in a "pattern or practice" of teacher employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, which became applicable to petitioners as public employers on March 24, 1972. The District Court following trial ruled that the Government had failed to establish a pattern or practice of discrimination. The Court of Appeals reversed, in part on the ground that the trial court's analysis of statistical data rested on an irrelevant comparison of Negro teachers to Negro pupils in Hazelwood, instead of a comparison of Negro teachers in Hazelwood to Negro teachers in the relevant labor market area, which it found to consist of St. Louis County and the city of St. Louis, where 15.4% of the teachers are Negro. In the 1972–1973 and 1973–1974 school years only 1.4% and 1.8%, respectively, of Hazelwood's teachers were Negroes, and this statistical disparity, particularly when viewed against the background of Hazelwood's teacher hiring procedures, was held to constitute a prima facie case of a pattern or practice of racial discrimination. Petitioners contend that the statistical data on which the Court of Appeals relied cannot sustain a finding of a violation of Title VII. *Held:* The Court of Appeals erred in disregarding the statistical data in the record dealing with Hazelwood's hiring after it became subject to Title VII and the court should have remanded the case to the District Court for further findings as to the relevant labor market area and for an ultimate determination whether Hazelwood has engaged in a pattern or practice of employment discrimination since March 24, 1972. Though the Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market, it erred in disregarding the possibility that the prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's post-Act hiring practices such as with respect to the number of Negroes hired compared

to the total number of Negro applicants. For, once a prima facie case has been established by statistical work-force disparities, the employer must be given an opportunity to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination," *Teamsters* v. *United States,* 431 U. S. 324, 360. The record showed, but the Court of Appeals in its conclusions ignored, that for the two-year period 1972–1974 3.7% of the new teachers hired in Hazelwood were Negroes. The court accepted the Government's argument that the relevant labor market was St. Louis County and the city of St. Louis without considering petitioners' contention that St. Louis County alone (where the figure was 5.7%) was the proper area because the city of St. Louis attempts to maintain a 50% Negro teaching staff. The difference between the figures may well be significant since the disparity between 3.7% and 5.7% may be sufficiently small to weaken the Government's other proof, while the disparity between 3.7% and 15.4% may be sufficiently large to reinforce it. In determining what figures provide the most accurate basis for comparison to the hiring figures at Hazelwood numerous other factors, moreover, must also be evaluated by the trial court. Pp. 306–313.

534 F. 2d 805, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., *post,* p. 313, and WHITE, J., *post,* p. 347, filed concurring opinions. STEVENS, J., filed a dissenting opinion, *post,* p. 314.

William H. Allen argued the cause for petitioners. With him on the briefs were *Coleman S. Hicks* and *Don O. Russell.*

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Days, Thomas S. Martin, Brian K. Landsberg, Walter W. Barnett,* and *Cynthia L. Attwood.**

---

*Briefs of *amici curiae* urging affirmance were filed by *Robert Allen Sedler* and *Joel M. Gora* for the American Civil Liberties Union; by *Robert A. Murphy, Richard S. Kohn,* and *Richard T. Seymour* for the Lawyers' Committee for Civil Rights Under Law; by *Jack Greenberg, James C. Gray, Jr., Patrick O. Patterson, Eric Schnapper,* and *Louis Gilden*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner Hazelwood School District covers 78 square miles in the northern part of St. Louis County, Mo. In 1973 the Attorney General brought this lawsuit against Hazelwood and various of its officials, alleging that they were engaged in a "pattern or practice" of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V).[1] The complaint asked for an injunction requiring Hazelwood to cease its discriminatory practices, to take affirmative steps to obtain qualified Negro faculty members, and to offer employment and give backpay to victims of past illegal discrimination.

Hazelwood was formed from 13 rural school districts between 1949 and 1951 by a process of annexation. By the 1967–1968 school year, 17,550 students were enrolled in the district, of whom only 59 were Negro; the number of Negro pupils increased to 576 of 25,166 in 1972–1973, a total of just over 2%.

From the beginning, Hazelwood followed relatively unstructured procedures in hiring its teachers. Every person requesting an application for a teaching position was sent one, and completed applications were submitted to a central per-

---

for the NAACP Legal Defense and Educational Fund, Inc.; and by *Stephen J. Pollak, Richard M. Sharp,* and *David Rubin* for the National Education Assn.

[1] Under 42 U. S. C. § 2000e–6 (a), the Attorney General was authorized to bring a civil action "[w]henever [he] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII], and that the pattern or practice is of such a nature and is intended to deny the full exercise of [those rights]." The 1972 amendments to Title VII directed that this function be transferred as of March 24, 1974, to the Equal Employment Opportunity Commission, at least with respect to private employers. § 2000e–6 (c) (1970 ed., Supp. V); see also § 2000e–5 (f)(1) (1970 ed., Supp. V). The present lawsuit was instituted more than seven months before that transfer.

sonnel office, where they were kept on file.[2] During the early 1960's the personnel office notified all applicants whenever a teaching position became available, but as the number of applications on file increased in the late 1960's and early 1970's, this practice was no longer considered feasible. The personnel office thus began the practice of selecting anywhere from 3 to 10 applicants for interviews at the school where the vacancy existed. The personnel office did not substantively screen the applicants in determining which of them to send for interviews, other than to ascertain that each applicant, if selected, would be eligible for state certification by the time he began the job. Generally, those who had most recently submitted applications were most likely to be chosen for interviews.[3]

Interviews were conducted by a department chairman, program coordinator, or the principal at the school where the teaching vacancy existed. Although those conducting the interviews did fill out forms rating the applicants in a number of respects, it is undisputed that each school principal possessed virtually unlimited discretion in hiring teachers for his school. The only general guidance given to the principals was to hire the "most competent" person available, and such intangibles as "personality, disposition, appearance, poise, voice, articulation, and ability to deal with people" counted heavily. The principal's choice was routinely honored by Hazelwood's Superintendent and the Board of Education.

In the early 1960's Hazelwood found it necessary to recruit new teachers, and for that purpose members of its staff visited a number of colleges and universities in Missouri and bordering States. All the institutions visited were predominantly white, and Hazelwood did not seriously recruit at either of the

---

[2] Before 1954 Hazelwood's application forms required designation of race, and those forms were in use as late as the 1962–1963 school year.

[3] Applicants with student or substitute teaching experience at Hazelwood were given preference if their performance had been satisfactory.

two predominantly Negro four-year colleges in Missouri.[4] As a buyer's market began to develop for public school teachers, Hazelwood curtailed its recruiting efforts. For the 1971–1972 school year, 3,127 persons applied for only 234 teaching vacancies; for the 1972–1973 school year, there were 2,373 applications for 282 vacancies. A number of the applicants who were not hired were Negroes.[5]

Hazelwood hired its first Negro teacher in 1969. The number of Negro faculty members gradually increased in successive years: 6 of 957 in the 1970 school year; 16 of 1,107 by the end of the 1972 school year; 22 of 1,231 in the 1973 school year. By comparison, according to 1970 census figures, of more than 19,000 teachers employed in that year in the St. Louis area, 15.4% were Negro. That percentage figure included the St. Louis City School District, which in recent years has followed a policy of attempting to maintain a 50% Negro teaching staff. Apart from that school district, 5.7% of the teachers in the county were Negro in 1970.

Drawing upon these historic facts, the Government mounted its "pattern or practice" attack in the District Court upon four different fronts. It adduced evidence of (1) a history of alleged racially discriminatory practices, (2) statistical disparities in hiring, (3) the standardless and largely subjective hiring procedures, and (4) specific instances of alleged discrimination against 55 unsuccessful Negro applicants for teaching jobs. Hazelwood offered virtually no additional evidence in response, relying instead on evidence introduced by the Government, perceived deficiencies in the Government's case, and its own officially promulgated policy "to hire all

---

[4] One of those two schools was never visited even though it was located in nearby St. Louis. The second was briefly visited on one occasion, but no potential applicant was interviewed.

[5] The parties disagree whether it is possible to determine from the present record exactly how many of the job applicants in each of the school years were Negroes.

teachers on the basis of training, preparation and recommendations, regardless of race, color or creed." [6]

The District Court ruled that the Government had failed to establish a pattern or practice of discrimination. The court was unpersuaded by the alleged history of discrimination, noting that no dual school system had ever existed in Hazelwood. The statistics showing that relatively small numbers of Negroes were employed as teachers were found nonprobative, on the ground that the percentage of Negro pupils in Hazelwood was similarly small. The court found nothing illegal or suspect in the teacher-hiring procedures that Hazelwood had followed. Finally, the court reviewed the evidence in the 55 cases of alleged individual discrimination, and after stating that the burden of proving intentional discrimination was on the Government, it found that this burden had not been sustained in a single instance. Hence, the court entered judgment for the defendants. 392 F. Supp. 1276 (ED Mo.).

The Court of Appeals for the Eighth Circuit reversed. 534 F. 2d 805. After suggesting that the District Court had assigned inadequate weight to evidence of discriminatory conduct on the part of Hazelwood before the effective date of Title VII,[7] the Court of Appeals rejected the trial court's

---

[6] The defendants offered only one witness, who testified to the total number of teachers who had applied and were hired for jobs in the 1971–1972 and 1972–1973 school years. They introduced several exhibits consisting of a policy manual, policy book, staff handbook, and historical summary of Hazelwood's formation and relatively brief existence.

[7] As originally enacted, Title VII of the Civil Rights Act of 1964 applied only to private employers. The Act was expanded to include state and local governmental employers by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, whose effective date was March 24, 1972. See 42 U. S. C. §§ 2000e (a), (b), (f), (h) (1970 ed., Supp. V).

The evidence of pre-Act discrimination relied upon by the Court of Appeals included the failure to hire any Negro teachers until 1969, the failure to recruit at predominantly Negro colleges in Missouri, and somewhat inconclusive evidence that Hazelwood was responsible for a 1962

analysis of the statistical data as resting on an irrelevant comparison of Negro teachers to Negro pupils in Hazelwood. The proper comparison, in the appellate court's view, was one between Negro teachers in Hazelwood and Negro teachers in the relevant labor market area. Selecting St. Louis County and St. Louis City as the relevant area,[8] the Court of Appeals compared the 1970 census figures, showing that 15.4% of teachers in that area were Negro, to the racial composition of Hazelwood's teaching staff. In the 1972–1973 and 1973–1974 school years, only 1.4% and 1.8%, respectively, of Hazelwood's teachers were Negroes. This statistical disparity, particularly when viewed against the background of the teacher-hiring procedures that Hazelwood had followed, was held to constitute a prima facie case of a pattern or practice of racial discrimination.

In addition, the Court of Appeals reasoned that the trial court had erred in failing to measure the 55 instances in which Negro applicants were denied jobs against the four-part standard for establishing a prima facie case of individual discrimination set out in this Court's opinion in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802.[9] Applying that

---

Mississippi newspaper advertisement for teacher applicants that specified "white only."

[8] The city of St. Louis is surrounded by, but not included in, St. Louis County. Mo. Ann. Stat. § 46.145 (1966).

[9] Under *McDonnell Douglas,* a prima facie case of illegal employment discrimination is established by showing

"(i) that [an individual] 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." 411 U. S., at 802.

Upon proof of these four elements, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Ibid.*

standard, the appellate court found 16 cases of individual discrimination,[10] which "buttressed" the statistical proof. Because Hazelwood had not rebutted the Government's prima facie case of a pattern or practice of racial discrimination, the Court of Appeals directed judgment for the Government and prescribed the remedial order to be entered.[11]

We granted certiorari, 429 U. S. 1037, to consider a substantial question affecting the enforcement of a pervasive federal law.

The petitioners primarily attack the judgment of the Court of Appeals for its reliance on "undifferentiated work force statistics to find an unrebutted prima facie case of employment discrimination." [12] The question they raise, in short, is

---

[10] The Court of Appeals held that none of the 16 prima facie cases of individual discrimination had been rebutted by the petitioners. See 534 F. 2d, at 814.

[11] The District Court was directed to order that the petitioners cease from discriminating on the basis of race or color in the hiring of teachers, promulgate accurate job descriptions and hiring criteria, recruit Negro and white applicants on an equal basis, give preference in filling vacancies to the 16 discriminatorily rejected applicants, make appropriate backpay awards, and submit periodic reports to the Government on its progress in hiring qualified Negro teachers. *Id.*, at 819–820.

[12] In their petition for certiorari and brief on the merits, the petitioners have phrased the question as follows:

"Whether a court may disregard evidence that an employer has treated actual job applicants in a nondiscriminatory manner and rely on undifferentiated workforce statistics to find an unrebutted prima facie case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964."

Their petition for certiorari and brief on the merits did raise a second question: "Whether Congress has authority under Section 5 of the Fourteenth Amendment to prohibit by Title VII of the Civil Rights Act of 1964 employment practices of an agency of a state government in the absence of proof that the agency purposefully discriminated against applicants on the basis of race." That issue, however, is not presented by the facts in this case. The Government's opening statement in the trial court explained that its evidence was designed to show that the scarcity

whether a basic component in the Court of Appeals' finding of a pattern or practice of discrimination—the comparatively small percentage of Negro employees on Hazelwood's teaching staff—was lacking in probative force.

This Court's recent consideration in *Teamsters* v. *United States,* 431 U. S. 324, of the role of statistics in pattern-or-practice suits under Title VII provides substantial guidance in evaluating the arguments advanced by the petitioners. In that case we stated that it is the Government's burden to "establish by a preponderance of the evidence that racial discrimination was the [employer's] standard operating procedure—the regular rather than the unusual practice." *Id.,* at 336. We also noted that statistics can be an important source of proof in employment discrimination cases, since

> "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703 (j) makes clear that Title VII imposes no requirement that a work force mirror the general population." *Id.,* at 340 n. 20.

See also *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 266; *Washington* v. *Davis,* 426 U. S. 229, 241–242. Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof

---

of Negro teachers at Hazelwood "is the result of purpose" and is attributable to "deliberately continued employment policies." Thus here, as in *Teamsters* v. *United States,* 431 U. S. 324, "[t]he Government's theory of discrimination was simply that the [employer], in violation of § 703 (a) of Title VII, regularly and purposefully treated Negroes . . . less favorably than white persons." *Id.,* at 335 (footnote omitted).

of a pattern or practice of discrimination. *Teamsters, supra,* at 339.

There can be no doubt, in light of the *Teamsters* case, that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.[13] See *Teamsters, supra,* at 337–338, and n. 17. The percentage of Negroes on Hazelwood's teaching staff in 1972–1973 was 1.4%, and in 1973–1974 it was 1.8%. By contrast, the percentage of qualified Negro teachers in the area was, according to the 1970 census, at least 5.7%.[14] Although these differ-

[13] In *Teamsters,* the comparison between the percentage of Negroes on the employer's work force and the percentage in the general areawide population was highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. The comparative statistics introduced by the Government in the District Court, however, were properly limited to public school teachers, and therefore this is not a case like *Mayor* v. *Educational Equality League,* 415 U. S. 605, in which the racial-composition comparisons failed to take into account special qualifications for the position in question. *Id.,* at 620–621.

Although the petitioners concede as a general matter the probative force of the comparative work-force statistics, they object to the Court of Appeals' heavy reliance on these data on the ground that applicant-flow data, showing the actual percentage of white and Negro applicants for teaching positions at Hazelwood, would be firmer proof. As we have noted, see n. 5, *supra,* there was no clear evidence of such statistics. We leave it to the District Court on remand to determine whether competent proof of those data can be adduced. If so, it would, of course, be very relevant. Cf. *Dothard* v. *Rawlinson, post,* at 330.

[14] As is discussed below, the Government contends that a comparative

ences were on their face substantial, the Court of Appeals erred in substituting its judgment for that of the District Court and holding that the Government had conclusively proved its "pattern or practice" lawsuit.

The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.[15] For this rea-

---

figure of 15.4%, rather than 5.7%, is the appropriate one. See *infra,* at 310–312. But even assuming, *arguendo,* that the 5.7% figure urged by the petitioners is correct, the disparity between that figure and the percentage of Negroes on Hazelwood's teaching staff would be more than fourfold for the 1972–1973 school year, and threefold for the 1973–1974 school year. A precise method of measuring the significance of such statistical disparities was explained in *Castaneda* v. *Partida,* 430 U. S. 482, 496–497, n. 17. It involves calculation of the "standard deviation" as a measure of predicted fluctuations from the expected value of a sample. Using the 5.7% figure as the basis for calculating the expected value, the expected number of Negroes on the Hazelwood teaching staff would be roughly 63 in 1972–1973 and 70 in 1973–1974. The observed number in those years was 16 and 22, respectively. The difference between the observed and expected values was more than six standard deviations in 1972–1973 and more than five standard deviations in 1973–1974. The Court in *Castaneda* noted that "[a]s a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations," then the hypothesis that teachers were hired without regard to race would be suspect. 430 U. S., at 497 n. 17.

[15] This is not to say that evidence of pre-Act discrimination can never have any probative force. Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decisionmaking process had

son, the Court cautioned in the *Teamsters* opinion that once a prima facie case has been established by statistical work-force disparities, the employer must be given an opportunity to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination." 431 U. S., at 360.

The record in this case showed that for the 1972–1973 school year, Hazelwood hired 282 new teachers, 10 of whom (3.5%) were Negroes; for the following school year it hired 123 new teachers, 5 of whom (4.1%) were Negroes. Over the two-year period, Negroes constituted a total of 15 of the 405 new teachers hired (3.7%). Although the Court of Appeals briefly mentioned these data in reciting the facts, it wholly ignored them in discussing whether the Government had shown a pattern or practice of discrimination. And it gave no consideration at all to the possibility that post-Act data as to the number of Negroes hired compared to the total number of Negro applicants might tell a totally different story.[16]

What the hiring figures prove obviously depends upon the figures to which they are compared. The Court of Appeals accepted the Government's argument that the relevant comparison was to the labor market area of St. Louis County and the city of St. Louis, in which, according to the 1970 census, 15.4% of all teachers were Negro. The propriety of that comparison was vigorously disputed by the petitioners, who urged that because the city of St. Louis has made special attempts to maintain a 50% Negro teaching staff, inclusion of

undergone little change. Cf. Fed. Rule Evid. 406; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 267; 1 J. Wigmore, Evidence § 92 (3d ed. 1940); 2 *id.*, §§ 302–305, 371, 375. And, of course, a public employer even before the extension of Title VII in 1972 was subject to the command of the Fourteenth Amendment not to engage in purposeful racial discrimination.

[16] See n. 13, *supra,* and n. 21, *infra.* But cf. *Teamsters*, 431 U. S., at 364–367.

that school district in the relevant market area distorts the comparison. Were that argument accepted, the percentage of Negro teachers in the relevant labor market area (St. Louis County alone) as shown in the 1970 census would be 5.7% rather than 15.4%.

The difference between these figures may well be important; the disparity between 3.7% (the percentage of Negro teachers hired by Hazelwood in 1972–1973 and 1973–1974) and 5.7% may be sufficiently small to weaken the Government's other proof, while the disparity between 3.7% and 15.4% may be sufficiently large to reinforce it.[17] In determining

[17] Indeed, under the statistical methodology explained in *Castaneda* v. *Partida, supra,* at 496–497, n. 17, involving the calculation of the standard deviation as a measure of predicted fluctuations, the difference between using 15.4% and 5.7% as the areawide figure would be significant. If the 15.4% figure is taken as the basis for comparison, the expected number of Negro teachers hired by Hazelwood in 1972–1973 would be 43 (rather than the actual figure of 10) of a total of 282, a difference of more than five standard deviations; the expected number in 1973–1974 would be 19 (rather than the actual figure 5) of a total of 123, a difference of more than three standard deviations. For the two years combined, the difference between the observed number of 15 Negro teachers hired (of a total of 405) would vary from the expected number of 62 by more than six standard deviations. Because a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race, 430 U. S., at 497 n. 17, each of these statistical comparisons would reinforce rather than rebut the Government's other proof. If, however, the 5.7% areawide figure is used, the expected number of Negro teachers hired in 1972–1973 would be roughly 16, less than two standard deviations from the observed number of 10; for 1973–1974, the expected value would be roughly seven, less than one standard deviation from the observed value of 5; and for the two years combined, the expected value of 23 would be less than two standard deviations from the observed total of 15. A more precise method of analyzing these statistics confirms the results of the standard deviation analysis. See F. Mosteller, R. Rourke, & G. Thomas, Probability with Statistical Applications 494 (2d ed. 1970).

These observations are not intended to suggest that precise calculations of statistical significance are necessary in employing statistical proof, but

which of the two figures—or, very possibly, what intermediate figure—provides the most accurate basis for comparison to the hiring figures at Hazelwood, it will be necessary to evaluate such considerations as (i) whether the racially based hiring policies of the St. Louis City School District were in effect as far back as 1970, the year in which the census figures were taken; [18] (ii) to what extent those policies have changed the racial composition of that district's teaching staff from what it would otherwise have been; (iii) to what extent St. Louis' recruitment policies have diverted to the city, teachers who might otherwise have applied to Hazelwood; [19] (iv) to what extent Negro teachers employed by the city would prefer employment in other districts such as Hazelwood; and (v) what the experience in other school districts in St. Louis County indicates about the validity of excluding the City School District from the relevant labor market.

It is thus clear that a determination of the appropriate comparative figures in this case will depend upon further evaluation by the trial court. As this Court admonished in *Teamsters:* "[S]tatistics . . . come in infinite variety . . . . [T]heir usefulness depends on all of the surrounding facts and circumstances." 431 U. S., at 340. Only the trial court is in a position to make the appropriate determination after further findings. And only after such a determination is made can a foundation be established for deciding whether or not Hazelwood engaged in a pattern or practice of racial

---

merely to highlight the importance of the choice of the relevant labor market area.

[18] In 1970 Negroes consituted only 42% of the faculty in St. Louis city schools, which could indicate either that the city's policy was not yet in effect or simply that its goal had not yet been achieved.

[19] The petitioners observe, for example, that Harris Teachers College in St. Louis, whose 1973 graduating class was 60% Negro, is operated by the city. It is the petitioners' contention that the city's public elementary and secondary schools occupy an advantageous position in the recruitment of Harris graduates.

discrimination in its employment practices in violation of the law.[20]

We hold, therefore, that the Court of Appeals erred in disregarding the post-Act hiring statistics in the record, and that it should have remanded the case to the District Court for further findings as to the relevant labor market area and for an ultimate determination of whether Hazelwood engaged in a pattern or practice of employment discrimination after March 24, 1972.[21] Accordingly, the judgment is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

[For concurring opinion of MR. JUSTICE WHITE, see *post,* p. 347.]

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion. Similarly to our decision in *Dayton Board of Education* v. *Brinkman, post,* p. 406, today's opinion revolves around the relative factfinding roles of district courts and courts of appeals. It should be plain, however, that the liberal substantive standards for establishing a Title VII violation, including the usefulness of statistical proof, are reconfirmed.

In the present case, the District Court had adopted a wholly inappropriate legal standard of discrimination, and therefore

---

[20] Because the District Court focused on a comparison between the percentage of Negro teachers and Negro pupils in Hazelwood, it did not undertake an evaluation of the relevant labor market, and its casual dictum that the inclusion of the city of St. Louis "distorted" the labor market statistics was not based upon valid criteria. 392 F. Supp. 1276, 1287 (ED Mo.).

[21] It will also be open to the District Court on remand to determine whether sufficiently reliable applicant-flow data are available to permit consideration of the petitioners' argument that those data may undercut a statistical analysis dependent upon hirings alone.

did not evaluate the factual record before it in a meaningful way. This remand in effect orders it to do so. It is my understanding, as apparently it is MR. JUSTICE STEVENS', *post,* at 318 n. 5, that the statistical inquiry mentioned by the Court, *ante,* at 311 n. 17, and accompanying text, can be of no help to the Hazelwood School Board in rebutting the Government's evidence of discrimination. Indeed, even if the relative comparison market is found to be 5.7% rather than 15.4% black, the applicable statistical analysis at most will not serve to bolster the Government's case. This obviously is of no aid to Hazelwood in meeting *its* burden of proof. Nonetheless I think that the remand directed by the Court is appropriate and will allow the parties to address these figures and calculations with greater care and precision. I also agree that given the misapplication of governing legal principles by the District Court, Hazelwood reasonably should be given the opportunity to come forward with more focused and specific applicant-flow data in the hope of answering the Government's prima facie case. If, as presently seems likely, reliable applicant data are found to be lacking, the conclusion reached by my Brother STEVENS will inevitably be forthcoming.

MR. JUSTICE STEVENS, dissenting.

The basic framework in a pattern-or-practice suit brought by the Government under Title VII of the Civil Rights Act of 1964 is the same as that in any other lawsuit. The plaintiff has the burden of proving a prima facie case; if he does so, the burden of rebutting that case shifts to the defendant.[1] In this

[1] "At the initial, 'liability' stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example,

case, since neither party complains that any relevant evidence was excluded, our task is to decide (1) whether the Government's evidence established a prima facie case; and (2), if so, whether the remaining evidence is sufficient to carry Hazelwood's burden of rebutting that prima facie case.

I

The first question is clearly answered by the Government's statistical evidence, its historical evidence, and its evidence relating to specific acts of discrimination.

One-third of the teachers hired by Hazelwood resided in the city of St. Louis at the time of their initial employment. As Mr. Justice Clark explained in his opinion for the Court of Appeals, it was therefore appropriate to treat the city, as well as the county, as part of the relevant labor market.[2]

---

that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination." *Teamsters* v. *United States*, 431 U. S. 324, 360.

[2] "We accept the Government's contention that St. Louis City and County is the relevant labor market area for our consideration. The relevant labor market area is that area from which the employer draws its employees. *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 551 n. 19 (9th Cir. 1971). Of the 176 teachers hired by Hazelwood between October, 1972, and September, 1973, approximately 80 percent resided in St. Louis City and County at the time of their initial employment. Approximately one-third of the teachers hired during this period resided in the City of St. Louis and 40 percent resided in areas of St. Louis County other than the Hazelwood District." 534 F. 2d 805, 811–812, n. 7 (1976).

It is noteworthy that in the Court of Appeals, Chief Judge Gibson, in dissent, though urging—as Hazelwood had in the District Court—that the labor market was even broader than the Government contended, *id.*, at 821, did not question the propriety of including the city in the same market as the county, see Defendants' Brief and Memorandum in Support of Its Proposed Findings of Fact and Conclusions of Law, filed on Aug. 21,

In that market, 15% of the teachers were black. In the Hazelwood District at the time of trial less than 2% of the teachers were black. An even more telling statistic is that after Title VII became applicable to it, only 3.7% of the new teachers hired by Hazelwood were black. Proof of these gross disparities was in itself sufficient to make out a prima facie case of discrimination. See *Teamsters* v. *United States,* 431 U. S. 324, 339; *Castaneda* v. *Partida,* 430 U. S. 482, 494–498.

As a matter of history, Hazelwood employed no black teachers until 1969. Both before and after the 1972 amendment making the statute applicable to public school districts, Hazelwood used a standardless and largely subjective hiring procedure. Since "relevant aspects of the decisionmaking process had undergone little change," it is proper to infer that the pre-Act policy of preferring white teachers continued to influence Hazelwood's hiring practices.[3]

The inference of discrimination was corroborated by post-Act evidence that Hazelwood had refused to hire 16 qualified black applicants for racial reasons. Taking the Government's evidence as a whole, there can be no doubt about the sufficiency of its prima facie case.

1974, in Civ. Act. No. 73–C–553 (A) (ED Mo.), p. 24. In this Court, petitioners had abandoned any argument similar to that made below.

[3] Proof that an employer engaged in racial discrimination prior to the effective date of the Act creates the inference that such discrimination continued "particularly where relevant aspects of the decisionmaking process [have] undergone little change. Cf. Fed. Rule Evid. 406; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 267; 1 J. Wigmore, Evidence § 92 (3d ed. 1940); 2 *id.,* §§ 302–305, 371, 375. And, of course, a public employer even before the extension of Title VII in 1972 was subject to the command of the Fourteenth Amendment not to engage in purposeful racial discrimination." *Ante,* at 309–310, n. 15.

Since Hazelwood's hiring before 1972 was so clearly discriminatory, there is some irony in its claim that "Hazelwood continued [after 1972] to select its teachers on the same careful basis that it had relied on before in staffing its growing system." Brief for Petitioners 29–30.

II

Hazelwood "offered virtually no additional evidence in response," *ante,* at 303. It challenges the Government's statistical analysis by claiming that the city of St. Louis should be excluded from the relevant market and pointing out that only 5.7% of the teachers in the county (excluding the city) were black. It further argues that the city's policy of trying to maintain a 50% black teaching staff diverted teachers from the county to the city. There are two separate reasons why these arguments are insufficient: they are not supported by the evidence; even if true, they do not overcome the Government's case.

The petitioners offered no evidence concerning wage differentials, commuting problems, or the relative advantages of teaching in an inner-city school as opposed to a suburban school. Without any such evidence in the record, it is difficult to understand why the simple fact that the city was the source of a third of Hazelwood's faculty should not be sufficient to demonstrate that it is a part of the relevant market. The city's policy of attempting to maintain a 50/50 ratio clearly does not undermine that conclusion, particularly when the record reveals no shortage of qualified black applicants in either Hazelwood or other suburban school districts.[4] Surely not *all* of the 2,000 black teachers employed by the city were unavailable for employment in Hazelwood at the time of their initial hire.

But even if it were proper to exclude the city of St. Louis from the market, the statistical evidence would still tend to prove discrimination. With the city excluded, 5.7% of the teachers in the remaining market were black. On the basis of a random selection, one would therefore expect 5.7% of

[4] "Had there been evidence obtainable to contradict and disprove the testimony offered by [the Government], it cannot be assumed that the State would have refrained from introducing it." *Pierre* v. *Louisiana,* 306 U. S. 354, 361–362.

the 405 teachers hired by Hazelwood in the 1972–1973 and 1973–1974 school years to have been black. But instead of 23 black teachers, Hazelwood hired only 15, less than two-thirds of the expected number. Without the benefit of expert testimony, I would hesitate to infer that the disparity between 23 and 15 is great enough, in itself, to prove discrimination.[5] It is perfectly clear, however, that whatever probative force this disparity has, it tends to prove discrimination and does absolutely nothing in the way of carrying Hazelwood's burden of overcoming the Government's prima facie case.

Absolute precision in the analysis of market data is too much to expect. We may fairly assume that a nondiscriminatory selection process would have resulted in the hiring of somewhere between the 15% suggested by the Government and the 5.7% suggested by petitioners, or perhaps 30 or 40 black teachers, instead of the 15 actually hired.[6] On that assumption, the Court of Appeals' determination that there were 16 individual cases of discriminatory refusal to hire black applicants in the post-1972 period seems remarkably accurate.

In sum, the Government is entitled to prevail on the present record. It proved a prima facie case, which Hazelwood failed to rebut. Why, then, should we burden a busy federal court with another trial? Hazelwood had an opportunity to offer evidence to dispute the 16 examples of racially motivated refusals to hire; but as the Court notes, the Court of Appeals has already "held that none of the 16 prima facie cases of

[5] After I had drafted this opinion, one of my law clerks advised me that, given the size of the two-year sample, there is only about a 5% likelihood that a disparity this large would be produced by a random selection from the labor pool. If his calculation (which was made using the method described in H. Blalock, Social Statistics 151–173 (1972)) is correct, it is easy to understand why Hazelwood offered no expert testimony.

[6] Some of the other school districts in the county have a 10% ratio of blacks on their faculties. See Plaintiff's Exhibit 54 in Civ. Act. No. 73–C–553 (A) (ED Mo. 1975); Brief for United States 30 n. 30.

individual discrimination had been rebutted by the petitioners. See 534 F. 2d 805, 814 (CA8)." *Ante,* at 306 n. 10. Hazelwood also had an opportunity to offer any evidence it could muster to show a change in hiring practices or to contradict the fair inference to be drawn from the statistical evidence. Instead, it "offered virtually no additional evidence in response," *ante,* at 303.

Perhaps "a totally different story" might be told by other statistical evidence that was never presented, *ante,* at 310. No lawsuit has ever been tried in which the losing party could not have pointed to a similar possibility.[7] It is always possible to imagine more evidence which could have been offered, but at some point litigation must come to an end.[8]

---

[7] Since Hazelwood failed to offer any "applicant-flow data" at the trial, and since it does not now claim to have any newly discovered evidence, I am puzzled by MR. JUSTICE BRENNAN'S explanation of the justification for a remand. Indeed, after the first trial was concluded, Hazelwood emphasized the fact that no evidence of this kind had been presented; it introduced no such evidence itself. It stated:

"There is absolutely no evidence in this case that provides any basis for making a comparison between black applicants and white applicants and their treatment by the Hazelwood School District relative to hiring or not being hired for a teaching position." Defendants' Brief and Memorandum in Support of Its Proposed Findings of Fact and Conclusions of Law, *supra,* n. 2, at 22.

[8] My analysis of this case is somewhat similar to MR. JUSTICE REHNQUIST'S analysis in *Dothard* v. *Rawlinson:*

"If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded. Since I agree with the Court that appellants made virtually no such effort, . . . I also agree with it that the District Court cannot be said to have erred as a matter of law in finding that a prima facie case had been made out in the instant case." *Post,* at 338–339 (concurring opinion).

Rather than depart from well-established rules of procedure, I would affirm the judgment of the Court of Appeals.[9] Since that judgment reflected a correct appraisal of the record, I see no reason to prolong this litigation with a remand neither side requested.[10]

---

[9] It is interesting to compare the disposition in this case with that in *Castaneda* v. *Partida,* 430 U. S. 482. In *Castaneda,* as in this case, "[i]nexplicably, the State introduced practically no evidence," *id.,* at 498. But in *Castaneda,* unlike the present case, the Court affirmed the finding of discrimination, rather than giving the State a second chance at trying its case. (It should be noted that the *Castaneda* Court expressly stated that it was possible that the statistical discrepancy could have been explained by the State. *Id.,* at 499.)

[10] Hazelwood's brief asks only for a remand "for reconsideration of the alleged individual cases of discrimination . . . ." Brief for Petitioners 78. Hazelwood explains: "[The question raised in its petition for certiorari is] a question of law. It is a question of what sort of evidentiary showing satisfies Title VII. . . . The question is whether on the evidence of record an unrebutted prima facie case was established." Reply Brief for Petitioners 2.

Syllabus

DOTHARD, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY OF ALABAMA, ET AL. *v.* RAWLINSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

No. 76–422. Argued April 19, 1977—Decided June 27, 1977

After her application for employment as a "correctional counselor" (prison guard) in Alabama was rejected because she failed to meet the minimum 120-pound weight requirement of an Alabama statute, which also establishes a height minimum of 5 feet 2 inches, appellee Rawlinson (hereafter appellee) filed a charge with the Equal Employment Opportunity Commission and ultimately brought a class action against appellant corrections officials challenging the statutory height and weight requirements and a regulation establishing gender criteria for assigning correctional counselors to "contact" positions (positions requiring close physical proximity to inmates) as violative of Title VII of the Civil Rights Act of 1964, *inter alia*. A three-judge District Court decided in appellee's favor. On the basis of national statistics as to the comparative height and weight of men and women indicating that Alabama's statutory standards would exclude over 40% of the female population but less than 1% of the male population, the court found that with respect to such standards appellee had made out a prima facie case of unlawful sex discrimination, which appellants had failed to rebut. The court also found the challenged regulation impermissible under Title VII as being based on stereotyped characterizations of the sexes, and, rejecting appellants' bona-fide-occupational-qualification defense under § 703 (e) of Title VII, ruled that being male was not such a qualification for the job of correctional counselor in a "contact" position in an Alabama male maximum-security penitentiary. *Held:*

1. The District Court did not err in holding that Title VII prohibited application of the statutory height and weight requirements to appellee and the class she represents. Pp. 328–332.

(a) To establish a prima facie case of employment discrimination, a plaintiff need only show that the facially neutral standards in question, such as Alabama's height and weight standards, select applicants for hire in a significantly discriminatory pattern, and here the showing of the disproportionate impact of the height and weight standards on women based on national statistics, rather than on comparative statis-

tics of actual applicants, sufficed to make out a prima facie case. Pp. 328–331.

(b) Appellants failed to rebut the prima facie case of discrimination on the basis that the height and weight requirements are job related in that they have a relationship to the strength essential to efficient job performance as a correctional counselor, where appellants produced no evidence correlating such requirements with the requisite amount of strength thought essential to good job performance, and in fact failed to offer evidence of any kind in specific justification of the statutory standards. P. 331.

2. In the particular circumstances of this case, the District Court erred in rejecting appellants' contention that the regulation in question falls within the narrow ambit of the bona-fide-occupational-qualification exception of § 703 (e), it appearing from the evidence that Alabama maintains a prison system where violence is the order of the day, inmate access to guards is facilitated by dormitory living arrangements, every correctional institution is understaffed, and a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, and that therefore the use of women guards in "contact" positions in the maximum-security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard. Pp. 332–337.

418 F. Supp. 1169, affirmed in part, reversed in part, and remanded.

STEWART, J., delivered the opinion of the Court, in which POWELL and STEVENS, JJ., joined; in all but Part II of which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined; and in all but Part III of which BRENNAN and MARSHALL, JJ., joined. REHNQUIST, J., filed an opinion concurring in the result and concurring in part, in which BURGER, C. J., and BLACKMUN, J., joined, *post,* p. 337. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, J., joined, *post,* p. 340. WHITE, J., filed a dissenting opinion, *post,* p. 347.

G. Daniel Evans, Assistant Attorney General of Alabama, argued the cause for appellants *pro hac vice.* With him on the briefs were *William J. Baxley,* Attorney General, and *Walter S. Turner* and *Eric A. Bowen,* Assistant Attorneys General.

Pamela S. Horowitz argued the cause for appellees *pro hac vice.* With her on the brief was *Morris S. Dees.**

*Briefs of *amici curiae* urging affirmance were filed by *Evelle J. Younger,*

MR. JUSTICE STEWART delivered the opinion of the Court.

Appellee Dianne Rawlinson sought employment with the Alabama Board of Corrections as a prison guard, called in Alabama a "correctional counselor." After her application was rejected, she brought this class suit under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed. and Supp. V), and under 42 U. S. C. § 1983, alleging that she had been denied employment because of her sex in violation of federal law. A three-judge Federal District Court for the Middle District of Alabama decided in her favor. *Mieth* v. *Dothard,* 418 F. Supp. 1169. We noted probable jurisdiction of this appeal from the District Court's judgment. 429 U. S. 976.[1]

I

At the time she applied for a position as correctional counselor trainee, Rawlinson was a 22-year-old college graduate whose major course of study had been correctional psychology. She was refused employment because she failed to meet the minimum 120-pound weight requirement estab-

---

Attorney General, *Stanford N. Gruskin,* Chief Assistant Attorney General, *Warren J. Abbott,* Assistant Attorney General, and *Hadassa K. Gilbert,* Deputy Attorney General, for the State of California; by *Slade Gorton,* Attorney General of Washington, *Morton M. Tytler,* Senior Assistant Attorney General, and *Anne L. Ellington,* Assistant Attorney General, for the Washington State Human Rights Comm'n; and by *Ruth Bader Ginsburg, Marjorie Mazen Smith,* and *Joel Gora* for the American Civil Liberties Union.

J. Albert Woll, Laurence Gold, and *Judith Lichtman* filed a brief for the Women's Legal Defense Fund et al. as *amici curiae.*

[1] The appellants sought to raise for the first time in their brief on the merits the claim that Congress acted unconstitutionally in extending Title VII's coverage to state governments. See the Equal Employment Opportunity Act of 1972, 86 Stat. 103, effective date, Mar. 24, 1972, 42 U. S. C. §§ 2000e (a), (b), (f), (h) (1970 ed., Supp. V). Not having been raised in the District Court, that issue is not before us. See *Adickes* v. *Kress & Co.,* 398 U. S. 144, 147 n. 2; *Irvine* v. *California,* 347 U. S. 128, 129.

lished by an Alabama statute. The statute also establishes a height minimum of 5 feet 2 inches.[2]

After her application was rejected because of her weight, Rawlinson filed a charge with the Equal Employment Opportunity Commission, and ultimately received a right-to-sue letter.[3] She then filed a complaint in the District Court on behalf of herself and other similarly situated women, challenging the statutory height and weight minima as violative of Title VII and the Equal Protection Clause of the Fourteenth Amendment.[4] A three-judge court was convened.[5] While the suit was pending, the Alabama Board of Correc-

---

[2] The statute establishes minimum physical standards for all law enforcement officers. In pertinent part, it provides:

"(d) *Physical qualifications.*—The applicant shall be not less than five feet two inches nor more than six feet ten inches in height, shall weigh not less than 120 pounds nor more than 300 pounds and shall be certified by a licensed physician designated as satisfactory by the appointing authority as in good health and physically fit for the performance of his duties as a law-enforcement officer. The commission may for good cause shown permit variances from the physical qualifications prescribed in this subdivision." Ala. Code, Tit. 55, § 373 (109) (Supp. 1973).

[3] See 42 U. S. C. § 2000e–5 (f) (1970 ed., Supp. V).

[4] A second plaintiff named in the complaint was Brenda Mieth, who, on behalf of herself and others similarly situated, challenged the 5′9″ height and 160-pound weight requirements for the position of Alabama state trooper as violative of the Equal Protection Clause. The District Court upheld her challenge, and the defendants did not appeal from that aspect of the District Court's judgment.

[5] Although a single-judge District Court could have considered Rawlinson's Title VII claims, her coplaintiff's suit rested entirely on the Constitution. See n. 4, *supra*. Given the similarity of the underlying issues in the two cases, it was not inappropriate to convene a three-judge court to deal with the constitutional and statutory issues presented in the complaint. When a properly convened three-judge court enjoins the operation of a state law on federal statutory grounds, an appeal to this Court from that judgment lies under 28 U. S. C. § 1253. See *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U. S. 423; *Philbrook* v. *Glodgett*, 421 U. S. 707.

tions adopted Administrative Regulation 204, establishing gender criteria for assigning correctional counselors to maximum-security institutions for "contact positions," that is, positions requiring continual close physical proximity to inmates of the institution.[6] Rawlinson amended her class-action

[6] Administrative Regulation 204 provides in pertinent part as follows:

"I. GENERAL

"1. The purpose of this regulation is to establish policy and procedure for identifying and designating institutional Correctional Counselor I positions which require selective certification for appointment of either male or female employees from State Personnel Department registers.

. . . . . .

"II. POLICY

"4. All Correctional Counselor I positions will be evaluated to identify and designate those which require selective certification for appointment of either a male or female employee. Such positions must fall within a bona fide occupational qualification stated in Title 4[2]–2000c of the United States Code . . . .

. . . . . .

"5. Selective certification from the Correctional Counselor Trainee register will be requested of the State Personnel Department whenever a position is being filled which has been designated for either a male or female employee only.

. . . . . .

"III. PROCEDURE

"8. Institutional Wardens and Directors will identify each institutional Correctional Counselor I position which they feel requires selective certification and will request that it be so designated in writing to the Associate Commissioner for Administration for his review, evaluation, and submission to the Commissioner for final decision.

"9. The request will contain the exact duties and responsibilities of the position and will utilize and identify the following criteria to establish that selective certification is necessary;

"A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

"B. That the position would require contact with the inmates of the opposite sex without the presence of others.

"C. That the position would require patroling dormitories, restrooms, or showers while in use, frequently, during the day or night.

[*Footnote 6 is continued on p. 326*]

complaint by adding a challenge to Regulation 204 as also violative of Title VII and the Fourteenth Amendment.

Like most correctional facilities in the United States,[7] Alabama's prisons are segregated on the basis of sex. Currently the Alabama Board of Corrections operates four major all-male penitentiaries—Holman Prison, Kilby Corrections Facility, G. K. Fountain Correction Center, and Draper Correctional Center. The Board also operates the Julia Tutwiler Prison for Women, the Frank Lee Youth Center, the Number Four Honor Camp, the State Cattle Ranch, and nine Work Release Centers, one of which is for women. The Julia Tutwiler Prison for Women and the four male penitentiaries are maximum-security institutions. Their inmate living quarters are for the most part large dormitories, with communal showers and toilets that are open to the dormitories and hallways. The Draper and Fountain penitentiaries carry on extensive farming operations, making necessary a large number of strip searches for contraband when prisoners re-enter the prison buildings.

A correctional counselor's primary duty within these institutions is to maintain security and control of the inmates

---

"D. That the position would require search of inmates of the opposite sex on a regular basis.

"E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

"10. All institutional Correctional Counselor I positions which are not approved for selective certification will be filled from Correctional Counselor Trainee registers without regard to sex."

Although Regulation 204 is not limited on its face to contact positions in maximum-security institutions, the District Court found that it did not "preclude . . . [women] from serving in contact positions in the all-male institutions other than the penitentiaries." 418 F. Supp., at 1176. Appellants similarly defended the regulation as applying only to maximum-security facilities.

[7] Note, The Sexual Segregation of American Prisons, 82 Yale L. J. 1229 (1973).

by continually supervising and observing their activities.[8] To be eligible for consideration as a correctional counselor, an applicant must possess a valid Alabama driver's license, have a high school education or its equivalent, be free from physical defects, be between the ages of 20½ years and 45 years at the time of appointment, and fall between the minimum height and weight requirements of 5 feet 2 inches, and 120 pounds, and the maximum of 6 feet 10 inches, and 300 pounds. Appointment is by merit, with a grade assigned each applicant based on experience and education. No written examination is given.

At the time this litigation was in the District Court, the Board of Corrections employed a total of 435 people in various correctional counselor positions, 56 of whom were women. Of those 56 women, 21 were employed at the Julia Tutwiler Prison for Women, 13 were employed in noncontact positions at the four male maximum-security institutions, and the remaining 22 were employed at the other institutions operated by the Alabama Board of Corrections. Because most of Alabama's prisoners are held at the four maximum-security male penitentiaries, 336 of the 435 correctional counselor jobs were in those institutions, a majority of them concededly in the "contact" classification.[9] Thus, even though meeting the statutory height and weight requirements, women applicants could under Regulation 204 com-

[8] The official job description for a correctional counselor position emphasizes counseling as well as security duties; the District Court found: "[C]orrectional counselors are persons who are commonly referred to as prison guards. Their duties primarily involve security rather than counseling." 418 F. Supp. 1169, 1175.

[9] At the time of the trial the Board of Corrections had not yet classified all of its correctional counselor positions in the maximum-security institutions according to the criteria established in Regulation 204; consequently evidence of the exact number of "male only" jobs within the prison system was not available.

pete equally with men for only about 25% of the correctional counselor jobs available in the Alabama prison system.

II

In enacting Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431. The District Court found that the minimum statutory height and weight requirements that applicants for employment as correctional counselors must meet constitute the sort of arbitrary barrier to equal employment opportunity that Title VII forbids.[10] The appellants assert that the District Court erred both in finding that the height and weight standards discriminate against women, and in its refusal to find that, even if they do, these standards are justified as "job related."

A

The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive.[11] It is as-

---

[10] Section 703(a) of Title VII, 42 U. S. C. § 2000e–2 (a) (1970 ed. and Supp. V), provides:

"(a) Employer practices. 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."

[11] See *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15.

serted, rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment by the Alabama Board of Corrections. We dealt in *Griggs* v. *Duke Power Co., supra,* and *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, with similar allegations that facially neutral employment standards disproportionately excluded Negroes from employment, and those cases guide our approach here.

Those cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co., supra,* at 432. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle Paper Co.* v. *Moody, supra,* at 425, quoting *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 801.

Although women 14 years of age or older compose 52.75% of the Alabama population and 36.89% of its total labor force, they hold only 12.9% of its correctional counselor positions. In considering the effect of the minimum height and weight standards on this disparity in rate of hiring between the sexes, the District Court found that the 5′2″-requirement would operate to exclude 33.29% of the women in the United States between the ages of 18–79, while excluding only 1.28% of men between the same ages. The 120-pound weight restriction would exclude 22.29% of the women and 2.35% of the men in this age group. When the height and weight restrictions are combined, Alabama's statutory standards would exclude 41.13% of the female popula-

tion while excluding less than 1% of the male population.[12] Accordingly, the District Court found that Rawlinson had made out a prima facie case of unlawful sex discrimination.

The appellants argue that a showing of disproportionate impact on women based on generalized national statistics should not suffice to establish a prima facie case. They point in particular to Rawlinson's failure to adduce comparative statistics concerning actual applicants for correctional counselor positions in Alabama. There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. See *Griggs* v. *Duke Power Co., supra,* at 430. The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory. See *Teamsters* v. *United States,* 431 U. S. 324, 365–367. A potential applicant could easily determine her height and weight and conclude that to make an application would be futile. Moreover, reliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.

---

[12] Affirmatively stated, approximately 99.76% of the men and 58.87% of the women meet both these physical qualifications. From the separate statistics on height and weight of males it would appear that after adding the two together and allowing for some overlap the result would be to exclude between 2.35% and 3.63% of males from meeting Alabama's statutory height and weight minima. None of the parties has challenged the accuracy of the District Court's computations on this score, however, and the discrepancy is in any event insignificant in light of the gross disparity between the female and male exclusions. Even under revised computations the disparity would greatly exceed the 34% to 12% disparity that served to invalidate the high school diploma requirement in the *Griggs* case. 401 U. S., at 430.

For these reasons, we cannot say that the District Court was wrong in holding that the statutory height and weight standards had a discriminatory impact on women applicants. The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made.[13]

B

We turn, therefore, to the appellants' argument that they have rebutted the prima facie case of discrimination by showing that the height and weight requirements are job related. These requirements, they say, have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor. In the District Court, however, the appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, they failed to offer evidence of any kind in specific justification of the statutory standards.[14]

---

[13] The height and weight statute contains a waiver provision that the appellants urge saves it from attack under Title VII. See n. 2, *supra*. The District Court noted that a valid waiver provision might indeed have that effect, but found that applicants were not informed of the waiver provision, and that the Board of Corrections had never requested a waiver from the Alabama Peace Officers' Standards and Training Commission. The court therefore correctly concluded that the waiver provision as administered failed to overcome the discriminatory effect of the statute's basic provisions.

[14] In what is perhaps a variation on their constitutional challenge to the validity of Title VII itself, see n. 1, *supra*, the appellants contend that the establishment of the minimum height and weight standards by statute requires that they be given greater deference than is typically

If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly.[15] Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that "measure[s] the person for the job and not the person in the abstract." *Griggs* v. *Duke Power Co.*, 401 U. S., at 436. But nothing in the present record even approaches such a measurement.

For the reasons we have discussed, the District Court was not in error in holding that Title VII of the Civil Rights Act of 1964, as amended, prohibits application of the statutory height and weight requirements to Rawlinson and the class she represents.

III

Unlike the statutory height and weight requirements, Regulation 204 explicitly discriminates against women on the basis of their sex.[16] In defense of this overt discrimination,

---

given private employer-established job qualifications. The relevant legislative history of the 1972 amendments extending Title VII to the States as employers does not, however, support such a result. Instead, Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. See H. R. Rep. No. 92–238, p. 17 (1971); S. Rep. No. 92–415, p. 10 (1971). See also *Schaeffer* v. *San Diego Yellow Cabs*, 462 F. 2d 1002 (CA9). Thus for both private and public employers, "[t]he touchstone is business necessity," *Griggs*, 401 U. S., at 431; a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.

[15] Cf. EEOC Guidelines on Employee Selection Procedures, 29 CFR § 1607 (1976). See also *Washington* v. *Davis*, 426 U. S. 229, 246–247; *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405; *Officers for Justice* v. *Civil Service Comm'n*, 395 F. Supp. 378 (ND Cal.).

[16] By its terms Regulation 204 applies to contact positions in both male and female institutions. See n. 6, *supra*. The District Court found, however, that "Regulation 204 is the administrative means by which the [Board of Corrections'] policy of not hiring women as correctional coun-

the appellants rely on § 703 (e) of Title VII, 42 U. S. C. § 2000e–2 (e), which permits sex-based discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

The District Court rejected the bona-fide-occupational-qualification (bfoq) defense, relying on the virtually uniform view of the federal courts that § 703 (e) provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities. This view has been variously formulated. In *Diaz* v. *Pan American World Airways,* 442 F. 2d 385, 388, the Court of Appeals for the Fifth Circuit held that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." (Emphasis in original.) In an earlier case, *Weeks* v. *Southern Bell Tel. & Tel. Co.,* 408 F. 2d 228, 235, the same court said that an employer could rely on the bfoq exception only by proving "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." See also *Phillips* v. *Martin Marietta Corp.,* 400 U. S. 542. But whatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes,[17] and the District

selors in contact positions in all-male penitentiaries has been implemented." 418 F. Supp., at 1176. The Regulation excludes women from consideration for approximately 75% of the available correctional counselor jobs in the Alabama prison system.

[17] See, *e. g., Gillin* v. *Federal Paper Board Co.,* 479 F. 2d 97 (CA2); *Jurinko* v. *Edwin L. Wiegand Co.,* 477 F. 2d 1038 (CA3); *Rosenfeld* v. *Southern Pacific Co.,* 444 F. 2d 1219 (CA9); *Bowe* v. *Colgate-Palmolive Co.,* 416 F. 2d 711 (CA7); *Meadows* v. *Ford Motor Co.,* 62 F. R. D. 98 (WD Ky.), modified on other grounds, 510 F. 2d 939 (CA6). See also *Jones Metal Products Co.* v. *Walker,* 29 Ohio St. 2d 173, 281 N. E. 2d 1;

Court in the present case held in effect that Regulation 204 is based on just such stereotypical assumptions.

We are persuaded—by the restrictive language of § 703 (e), the relevant legislative history,[18] and the consistent interpretation of the Equal Employment Opportunity Commission [19]—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.[20] In the particular factual circumstances of this case, however, we conclude that the District Court erred in rejecting the State's contention that Regulation 204 falls within the narrow ambit of the bfoq exception.

The environment in Alabama's penitentiaries is a peculiarly inhospitable one for human beings of whatever sex. Indeed, a Federal District Court has held that the conditions of confinement in the prisons of the State, characterized by "rampant violence" and a "jungle atmosphere," are constitutionally intolerable. *Pugh* v. *Locke,* 406 F. Supp. 318, 325 (MD Ala.). The record in the present case shows that

---

EEOC Guidelines on Discrimination Because of Sex, 29 CFR § 1604 (1976).

[18] See Interpretative Memorandum of Senators Clark and Case, 110 Cong. Rec. 7213 (1964).

[19] The EEOC issued guidelines on sex discrimination in 1965 reflecting its position that "the bona fide occupational qualification as to sex should be interpreted narrowly." 29 CFR § 1604.2 (a). It has adhered to that principle consistently, and its construction of the statute can accordingly be given weight. See *Griggs* v. *Duke Power Co.,* 401 U. S., at 434; *McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U. S. 273, 279–280.

[20] In the case of a state employer, the bfoq exception would have to be interpreted at the very least so as to conform to the Equal Protection Clause of the Fourteenth Amendment. The parties do not suggest, however, that the Equal Protection Clause requires more rigorous scrutiny of a State's sexually discriminatory employment policy than does Title VII. There is thus no occasion to give independent consideration to the District Court's ruling that Regulation 204 violates the Fourteenth Amendment as well as Title VII.

because of inadequate staff and facilities, no attempt is made in the four maximum-security male penitentiaries to classify or segregate inmates according to their offense or level of dangerousness—a procedure that, according to expert testimony, is essential to effective penological administration. Consequently, the estimated 20% of the male prisoners who are sex offenders are scattered throughout the penitentiaries' dormitory facilities.

In this environment of violence and disorganization, it would be an oversimplification to characterize Regulation 204 as an exercise in "romantic paternalism." Cf. *Frontiero* v. *Richardson,* 411 U. S. 677, 684. In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.[21] More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment in a "contact" position in a maximum-security male prison.

The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.[22] In a prison system where violence is the order

[21] See, *e. g., Weeks* v. *Southern Bell Tel. & Tel. Co.,* 408 F. 2d 228, 232–236 (CA5); *Bowe* v. *Colgate-Palmolive Co., supra,* at 717–718; *Rosenfeld* v. *Southern Pacific Co., supra.*

[22] The record contains evidence of an attack on a female clerical worker in an Alabama prison, and of an incident involving a woman student who

of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians.

Appellee Rawlinson's own expert testified that dormitory housing for aggressive inmates poses a greater security problem than single-cell lockups, and further testified that it would be unwise to use women as guards in a prison where even 10% of the inmates had been convicted of sex crimes and were not segregated from the other prisoners.[23] The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.

There was substantial testimony from experts on both sides of this litigation that the use of women as guards in "contact" positions under the existing conditions in Alabama maximum-security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard. On the basis of that evidence, we conclude that the District Court was in error in ruling that being male is not a bona fide occupational qualification for the job of

---

was taken hostage during a visit to one of the maximum-security institutions.

[23] Alabama's penitentiaries are evidently not typical. Appellee Rawlinson's two experts testified that in a normal, relatively stable maximum-security prison—characterized by control over the inmates, reasonable living conditions, and segregation of dangerous offenders—women guards could be used effectively and beneficially. Similarly, an *amicus* brief filed by the State of California attests to that State's success in using women guards in all-male penitentiaries.

correctional counselor in a "contact" position in an Alabama male maximum-security penitentiary.[24]

The judgment is accordingly affirmed in part and reversed in part, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in the result and concurring in part.

I agree with, and join, Parts I and III of the Court's opinion in this case and with its judgment. While I also agree with the Court's conclusion in Part II of its opinion, holding that the District Court was "not in error" in holding the statutory height and weight requirements in this case to be invalidated by Title VII, *ante,* at 332, the issues with which that Part deals are bound to arise so frequently that I feel obliged to separately state the reasons for my agreement with its result. I view affirmance of the District Court in this respect as essentially dictated by the peculiarly limited factual and legal justifications offered below by appellants on behalf of the statutory requirements. For that reason, I do not believe—and do not read the Court's opinion as holding—that all or even many of the height and weight requirements imposed by States on applicants for a multitude of law enforcement agency jobs are pretermitted by today's decision.

I agree that the statistics relied upon in this case are sufficient, absent rebuttal, to sustain a finding of a prima

[24] The record shows, by contrast, that Alabama's minimum-security facilities, such as work-release centers, are recognized by their inmates as privileged confinement situations not to be lightly jeopardized by disobeying applicable rules of conduct. Inmates assigned to these institutions are thought to be the "cream of the crop" of the Alabama prison population.

facie violation of § 703 (a)(2), in that they reveal a significant discrepancy between the numbers of men, as opposed to women, who are automatically disqualified by reason of the height and weight requirements. The fact that these statistics are national figures of height and weight, as opposed to statewide or pool-of-labor-force statistics, does not seem to me to require us to hold that the District Court erred as a matter of law in admitting them into evidence. See *Hamling* v. *United States,* 418 U. S. 87, 108, 124–125 (1974); cf. *Zenith Corp.* v. *Hazeltine,* 395 U. S. 100, 123–125 (1969). It is for the District Court, in the first instance, to determine whether these statistics appear sufficiently probative of the ultimate fact in issue—whether a given job qualification requirement has a disparate impact on some group protected by Title VII. *Hazelwood School Dist.* v. *United States, ante,* at 312–313; see *Hamling* v. *United States, supra,* at 108, 124–125; *Mayor* v. *Educational Equality League,* 415 U. S. 605, 621 n. 20 (1974); see also *McAllister* v. *United States,* 348 U. S. 19 (1954); *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 340–342 (1949). In making this determination, such statistics are to be considered in light of all other relevant facts and circumstances. Cf. *Teamsters* v. *United States,* 431 U. S. 324, 340 (1977). The statistics relied on here do not suffer from the obvious lack of relevancy of the statistics relied on by the District Court in *Hazelwood School Dist.* v. *United States, ante,* at 308. A reviewing court cannot say as a matter of law that they are irrelevant to the contested issue or so lacking in reliability as to be inadmissible.

If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which

the plaintiffs' evidence should be accorded. Since I agree with the Court that appellants made virtually no such effort, *ante,* at 331, I also agree with it that the District Court cannot be said to have erred as a matter of law in finding that a prima facie case had been made out in the instant case.

While the District Court's conclusion is by no means *required* by the proffered evidence, I am unable to conclude that the District Court's finding in that respect was clearly erroneous. In other cases there could be different evidence which could lead a district court to conclude that height and weight *are* in fact an accurate enough predictor of strength to justify, under all the circumstances, such minima. Should the height and weight requirements be found to advance the job-related qualification of strength sufficiently to rebut the prima facie case, then, under our cases, the burden would shift back to appellee Rawlinson to demonstrate that other tests, *without* such disparate effect, would also meet that concern. *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 425 (1975). But, here, the District Court permissibly concluded that appellants had not shown enough of a nexus even to rebut the inference.

Appellants, in order to rebut the prima facie case under the statute, had the burden placed on them to advance job-related reasons for the qualification. *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802 (1973). This burden could be shouldered by offering evidence or by making legal arguments not dependent on any new evidence. The District Court was confronted, however, with only one suggested job-related reason for the qualification—that of strength. Appellants argued only the job-relatedness of actual physical strength; they did not urge that an equally job-related qualification for prison guards is the *appearance* of strength. As the Court notes, the primary job of correctional counselor in Alabama prisons "is to maintain security and control of the inmates . . . ," *ante,* at 326, a function that I at least would

imagine is aided by the psychological impact on prisoners of the presence of tall and heavy guards. If the appearance of strength had been urged upon the District Court here as a reason for the height and weight minima, I think that the District Court would surely have been entitled to reach a different result than it did. For, even if not perfectly correlated, I would think that Title VII would not preclude a State from saying that anyone under 5'2" or 120 pounds, no matter how strong in fact, does not have a sufficient appearance of strength to be a prison guard.

But once the burden has been placed on the defendant, it is then up to the defendant to articulate the asserted job-related reasons underlying the use of the minima. *McDonnell Douglas Corp.* v. *Green, supra,* at 802; *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 431 (1971); *Albemarle Paper Co.* v. *Moody, supra,* at 425. Because of this burden, a reviewing court is not ordinarily justified in relying on arguments in favor of a job qualification that were not first presented to the trial court. Cf. *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365, 374 n. 5 (1967); *Thomas* v. *Taylor,* 224 U. S. 73, 84 (1912); *Bell* v. *Bruen,* 1 How. 169, 187 (1843). As appellants did not even present the "appearance of strength" contention to the District Court as an asserted job-related reason for the qualification requirements, I agree that their burden was not met. The District Court's holding thus did not deal with the question of whether such an assertion could or did rebut appellee Rawlinson's prima facie case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in part and dissenting in part.

I agree entirely with the Court's analysis of Alabama's height and weight requirements for prison guards, and with its finding that these restrictions discriminate on the basis of sex in violation of Title VII. Accordingly, I join Parts I and II of the Court's opinion. I also agree with much of the Court's general discussion in Part III of the bona-fide-occupational-

qualification exception contained in § 703 (e) of Title VII.[1] The Court is unquestionably correct when it holds "that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Ante,* at 334. See *Phillips* v. *Martin Marietta Corp.,* 400 U. S. 542, 544 (1971) (MARSHALL, J., concurring). I must, however, respectfully disagree with the Court's application of the bfoq exception in this case.

The Court properly rejects two proffered justifications for denying women jobs as prison guards. It is simply irrelevant here that a guard's occupation is dangerous and that some women might be unable to protect themselves adequately. Those themes permeate the testimony of the state officials below, but as the Court holds, "the argument that a particular job is too dangerous for women" is refuted by the "purpose of Title VII to allow the individual woman to make that choice for herself." *Ante,* at 335. Some women, like some men, undoubtedly are not qualified and do not wish to serve as prison guards, but that does not justify the exclusion of all women from this employment opportunity. Thus, "[i]n the usual case," *ibid.,* the Court's interpretation of the bfoq exception would mandate hiring qualified women for guard jobs in maximum-security institutions. The highly successful experiences of other States allowing such job opportunities, see briefs for the States of California and Washington as *amici curiae,* confirm that absolute disqualification of women is not, in the words of Title VII, "reasonably necessary to the normal operation" of a maximum-security prison.

What would otherwise be considered unlawful discrimination against women is justified by the Court, however, on the

[1] Section 703 (e), 42 U. S. C. § 2000e–2 (e), provides in pertinent part: "(1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."

basis of the "barbaric and inhumane" conditions in Alabama prisons, conditions so bad that state officials have conceded that they violate the Constitution. See *Pugh* v. *Locke,* 406 F. Supp. 318, 329, 331 (MD Ala. 1976). To me, this analysis sounds distressingly like saying two wrongs make a right. It is refuted by the plain words of § 703 (e). The statute requires that a bfoq be "reasonably necessary to the normal operation of that particular business or enterprise." But no governmental "business" may operate "normally" in violation of the Constitution. Every action of government is constrained by constitutional limitations. While those limits may be violated more frequently than we would wish, no one disputes that the "normal operation" of all government functions takes place within them. A prison system operating in blatant violation of the Eighth Amendment is an exception that should be remedied with all possible speed, as Judge Johnson's comprehensive order in *Pugh* v. *Locke, supra,* is designed to do. In the meantime, the existence of such violations should not be legitimatized by calling them "normal." Nor should the Court accept them as justifying conduct that would otherwise violate a statute intended to remedy age-old discrimination.

The Court's error in statutory construction is less objectionable, however, than the attitude it displays toward women. Though the Court recognizes that possible harm to women guards is an unacceptable reason for disqualifying women, it relies instead on an equally speculative threat to prison discipline supposedly generated by the sexuality of female guards. There is simply no evidence in the record to show that women guards would create any danger to security in Alabama prisons significantly greater than that which already exists. All of the dangers—with one exception discussed below—are inherent in a prison setting, whatever the gender of the guards.

The Court first sees women guards as a threat to security because "there are few visible deterrents to inmate assaults on women custodians." *Ante,* at 336. In fact, any prison guard is constantly subject to the threat of attack by inmates, and "invisible" deterrents are the guard's only real protection. No prison guard relies primarily on his or her ability to ward off an inmate attack to maintain order. Guards are typically unarmed and sheer numbers of inmates could overcome the normal complement. Rather, like all other law enforcement officers, prison guards must rely primarily on the moral authority of their office and the threat of future punishment for miscreants. As one expert testified below, common sense, fairness, and mental and emotional stability are the qualities a guard needs to cope with the dangers of the job. App. 81. Well qualified and properly trained women, no less than men, have these psychological weapons at their disposal.

The particular severity of discipline problems in the Alabama maximum-security prisons is also no justification for the discrimination sanctioned by the Court. The District Court found in *Pugh* v. *Locke, supra,* that guards "must spend all their time attempting to maintain control or to protect themselves." 406 F. Supp., at 325. If male guards face an impossible situation, it is difficult to see how women could make the problem worse, unless one relies on precisely the type of generalized bias against women that the Court agrees Title VII was intended to outlaw. For example, much of the testimony of appellants' witnesses ignores individual differences among members of each sex and reads like "ancient canards about the proper role of women." *Phillips* v. *Martin Marietta Corp.,* 400 U. S., at 545. The witnesses claimed that women guards are not strict disciplinarians; that they are physically less capable of protecting themselves and subduing unruly inmates; that inmates take advantage of them as they did their mothers, while male guards are strong father figures

who easily maintain discipline, and so on.[2] Yet the record shows that the presence of women guards has not led to a single incident amounting to a serious breach of security in any Alabama institution.[3] And, in any event, "[g]uards rarely enter the cell blocks and dormitories," *Pugh* v. *Locke*, 406 F. Supp., at 325, where the danger of inmate attacks is the greatest.

---

[2] See, *e. g.*, App. 111–112, 117–118, 144, 147, 151–153, 263–264, 290–292, 301–302. The State Commissioner of Corrections summed up these prejudices in his testimony:

"Q Would a male that is 5'6", 140 lbs., be able to perform the job of Correctional Counselor in an all male institution?

. . . . . .

"A Well, if he qualifies otherwise, yes.

"Q But a female 5'6", 140 lbs., would not be able to perform all the duties?

"A No.

"Q What do you use as a basis for that opinion?

"A The innate intention between a male and a female. The physical capabilities, the emotions that go into the psychic make-up of a female vs. the psychic make-up of a male. The attitude of the rural type inmate we have vs. that of a woman. The superior feeling that a man has, historically, over that of a female." *Id.*, at 153.

Strikingly similar sentiments were expressed a century ago by a Justice of this Court in a case long since discredited:

"I am not prepared to say that it is one of [women's] fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. . . . [I]n my opinion, in view of the particular characteristics, destiny, and mission of women, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." *Bradwell* v. *Illinois*, 16 Wall. 130, 139, 142 (1873) (Bradley, J., concurring).

[3] The Court refers to two incidents involving potentially dangerous attacks on women in prisons. *Ante*, at 335–336, n. 22. But these did not involve trained corrections officers; one victim was a clerical worker and the other a student visiting on a tour.

It appears that the real disqualifying factor in the Court's view is "[t]he employee's very womanhood." *Ante,* at 336. The Court refers to the large number of sex offenders in Alabama prisons, and to "[t]he likelihood that inmates would assault a woman because she was a woman." *Ibid.* In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, "[t]he pedestal upon which women have been placed has . . . , upon closer inspection, been revealed as a cage." *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal. 3d 1, 20, 485 P. 2d 529, 541 (1971). It is particularly ironic that the cage is erected here in response to feared misbehavior by imprisoned criminals.[4]

The Court points to no evidence in the record to support the asserted "likelihood that inmates would assault a woman because she was a woman." *Ante,* at 336. Perhaps the Court relies upon common sense, or "innate recognition," Brief for Appellants 51. But the danger in this emotionally laden context is that common sense will be used to mask the " 'romantic paternalism' " and persisting discriminatory atti-

[4] The irony is multiplied by the fact that enormous staff increases are required by the District Court's order in *Pugh* v. *Locke,* 406 F. Supp. 318 (MD Ala. 1976). This necessary hiring would be a perfect opportunity for appellants to remedy their past discrimination against women, but instead the Court's decision permits that policy to continue. Moreover, once conditions are improved in accordance with the *Pugh* order, the problems that the Court perceives with women guards will be substantially alleviated.

tudes that the Court properly eschews. *Ante,* at 335. To me, the only matter of innate recognition is that the incidence of sexually motivated attacks on guards will be minute compared to the "likelihood that inmates will assault" a *guard* because he or she is a *guard.*

The proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities of law-abiding women who wish to contribute to their community, but to take swift and sure punitive action against the inmate offenders. Presumably, one of the goals of the Alabama prison system is the eradication of inmates' antisocial behavior patterns so that prisoners will be able to live one day in free society. Sex offenders can begin this process by learning to relate to women guards in a socially acceptable manner. To deprive women of job opportunities because of the threatened behavior of convicted criminals is to turn our social priorities upside down.[5]

Although I do not countenance the sex discrimination

---

[5] The appellants argue that restrictions on employment of women are also justified by consideration of inmates' privacy. It is strange indeed to hear state officials who have for years been violating the most basic principles of human decency in the operation of their prisons suddenly become concerned about inmate privacy. It is stranger still that these same officials allow women guards in contact positions in a number of nonmaximum-security institutions, but strive to protect inmates' privacy in the prisons where personal freedom is most severely restricted. I have no doubt on this record that appellants' professed concern is nothing but a feeble excuse for discrimination.

As the District Court suggested, it may well be possible, once a constitutionally adequate staff is available, to rearrange work assignments so that legitimate inmate privacy concerns are respected without denying jobs to women. Finally, if women guards behave in a professional manner at all times, they will engender reciprocal respect from inmates, who will recognize that their privacy is being invaded no more than if a woman doctor examines them. The suggestion implicit in the privacy argument that such behavior is unlikely on either side is an insult to the professionalism of guards and the dignity of inmates.

condoned by the majority, it is fortunate that the Court's decision is carefully limited to the facts before it. I trust the lower courts will recognize that the decision was impelled by the shockingly inhuman conditions in Alabama prisons, and thus that the "extremely narrow [bfoq] exception" recognized here, *ante,* at 334, will not be allowed "to swallow the rule" against sex discrimination. See *Phillips* v. *Martin Marietta Corp.,* 400 U. S., at 545. Expansion of today's decision beyond its narrow factual basis would erect a serious roadblock to economic equality for women.

MR. JUSTICE WHITE, concurring in No. 76–255 and dissenting in No. 76–422.

I join the Court's opinion in *Hazelwood School Dist.* v. *United States,* No. 76–255, *ante,* p. 299, but with reservations with respect to the relative neglect of applicant pool data in finding a prima facie case of employment discrimination and heavy reliance on the disparity between the areawide percentage of black public school teachers and the percentage of blacks on Hazelwood's teaching staff. Since the issue is whether Hazelwood discriminated against blacks in hiring after Title VII became applicable to it in 1972, perhaps the Government should have looked initially to Hazelwood's hiring practices in the 1972–1973 and 1973–1974 academic years with respect to the available applicant pool, rather than to history and to comparative work-force statistics from other school districts. Indeed, there is evidence in the record suggesting that Hazelwood, with a black enrollment of only 2%, hired a higher percentage of black applicants than of white applicants for these two years. The Court's opinion, of course, permits Hazelwood to introduce applicant pool data on remand in order to rebut the prima facie case of a discriminatory pattern or practice. This may be the only fair and realistic allocation of the evidence burden, but arguably the United States should have been required to adduce evidence as to the applicant pool

before it was entitled to its prima facie presumption. At least it might have been required to present some defensible ground for believing that the racial composition of Hazelwood's applicant pool was roughly the same as that for the school districts in the general area, before relying on comparative work-force data to establish its prima facie case.

In *Dothard* v. *Rawlinson,* No. 76–422, I have more trouble agreeing that a prima facie case of sex discrimination was made out by statistics showing that the Alabama height and weight requirements would exclude a larger percentage of women in the United States than of men. As in *Hazelwood,* the issue is whether there was discrimination in dealing with actual or potential applicants; but in *Hazelwood* there was at least a colorable argument that the racial composition of the area-wide teacher work force was a reasonable proxy for the composition of the relevant applicant pool and hence that a large divergence between the percentage of blacks on the teaching staff and the percentage in the teacher work force raised a fair inference of racial discrimination in dealing with the applicant pool. In *Dothard,* however, I am unwilling to believe that the percentage of women applying or interested in applying for jobs as prison guards in Alabama approximates the percentage of women either in the national or state population. A plaintiff could, of course, show that the composition of the applicant pool was distorted by the exclusion of non-applicants who did not apply because of the allegedly discriminatory job requirement. But no such showing was made or even attempted here; and although I do not know what the actual fact is, I am not now convinced that a large percentage of the actual women applicants, or of those who are seriously interested in applying, for prison guard positions would fail to satisfy the height and weight requirements. Without a more satisfactory record on this issue, I cannot conclude that appellee Rawlinson has either made out a prima facie case for the invalidity of the restrictions or otherwise proved that she was

improperly denied employment as a prison guard. There being no showing of discrimination, I do not reach the question of justification; nor, since she does not meet the threshold requirements for becoming a prison guard, need I deal with the gender-based requirements for contact positions. I dissent from the Court's judgment in *Dothard* insofar as it affirms the judgment of the District Court.

BATES ET AL. *v.* STATE BAR OF ARIZONA

APPEAL FROM THE SUPREME COURT OF ARIZONA

No. 76–316. Argued January 18, 1977—Decided June 27, 1977

Appellants, who are licensed attorneys and members of the Arizona State Bar, were charged in a complaint filed by the State Bar's president with violating the State Supreme Court's disciplinary rule, which prohibits attorneys from advertising in newspapers or other media. The complaint was based upon a newspaper advertisement placed by appellants for their "legal clinic," stating that they were offering "legal services at very reasonable fees," and listing their fees for certain services, namely, uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name. The Arizona Supreme Court upheld the conclusion of a bar committee that appellants had violated the rule, having rejected appellants' claims that the rule violated §§ 1 and 2 of the Sherman Act because of its tendency to limit competition and that it infringed appellants' First Amendment rights. *Held:*

1. The restraint upon attorney advertising imposed by the Supreme Court of Arizona wielding the power of the State over the practice of law is not subject to attack under the Sherman Act. *Parker* v. *Brown,* 317 U. S. 341, followed; *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773; *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579, distinguished. Pp. 359–363.

2. Commercial speech, which serves individual and societal interests in assuring informed and reliable decisionmaking, is entitled to some First Amendment protection, *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748, and the justifications advanced by appellee are inadequate to support the suppression of all advertising by attorneys. Pp. 363–384.

(a) This case does not involve any question concerning in-person solicitation or advertising as to the *quality* of legal services, but only the question whether lawyers may constitutionally advertise the *prices* at which certain routine services will be performed. Pp. 366–367.

(b) The belief that lawyers are somehow above "trade" is an anachronism, and for a lawyer to advertise his fees will not undermine true professionalism. Pp. 368–372.

(c) Advertising legal services is not inherently misleading. Only routine services lend themselves to advertising, and for such services fixed rates can be meaningfully established, as the Arizona State Bar's own Legal Services Program demonstrates. Although a client may not

know the detail involved in a given task, he can identify the service at the level of generality to which advertising lends itself. Though advertising does not provide a complete foundation on which to select an attorney, it would be peculiar to deny the consumer at least some of the relevant information needed for an informed decision on the ground that the information was not complete. Pp. 372–375.

(d) Advertising, the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange, may well benefit the administration of justice. Pp. 375–377.

(e) It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer, and may well aid new attorneys in entering the market. Pp. 377–378.

(f) An attorney who is inclined to cut quality will do so regardless of the rule on advertising, the restraints on which are an ineffective deterrent to shoddy work. Pp. 378–379.

(g) Undue enforcement problems need not be anticipated, and it is at least incongruous for the opponents of advertising to extol the virtues of the legal profession while also asserting that through advertising lawyers will mislead their clients. P. 379.

3. The First Amendment overbreadth doctrine, which represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court, is inapplicable to professional advertising, a context where it is not necessary to further its intended objective, cf. *Bigelow* v. *Virginia*, 421 U. S. 809, 817–818, and appellants must therefore demonstrate that their specific conduct was constitutionally protected. Pp. 379–381.

4. On this record, appellants' advertisement (contrary to appellee's contention) is not misleading and falls within the scope of First Amendment protection. Pp. 381–382.

(a) The term "legal clinic" would be understood to refer to an operation like appellants' that is geared to provide standardized and multiple services. Pp. 381–382.

(b) The advertisement's claim that appellants offer services at "very reasonable" prices is not misleading. Appellants' advertised fee for an uncontested divorce, which was specifically cited by appellee, is in line with customary charges in the area. P. 382.

(c) Appellants' failure to disclose that a name change might be accomplished by the client without an attorney's aid was not misleading since the difficulty of performing the task is not revealed and since most

legal services may be performed legally by the citizen for himself. See *Faretta* v. *California*, 422 U. S. 806. P. 382.

113 Ariz. 394, 555 P. 2d 640, affirmed in part and reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined, and in Parts I and II of which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed an opinion concurring in part and dissenting in part, *post*, p. 386. POWELL, J., filed an opinion concurring in part and dissenting in part, in which STEWART, J., joined, *post*, p. 389. REHNQUIST, J., filed an opinion dissenting in part, *post*, p. 404.

William C. Canby, Jr., argued the cause for appellants. With him on the briefs was *Melvin L. Wulf*.

John P. Frank argued the cause for appellee. With him on the brief was *Orme Lewis*.

Deputy Solicitor General Friedman argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Bork, Assistant Attorney General Baker,* and *Barry Grossman*.*

---

*Briefs of *amici curiae* urging reversal were filed by *John R. Schmidt* for the Chicago Council of Lawyers; by *Peter H. Schuck* and *Alan B. Morrison* for the Consumers Union of United States, Inc., et al.; and by *Philip L. Goar* for the Mountain Plains Congress of Senior Organizations et al.

Briefs of *amici curiae* urging affirmance were filed by *Justin A. Stanley* and *H. Blair White* for the American Bar Assn.; by *Peter M. Sfikas* for the American Dental Assn.; by *Ellis Lyons, Bennett Boskey,* and *Edward A. Groobert* for the American Optometric Assn.; by *James W. Rankin* and *Donald E. Scott* for the American Veterinary Medical Assn.; by *Alfred L. Scanlan* and *George W. Liebmann* for the Maryland State Bar Assn., Inc., et al.; by *Andrew P. Miller,* Attorney General of Virginia, *Stuart H. Dunn,* Deputy Attorney General, and *John J. Miles,* Assistant Attorney General, for the Virginia State Bar; and by *Roger P. Stokey, pro se.*

Briefs of *amici curiae* were filed by the American Medical Assn.; by *John J. Relihan* and *Martin J. Solomon* for the Arizona Credit Union League, Inc.; by *Edward L. Lascher, Herbert M. Rosenthal,* and *Stuart A. Forsyth* for the State Bar of California; and by *Rufus L. Edmisten,*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

As part of its regulation of the Arizona Bar, the Supreme Court of that State has imposed and enforces a disciplinary rule that restricts advertising by attorneys. This case presents two issues: whether §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, forbid such state regulation, and whether the operation of the rule violates the First Amendment, made applicable to the States through the Fourteenth.[1]

I

Appellants John R. Bates and Van O'Steen are attorneys licensed to practice law in the State of Arizona.[2] As such, they are members of the appellee, the State Bar of Arizona.[3]

Attorney General of North Carolina, *Andrew A. Vanore, Jr.*, Senior Deputy Attorney General, *Norma S. Harrell*, Associate Attorney General, and *Harry W. McGalliard* for the State Bar of North Carolina.

[1] See *Bigelow* v. *Virginia*, 421 U. S. 809, 811 (1975); *Schneider* v. *State*, 308 U. S. 147, 160 (1939).

[2] Each appellant is a 1972 graduate of Arizona State University College of Law. Mr. Bates was named by the faculty of that law school as the outstanding student of his class; Mr. O'Steen graduated *cum laude*. App. 220–221.

[3] Rule 27 (a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. pp. 84–85 (1973), reads in part:

"1. In order to advance the administration of justice according to law, . . . the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this Court an organization known as the State Bar of Arizona, and all persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this Court. . . ."

. . . . .

"3. No person shall practice law in this state or hold himself out as one who may practice law in this state unless he is an active member of the state bar."

See Ariz. Const., Art. 3; Ariz. Rev. Stat. §§ 32–201, 32–237, 32–264 (1976). The Arizona Bar, thus, is an integrated one. See *Lathrop* v. *Donohue*, 367 U. S. 820 (1961).

After admission to the bar in 1972, appellants worked as attorneys with the Maricopa County Legal Aid Society. App. 221.

In March 1974, appellants left the Society and opened a law office, which they call a "legal clinic," in Phoenix. Their aim was to provide legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid. *Id.*, at 75. In order to achieve this end, they would accept only routine matters, such as uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name, for which costs could be kept down by extensive use of paralegals, automatic typewriting equipment, and standardized forms and office procedures. More complicated cases, such as contested divorces, would not be accepted. *Id.*, at 97. Because appellants set their prices so as to have a relatively low return on each case they handled, they depended on substantial volume. *Id.*, at 122–123.

After conducting their practice in this manner for two years, appellants concluded that their practice and clinical concept could not survive unless the availability of legal services at low cost was advertised and, in particular, fees were advertised. *Id.*, at 120–123. Consequently, in order to generate the necessary flow of business, that is, "to attract clients," *id.*, at 121; Tr. of Oral Arg. 4, appellants on February 22, 1976, placed an advertisement (reproduced in the Appendix to this opinion, *infra*, at 385) in the Arizona Republic, a daily newspaper of general circulation in the Phoenix metropolitan area. As may be seen, the advertisement stated that appellants were offering "legal services at very reasonable fees," and listed their fees for certain services.[4]

[4] The office benefited from an increase in business after the appearance of the advertisement. App. 235–236, 479–480. It is doubtful, however, whether the increase was due solely to the advertisement, for the advertising itself prompted several news stories. *Id.*, at 229. It might be expected, nonetheless, that advertising will increase business. See Hobbs, Lawyer Advertising: A Good Beginning but Not Enough, 62 A. B. A. J. 735,

Appellants concede that the advertisement constituted a clear violation of Disciplinary Rule 2–101 (B), incorporated in Rule 29 (a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat., p. 26 (Supp. 1976). The disciplinary rule provides in part:

> "(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf." [5]

---

736 (1976) (lawyer referral service that advertised referred more than 11 times as many clients as one that did not advertise in another city of comparable size).

[5] The remainder of subdivision (B) states exceptions to the general prohibition:

"However, a lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

"(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

"(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

"(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

"(4) In and on legal documents prepared by him.

"(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

"(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2–102 (A) (6)

Upon the filing of a complaint initiated by the president of the State Bar, App. 350, a hearing was held before a three-member Special Local Administrative Committee, as prescribed by Arizona Supreme Court Rule 33. App. 16. Although the committee took the position that it could not consider an attack on the validity of the rule, it allowed the parties to develop a record on which such a challenge could be based. The committee recommended that each of the appellants be suspended from the practice of law for not less than six months. *Id.*, at 482. Upon further review by the Board of Governors of the State Bar, pursuant to the Supreme Court's Rule 36, the Board recommended only a one-week suspension for each appellant, the weeks to run consecutively. App. 486–487.

Appellants, as permitted by the Supreme Court's Rule 37, then sought review in the Supreme Court of Arizona, arguing, among other things, that the disciplinary rule violated §§ 1 and 2 of the Sherman Act because of its tendency to limit competition, and that the rule infringed their First Amendment rights. The court rejected both claims. *In re Bates*, 113 Ariz. 394, 555 P. 2d 640 (1976). The plurality [6] may have viewed with some skepticism the claim that a restraint on advertising might have an adverse effect on competition.[7] But, even if the rule might otherwise violate the

---

[biographical information that may be listed 'in a reputable law list or legal directory'], directed to a member or beneficiary of such organization."

[6] The plurality opinion represented the views of two of the five justices that compose the Supreme Court of Arizona. Ariz. Const., Art. 6, § 2; Ariz. Rev. Stat. § 12–101 (1956). It is evident, however, that a majority adhered to the plurality's exposition of the law. One opinion, although styled a dissent, stated that the author agreed with the plurality opinion "in all respects" except for the reduction in punishment. One justice, specially concurring, stated that he agreed "with much of the law and many of the comments expressed by the majority." The opinion of the remaining justice is discussed in the text.

[7] But see *United States* v. *Gasoline Retailers Assn.*, 285 F. 2d 688, 691

Act, the plurality concluded that the regulation was exempt from Sherman Act attack because the rule "is an activity of the State of Arizona acting as sovereign." *Id.*, at 397, 555 P. 2d, at 643. The regulation thus was held to be shielded from the Sherman Act by the state-action exemption of *Parker* v. *Brown*, 317 U. S. 341 (1943).

Turning to the First Amendment issue, the plurality noted that restrictions on professional advertising have survived constitutional challenge in the past, citing, along with other cases, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955), and *Semler* v. *Dental Examiners*, 294 U. S. 608 (1935).[8] Although recognizing that *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976), and *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), held that commercial speech was entitled to certain protection under the First Amendment, the plurality focused on passages in those opinions acknowledging that special considerations might bear on the advertising of professional services by lawyers. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S., at 773 n. 25; *id.*, at 773–775 (concurring opinion); *Bigelow* v. *Virginia*, 421 U. S., at 825 n. 10. The plurality apparently was of the view that the older decisions dealing with professional advertising survived these recent cases unscathed, and held that Disciplinary Rule 2–101 (B) passed First Amend-

---

(CA7 1961); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221–222 (1940); *United States* v. *National Society of Professional Engineers*, 181 U. S. App. D. C. 41, 555 F. 2d 978 (1977) (ethical prohibition on members of society from submitting competitive bids for engineering services violates Sherman Act).

[8] See also *Head* v. *New Mexico Board*, 374 U. S. 424 (1963). The Court did not resolve a First Amendment issue in any of these cases. The advertising restrictions were upheld in the face of challenges based on due process, equal protection, and interference with interstate commerce. Although the First Amendment issue was raised in *Head*, the Court refused to consider it because it had been neither presented to the state courts nor reserved in the notice of appeal. *Id.*, at 432–433, n. 12.

ment muster.[9] Because the court, in agreement with the Board of Governors, felt that appellants' advertising "was done in good faith to test the constitutionality of DR 2–101 (B)," it reduced the sanction to censure only.[10] 113 Ariz., at 400, 555 P. 2d, at 646.

Of particular interest here is the opinion of Mr. Justice Holohan in dissent. In his view, the case should have been framed in terms of "the right of the public as consumers and citizens to know about the activities of the legal profession," *id.*, at 402, 555 P. 2d, at 648, rather than as one involving merely the regulation of a profession. Observed in this light, he felt that the rule performed a substantial disservice to the public:

> "Obviously the information of what lawyers charge is important for private economic decisions by those in need of legal services. Such information is also helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered. . . . The rule at issue prevents access to such information by the public." *Id.*, at 402–403, 555 P. 2d, at 648–649.

Although the dissenter acknowledged that some types of advertising might cause confusion and deception, he felt that the remedy was to ban that form, rather than all advertising. Thus, despite his "personal dislike of the concept of advertising by attorneys," *id.*, at 402, 555 P. 2d, at 648, he found the ban unconstitutional.

We noted probable jurisdiction. 429 U. S. 813 (1976).

---

[9] Appellants also unsuccessfully challenged the rule on equal protection and vagueness grounds and asserted that the disciplinary procedures violated due process. These contentions are not made here.

[10] MR. JUSTICE REHNQUIST stayed the order of censure pending final determination of the matter by this Court.

II

The Sherman Act

In *Parker* v. *Brown,* 317 U. S. 341 (1943), this Court held that the Sherman Act was not intended to apply against certain state action. See also *Olsen* v. *Smith,* 195 U. S. 332, 344–345 (1904). In *Parker* a raisin producer-packer brought suit against California officials challenging a state program designed to restrict competition among growers and thereby to maintain prices in the raisin market. The Court held that the State, "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U. S., at 352. Appellee argues, and the Arizona Supreme Court held, that the *Parker* exemption also bars the instant Sherman Act claim. We agree.

Of course, *Parker* v. *Brown* has not been the final word on the matter. In two recent cases the Court has considered the state-action exemption to the Sherman Act and found it inapplicable for one reason or another. *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975); *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579 (1976). *Goldfarb* and *Cantor,* however, are distinguishable, and their reasoning supports our conclusion here.

In *Goldfarb* we held that § 1 of the Sherman Act was violated by the publication of a minimum-fee schedule by a county bar association and by its enforcement by the State Bar. The schedule and its enforcement mechanism operated to create a rigid price floor for services and thus constituted a classic example of price fixing. Both bar associations argued that their activity was shielded by the state-action exemption. This Court concluded that the action was not protected, emphasizing that "we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." 421 U. S., at 790. In the instant case, by contrast, the chal-

lenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27 (a) and 29 (a) and its Disciplinary Rule 2–101 (B). That court is the ultimate body wielding the State's power over the practice of law, see Ariz. Const., Art. 3; *In re Bailey,* 30 Ariz. 407, 248 P. 29 (1926), and, thus, the restraint is "compelled by direction of the State acting as a sovereign." 421 U. S., at 791.[11]

Appellants seek to draw solace from *Cantor.* The defendant in that case, an electric utility, distributed light bulbs to its residential customers without additional charge, including the cost in its state-regulated utility rates. The plaintiff, a retailer who sold light bulbs, brought suit, claiming that the utility was using its monopoly power in the distribution of electricity to restrain competition in the sale of bulbs. The Court held that the utility could not immunize itself from Sherman Act attack by embodying its challenged practices in a tariff approved by a state commission. Since the disciplinary rule at issue here is derived from the Code of Professional Responsibility of the American Bar Association,[12] appellants argue by analogy to *Cantor* that no immunity should result from the bar's success in having the Code adopted by the State. They also assert that the interest embodied in the Sherman Act must prevail over the state

[11] We note, moreover, that the Court's opinion in *Goldfarb* concluded with the observation that "[i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." 421 U. S., at 793. Allowing the instant Sherman Act challenge to the disciplinary rule would have precisely that undesired effect.

[12] Rule 29 (a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat., p. 26 (Supp. 1976), provides:

"The duties and obligations of members [of the bar] shall be as prescribed by the Code of Professional Responsibility of the American Bar Association, effective November 1, 1970, as amended by this Court." The challenged rule, DR 2–101 (B), is now identical with the present version of the parallel rule, also numbered DR 2–101 (B), of the ABA Code of Professional Responsibility, as amended to August 1976.

interest in regulating the bar. See 428 U. S., at 595. Particularly is this the case, they claim, because the advertising ban is not tailored so as to intrude upon the federal interest to the minimum extent necessary. See *id.*, at 596 n. 34, and 597.

We believe, however, that the context in which *Cantor* arose is critical. First, and most obviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party.[13] Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In re Wilson,* 106 Ariz. 34, 470 P. 2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

Second, the Court emphasized in *Cantor* that the State had no independent regulatory interest in the market for light bulbs. 428 U. S., at 584–585; *id.*, at 604–605, 612–614 (concurring opinions). There was no suggestion that the bulb program was justified by flaws in the competitive market or was a response to health or safety concerns. And an exemption for the program was not essential to the State's regulation of electric utilities. In contrast, the regulation of the activities of the bar is at the core of the State's power to protect the public. Indeed, this Court in *Goldfarb* acknowledged that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the

---

[13] Mr. Justice Stevens, in a portion of his opinion in *Cantor* that was joined by Brennan, White, and Marshall, JJ., observed that *Parker* v. *Brown* was a suit against public officials, whereas in *Cantor* the claims were directed against only a private defendant. 428 U. S., at 585–592, 600–601. The dissenters in *Cantor* would have applied the state-action exemption regardless of the identity of the defendants. *Id.*, at 615–617 (Stewart, J., joined by Powell and Rehnquist, JJ.).

primary governmental function of administering justice, and have historically been 'officers of the courts.' " 421 U. S., at 792. See *Cohen* v. *Hurley,* 366 U. S. 117, 123–124 (1961).[14] More specifically, controls over solicitation and advertising by attorneys have long been subject to the State's oversight.[15] Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in *Cantor.*[16]

Finally, the light-bulb program in *Cantor* was instigated by the utility with only the acquiescence of the state regulatory commission. The State's incorporation of the program into the tariff reflected its conclusion that the utility was authorized to employ the practice if it so desired. See 428 U. S., at 594, and n. 31. The situation now before us is entirely different. The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

---

[14] *Cohen* v. *Hurley,* in other respects, has been overruled. *Spevack* v. *Klein,* 385 U. S. 511 (1967).

[15] The limitation on advertising by attorneys in Arizona seems to have commenced in 1919 with the incorporation by reference of the American Bar Association's 1908 Canons of Professional Ethics into Arizona's statutory law. 1919 Ariz. Sess. Laws, c. 158.

[16] Indeed, our decision today on the Sherman Act issue was presaged in *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748, 770 (1976). We noted there: "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker* v. *Brown,* 317 U. S. 341 (1943)."

We conclude that the Arizona Supreme Court's determination that appellants' Sherman Act claim is barred by the *Parker* v. *Brown* exemption must be affirmed.

III

The First Amendment

A

Last Term, in *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748 (1976), the Court considered the validity under the First Amendment of a Virginia statute declaring that a pharmacist was guilty of "unprofessional conduct" if he advertised prescription drug prices. The pharmacist would then be subject to a monetary penalty or the suspension or revocation of his license. The statute thus effectively prevented the advertising of prescription drug price information. We recognized that the pharmacist who desired to advertise did not wish to report any particularly newsworthy fact or to comment on any cultural, philosophical, or political subject; his desired communication was characterized simply: " 'I will sell you the X prescription drug at the Y price.' " *Id.,* at 761. Nonetheless, we held that commercial speech of that kind was entitled to the protection of the First Amendment.

Our analysis began, *ibid.,* with the observation that our cases long have protected speech even though it is in the form of a paid advertisement, *Buckley* v. *Valeo,* 424 U. S. 1 (1976); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); in a form that is sold for profit, *Smith* v. *California,* 361 U. S. 147 (1959); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); or in the form of a solicitation to pay or contribute money, *New York Times Co.* v. *Sullivan, supra; Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). If commercial speech is to be distinguished, it "must be distinguished by its content." 425 U. S., at 761. But a consideration of competing interests reinforced our view that such speech should not be with-

drawn from protection merely because it proposed a mundane commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts. See, *e. g., NLRB* v. *Gissel Packing Co.,* 395 U. S. 575 (1969); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940). The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. See *Bigelow* v. *Virginia,* 421 U. S. 809 (1975). And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. See *FTC* v. *Procter & Gamble Co.,* 386 U. S. 568, 603–604 (1967) (Harlan, J., concurring). In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking. 425 U. S., at 761–765.

Arrayed against these substantial interests in the free flow of commercial speech were a number of proffered justifications for the advertising ban. Central among them were claims that the ban was essential to the maintenance of professionalism among licensed pharmacists. It was asserted that advertising would create price competition that might cause the pharmacist to economize at the customer's expense. He might reduce or eliminate the truly professional portions of his services: the maintenance and packaging of drugs so as to assure their effectiveness, and the supplementation on occasion of the prescribing physician's advice as to use. Moreover, it was said, advertising would cause consumers to price-shop, thereby undermining the pharmacist's effort to monitor the drug use of a regular customer so as to ensure that the prescribed drug would not provoke an allergic reaction or be incompatible with another substance the customer was

consuming. Finally, it was argued that advertising would reduce the image of the pharmacist as a skilled and specialized craftsman—an image that was said to attract talent to the profession and to reinforce the good habits of those in it—to that of a mere shopkeeper. *Id.,* at 766–768.

Although acknowledging that the State had a strong interest in maintaining professionalism among pharmacists, this Court concluded that the proffered justifications were inadequate to support the advertising ban. High professional standards were assured in large part by the close regulation to which pharmacists in Virginia were subject. *Id.,* at 768. And we observed that "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." *Id.,* at 769. But we noted the presence of a potent alternative to this "highly paternalistic" approach: "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.,* at 770. The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice "that the First Amendment makes for us." *Ibid.* See also *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 97 (1977).

We have set out this detailed summary of the *Pharmacy* opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from it. Like the Virginia statutes, the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance. Because of the possibility, however, that the differences among professions might bring different constitutional considerations into play, we specifically reserved judgment as to other professions.[17]

[17] "We stress that we have considered in this case the regulation of

In the instant case we are confronted with the arguments directed explicitly toward the regulation of advertising by licensed attorneys.

B

The issue presently before us is a narrow one. First, we need not address the peculiar problems associated with advertising claims relating to the *quality* of legal services. Such claims probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false. Appellee does not suggest, nor do we perceive, that appellants' advertisement contained claims, extravagant or otherwise, as to the quality of services. Accordingly, we leave that issue for another day. Second, we also need not resolve the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or "runners." Activity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. Hence, this issue also is not before us. Third, we note that appellee's criticism of advertising by attorneys does not apply with much force to some of the basic factual content of advertising: information as to the attorney's name, address, and telephone number, office hours, and the like. The American Bar Association itself has a provision in its current Code of Professional Responsibility that would allow the disclosure of such information, and more,

---

commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." 425 U. S., at 773 n. 25 (emphasis in original). See *id.*, at 773–775 (concurring opinion).

in the classified section of the telephone directory. DR 2–102 (A)(6) (1976).[18] We recognize, however, that an advertising diet limited to such spartan fare would provide scant nourishment.

The heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which

---

[18] The disciplinary rule, after referring to a listing in "a reputable law list," legal directory, or classified section of a telephone company directory, states:

"The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates, to the extent not prohibited by the authority having jurisdiction under state law over the subject; a statement that practice is limited to one or more fields of law, to the extent not prohibited by the authority having jurisdiction under state law over the subject of limitation of practice by lawyers; a statement that the lawyer or law firm specializes in a particular field of law or law practice, to the extent permitted by the authority having jurisdiction under state law over the subject of specialization by lawyers and in accordance with rules prescribed by that authority; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented; whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services; provided, all such published data shall be disseminated only to the extent and in such format and language uniformly applicable to all lawyers, as prescribed by the authority having jurisdiction by state law over the subject. This proviso is not applicable in any state unless and until it is implemented by such authority in that state."

certain routine services will be performed. Numerous justifications are proffered for the restriction of such price advertising. We consider each in turn:

1. *The Adverse Effect on Professionalism.* Appellee places particular emphasis on the adverse effects that it feels price advertising will have on the legal profession. The key to professionalism, it is argued, is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve. Advertising is also said to erode the client's trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client's welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession.

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present Members of this Court, licensed attorneys all, could not feel otherwise. And we would have reason to pause if we felt that our decision today would undercut that spirit. But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception.[19] And rare is the client, moreover,

[19] Counsel for the appellee at oral argument readily stated: "We all know that law offices are big businesses, that they may have billion-dollar or million-dollar clients, they're run with computers, and all the rest. And so the argument may be made that to term them noncommercial is sanctimonious humbug." Tr. of Oral Arg. 64.

even one of modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge. See B. Christensen, Lawyers for People of Moderate Means 152–153 (1970). In fact, the American Bar Association advises that an attorney should reach "a clear agreement with his client as to the basis of the fee charges to be made," and that this is to be done "[a]s soon as feasible after a lawyer has been employed." Code of Professional Responsibility EC 2–19 (1976). If the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office.

Moreover, the assertion that advertising will diminish the attorney's reputation in the community is open to question. Bankers and engineers advertise,[20] and yet these professions

---

[20] See B. Christensen, Lawyers for People of Moderate Means 151–152 (1970); Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 Yale L. J. 1181, 1190 (1972). Indeed, it appears that even the medical profession now views the alleged adverse effect of advertising in a somewhat different light from the appellee. A Statement of the Judicial Council of the American Medical Association provides in part:

"Advertising—The *Principles* [*of Medical Ethics*] do not proscribe advertising; they proscribe the solicitation of patients. . . . The public is entitled to know the names of physicians, the type of their practices, the location of their offices, their office hours, and other useful information that will enable people to make a more informed choice of physician.

"The physician may furnish this information through the accepted local media of advertising or communication, which are open to all physicians on like conditions. Office signs, professional cards, dignified announcements, telephone directory listings, and reputable directories are examples of acceptable media for making information available to the public.

"A physician may give biographical and other relevant data for listing in a reputable directory. . . . If the physician, at his option, chooses to supply fee information, the published data may include his charge for a standard office visit or his fee or range of fees for specific types of services, provided disclosure is made of the variable and other pertinent factors

are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession.[21] The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services [22] or because of an inability to locate a competent attorney.[23] Indeed, cynicism

---

affecting the amount of the fee specified. The published data may include other relevant facts about the physician, but false, misleading, or deceptive statements or claims should be avoided." 235 J. A. M. A. 2328 (1976).

[21] See M. Freedman, Lawyers' Ethics in an Adversary System 115–116 (1975); Branca & Steinberg, Attorney Fee Schedules and Legal Advertising: The Implications of *Goldfarb,* 24 UCLA L. Rev. 475, 516–517 (1977).

[22] The Report of the Special Committee on the Availability of Legal Services, adopted by the House of Delegates of the American Bar Association, and contained in the ABA's Revised Handbook on Prepaid Legal Services (1972), states, at 26: "We are persuaded that the actual or feared price of such services coupled with a sense of unequal bargaining status is a significant barrier to wider utilization of legal services." See also E. Koos, The Family and The Law 7 (1948) (survey in which 47.6% of working-class families cited cost as the reason for not using a lawyer); P. Murphy & S. Walkowski, Compilation of Reference Materials on Prepaid Legal Services 2–3 (1973) (summarizing study in which 514 of 1,040 respondents gave expected cost as reason for not using a lawyer's services despite a perceived need). There are indications that fear of cost is unrealistic. See Petition of the Board of Governors of the District of Columbia Bar for Amendments to Rule X of the Rules Governing the Bar of the District of Columbia (1976), reprinted in the App. to Brief for United States as *Amicus Curiae* 10a, 24a–25a (reporting study in which middle-class consumers overestimated lawyers' fees by 91% for the drawing of a simple will, 340% for reading and advising on a 2-page installment sales contract, and 123% for 30 minutes of consultation). See also F. Marks, R. Hallauer, & R. Clifton, The Shreveport Plan: An Experiment in the Delivery of Legal Services 50–52 (1974).

[23] The preliminary release of some of the results of a survey conducted by the ABA Special Committee to Survey Legal Needs in collaboration

with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly. See H. Drinker, Legal Ethics 5, 210–211 (1953).[24] Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. *Id.*, at 211. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow "above"

---

with the American Bar Foundation reveals that 48.7% strongly agreed and another 30.2% slightly agreed with the statement that people do not go to lawyers because they have no way of knowing which lawyers are competent to handle their particular problems. ABA, Legal Services and the Public, 3 Alternatives 15 (Jan. 1976). See B. Curran & F. Spalding, The Legal Needs of the Public 96 (Preliminary Report 1974) (an earlier report concerning the same survey). Although advertising by itself is not adequate to deal with this problem completely, it can provide some of the information that a consumer needs to make an intelligent selection.

[24] The British view may be changing. An official British Commission recently presented reports to Parliament recommending that solicitors be permitted to advertise. Monopolies and Mergers Commission, Services of Solicitors in England and Wales: A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising 39–41 (1976); Monopolies and Mergers Commission, Services of Solicitors in Scotland: A Report on the Supply of Services of Solicitors in Scotland in Relation to Restrictions on Advertising 31–34 (1976). A companion study concerning barristers recommended that no changes be made in the restrictions upon their advertising, chiefly because barristers are not hired directly by laymen. Monopolies and Mergers Commission, Barristers' Services: A Report on the Supply of Barristers' Services in Relation to Restrictions on Advertising 21–24 (1976).

trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.

2. *The Inherently Misleading Nature of Attorney Advertising.* It is argued that advertising of legal services inevitably will be misleading (a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal services is unable to determine in advance just what services he needs, and (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill.

We are not persuaded that restrained professional advertising by lawyers inevitably will be misleading. Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type.[25] The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like—the very services advertised by appellants.[26] Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising

---

[25] See Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702, 741 (1977); Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 Yale L. J. 1181, 1203 (1972). Economic considerations suggest that advertising is a more significant force in the marketing of inexpensive and frequently used goods and services with mass markets than in the marketing of unique products or services.

[26] Moreover, we see nothing that is misleading in the advertisement of the cost of an initial half-hour consultation. The American Bar Association's Code of Professional Responsibility DR 2–102 (A)(6) (1976), permits the disclosure of such fee information in the classified section of a telephone directory. See n. 18, *supra*. If the information is not misleading when published in a telephone directory, it is difficult to see why it becomes misleading when published in a newspaper.

misleading so long as the attorney does the necessary work at the advertised price.[27] The argument that legal services are so unique that fixed rates cannot meaningfully be established is refuted by the record in this case: The appellee State Bar itself sponsors a Legal Services Program in which the participating attorneys agree to perform services like those advertised by the appellants at standardized rates. App. 459–478. Indeed, until the decision of this Court in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975), the Maricopa County Bar Association apparently had a schedule of suggested minimum fees for standard legal tasks. App. 355. We thus find of little force the assertion that advertising is misleading because of an inherent lack of standardization in legal services.[28]

The second component of the argument—that adver-

---

[27] One commentator has observed: "[A] moment's reflection reveals that the same argument can be made for barbers; rarely are two haircuts identical, but that does not mean that barbers cannot quote a standard price. Lawyers perform countless relatively standardized services which vary somewhat in complexity but not so much as to make each job utterly unique." Morgan, *supra,* n. 25, at 714.

[28] THE CHIEF JUSTICE and MR. JUSTICE POWELL argue in dissent that advertising will be misleading because the exact services that are included in an advertised package may not be clearly specified or understood by the prospective client. *Post,* at 386–387 and 392–394. The bar, however, retains the power to define the services that must be included in an advertised package, such as an uncontested divorce, thereby standardizing the "product." We recognize that an occasional client might fail to appreciate the complexity of his legal problem and will visit an attorney in the mistaken belief that his difficulty can be handled at the advertised price. The misunderstanding, however, usually will be exposed at the initial consultation, and an ethical attorney would impose, at the most, a minimal consultation charge or no charge at all for the discussion. If the client decides to have work performed, a fee could be negotiated in the normal manner. The client is thus in largely the same position as he would be if there were no advertising. In light of the benefits of advertising to those whose problem can be resolved at the advertised price, suppression is not warranted on account of the occasional client who misperceives his legal difficulties.

238-670 O - 79 - 26

tising ignores the diagnostic role—fares little better.[29] It is unlikely that many people go to an attorney merely to ascertain if they have a clean bill of legal health. Rather, attorneys are likely to be employed to perform specific tasks. Although the client may not know the detail involved in performing the task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself.

The third component is not without merit: Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers.[30] Moreover, the argument assumes that the public

[29] The same argument could be made about the advertising of abortion services. Although the layman may not know all the details of the medical procedure and may not always be able accurately to diagnose pregnancy, such advertising has certain First Amendment protection. *Bigelow* v. *Virginia,* 421 U. S. 809 (1975).

[30] It might be argued that advertising is undesirable because it allows the potential client to substitute advertising for reputational information in selecting an appropriate attorney. See, *e. g.,* Note, Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys, 62 Va. L. Rev. 1135, 1152–1157 (1976). Since in a referral system relying on reputation an attorney's future business is partially dependent on current performance, such a system has the benefit both of providing a mechanism for disciplining misconduct and of creating an incentive for an attorney to do a better job for his present clients. Although the system may have worked when the typical lawyer practiced in a small, homogeneous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy. See, *e. g.,* B. Christensen, Lawyers for People of Moderate Means 128–135 (1970); Note, Bar Restrictions on Dissemination of Information about Legal Services, 22 UCLA L. Rev. 483, 500 (1974); Note, Sherman Act Scrutiny, *supra,* at 1156–1157. The trends of urbanization and specialization long since have moved the typical practice of law from its small-

is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S., at 769–770. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.

3. *The Adverse Effect on the Administration of Justice.* Advertising is said to have the undesirable effect of stirring up litigation.[31] The judicial machinery is designed to serve those who feel sufficiently aggrieved to bring forward their claims. Advertising, it is argued, serves to encourage the assertion of legal rights in the courts, thereby undesirably unsettling

---

town setting. See R. Pound, The Lawyer from Antiquity to Modern Times 242 (1953). Information as to the qualifications of lawyers is not available to many. See n. 23, *supra*. And, if available, it may be inaccurate or biased. See Note, Sherman Act Scrutiny, *supra*, at 1157.

[31] It is argued that advertising also will encourage fraudulent claims. We do not believe, however, that there is an inevitable relationship between advertising and dishonesty. See Monopolies and Mergers Commission, Services of Solicitors in England and Wales, *supra*, n. 24, at 32–33 ("The temptation to depart from the high standards required of the profession no doubt exists, but we do not believe that solicitors would be likely to succumb to it more easily or more frequently merely by reason of the supposed contamination of advertising; the traditions of the profession and the sense of responsibility of its members are in our view too strong for this to happen"). Unethical lawyers and dishonest laymen are likely to meet even though restrictions on advertising exist. The appropriate response to fraud is a sanction addressed to that problem alone, not a sanction that unduly burdens a legitimate activity.

societal repose. There is even a suggestion of barratry. See, *e. g.*, Comment, A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674, 675–676 (1958).

But advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.[32] As the bar acknowledges, "the middle 70% of our population is not being reached or served adequately by the legal profession." ABA, Revised Handbook on Prepaid Legal Services 2 (1972).[33] Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. See nn. 22 and 23, *supra*. Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, par-

[32] Decided cases reinforce this view. The Court often has recognized that collective activity undertaken to obtain meaningful access to the courts is protected under the First Amendment. See *United Transportation Union* v. *Michigan Bar*, 401 U. S. 576, 585 (1971); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222–224 (1967); *Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1, 7 (1964); *NAACP* v. *Button*, 371 U. S. 415, 438–440 (1963). It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups.

[33] The ABA survey discussed in n. 23 indicates that 35.8% of the adult population has never visited an attorney and another 27.9% has visited an attorney only once. 3 Alternatives, *supra*, n. 23, at 12. See also P. Murphy & S. Walkowski, Compilation of Reference Materials on Prepaid Legal Services 1 (1973); Meserve, Our Forgotten Client: The Average American, 57 A. B. A. J. 1092 (1971). Appellee concedes the existence of the problem, but argues that advertising offers an unfortunate solution. Brief for Appellee 54–56.

ticularly for the not-quite-poor and the unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." ABA Code of Professional Responsibility EC 2–1 (1976).

4. *The Undesirable Economic Effects of Advertising.* It is claimed that advertising will increase the overhead costs of the profession, and that these costs then will be passed along to consumers in the form of increased fees. Moreover, it is claimed that the additional cost of practice will create a substantial entry barrier, deterring or preventing young attorneys from penetrating the market and entrenching the position of the bar's established members.

These two arguments seem dubious at best. Neither distinguishes lawyers from others, see *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S., at 768, and neither appears relevant to the First Amendment. The ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced. Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising.[34] It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer.[35]

---

[34] See Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. Law & Econ. 337 (1972); J. Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976). See also *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S., at 754, and n. 11 (noting variation in drug prices of up to 1200% in one city).

[35] On the one hand, advertising does increase an attorney's overhead costs, and, in light of the underutilization of legal services by the public,

The entry-barrier argument is equally unpersuasive. In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetuate the market position of established attorneys. Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.

5. *The Adverse Effect of Advertising on the Quality of Service.* It is argued that the attorney may advertise a given "package" of service at a set price, and will be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client's needs.

Restraints on advertising, however, are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising. And the advertisement of a standardized fee does not necessarily mean that the services offered are undesirably standardized. Indeed, the assertion that an attorney who advertises a standard fee will cut quality is substantially undermined by the fixed-fee schedule of appellee's own prepaid Legal Services Program. Even if advertising leads to the

---

see n. 33, *supra,* it may increase substantially the demand for services. Both these factors will tend to increase the price of legal services. On the other hand, the tendency of advertising to enhance competition might be expected to produce pressures on attorneys to reduce fees. The net effect of these competing influences is hard to estimate. We deem it significant, however, that consumer organizations have filed briefs as *amici* urging that the restriction on advertising be lifted. And we note as well that, despite the fact that advertising on occasion might increase the price the consumer must pay, competition through advertising is ordinarily the desired norm.

Even if advertising causes fees to drop, it is by no means clear that a loss of income to lawyers will result. The increased volume of business generated by advertising might more than compensate for the reduced profit per case. See Frierson, Legal Advertising, Barrister 6, 8 (Winter 1975); Wilson, Madison Avenue, Meet the Bar, 61 A. B. A. J. 586, 588 (1975).

creation of "legal clinics" like that of appellants'—clinics that emphasize standardized procedures for routine problems—it is possible that such clinics will improve service by reducing the likelihood of error.

6. *The Difficulties of Enforcement.* Finally, it is argued that the wholesale restriction is justified by the problems of enforcement if any other course is taken. Because the public lacks sophistication in legal matters, it may be particularly susceptible to misleading or deceptive advertising by lawyers. After-the-fact action by the consumer lured by such advertising may not provide a realistic restraint because of the inability of the layman to assess whether the service he has received meets professional standards. Thus, the vigilance of a regulatory agency will be required. But because of the numerous purveyors of services, the overseeing of advertising will be burdensome.

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.

In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys.

C

In the usual case involving a restraint on speech, a showing that the challenged rule served unconstitutionally to suppress

speech would end our analysis. In the First Amendment context, the Court has permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that in fact his specific conduct was protected. See, *e. g., Bigelow* v. *Virginia,* 421 U. S., at 815–816; *Gooding* v. *Wilson,* 405 U. S. 518, 521–522 (1972); *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965). Having shown that the disciplinary rule interferes with protected speech, appellants ordinarily could expect to benefit regardless of the nature of their acts.

The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court. See, *e. g., Broadrick* v. *Oklahoma,* 413 U. S. 601, 610 (1973); *United States* v. *Raines,* 362 U. S. 17, 21 (1960); *Ashwander* v. *TVA,* 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute. See *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.

But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S., at 771 n. 24, there

are "commonsense differences" between commercial speech and other varieties. See also *id.*, at 775–781 (concurring opinion). Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See *id.*, at 771–772, n. 24. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. *Ibid.* Since overbreadth has been described by this Court as "strong medicine," which "has been employed . . . sparingly and only as a last resort," *Broadrick* v. *Oklahoma*, 413 U. S., at 613, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. Cf. *Bigelow* v. *Virginia*, 421 U. S., at 817–818.

Is, then, appellants' advertisement outside the scope of basic First Amendment protection? Aside from general claims as to the undesirability of any advertising by attorneys, a matter considered above, appellee argues that appellants' advertisement is misleading, and hence unprotected, in three particulars: (a) the advertisement makes reference to a "legal clinic," an allegedly undefined term; (b) the advertisement claims that appellants offer services at "very reasonable" prices, and, at least with regard to an uncontested divorce, the advertised price is not a bargain; and (c) the advertisement does not inform the consumer that he may obtain a name change without the services of an attorney. Tr. of Oral Arg. 56–57. On this record, these assertions are unpersuasive. We suspect that the public would readily understand the term "legal clinic"—if, indeed, it focused on the term at all—to refer to an operation like that of appellants' that is geared to provide standardized and multiple services. In fact, in his deposition the president of the State Bar of Arizona observed

that there was a committee of the bar "exploring the ways in which the legal clinic concept can be properly developed." App. 375; see *id.*, at 401. See also *id.*, at 84–85 (testimony of appellants). And the clinical concept in the sister profession of medicine surely by now is publicly acknowledged and understood.

As to the cost of an uncontested divorce, appellee's counsel stated at oral argument that this runs from $150 to $300 in the area. Tr. of Oral Arg. 58. Appellants advertised a fee of $175 plus a $20 court filing fee, a rate that seems "very reasonable" in light of the customary charge. Appellee's own Legal Services Program sets the rate for an uncontested divorce at $250. App. 473. Of course, advertising will permit the comparison of rates among competitors, thus revealing if the rates are reasonable.

As to the final argument—the failure to disclose that a name change might be accomplished by the client without the aid of an attorney—we need only note that most legal services may be performed legally by the citizen for himself. See *Faretta* v. *California*, 422 U. S. 806 (1975); ABA Code of Professional Responsibility EC 3–7 (1976). The record does not unambiguously reveal some of the relevant facts in determining whether the nondisclosure is misleading, such as how complicated the procedure is and whether the State provides assistance for laymen. The deposition of one appellant, however, reflects that when he ascertained that a name change required only the correction of a record or the like, he frequently would send the client to effect the change himself.[36] App. 112.

We conclude that it has not been demonstrated that the advertisement at issue could be suppressed.

---

[36] The same appellant, however, stated: "[I]t's not my job to inform a prospective client that he needn't employ a lawyer to handle his work." App. 112–113.

IV

In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding.

Advertising that is false, deceptive, or misleading of course is subject to restraint. See *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S., at 771–772, and n. 24. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. *Id.,* at 771–772, n. 24. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. Compare *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 339–341 (1974), and *Cantwell* v. *Connecticut,* 310 U. S., at 310, with *NLRB* v. *Gissel Packing Co.,* 395 U. S., at 618. In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.[37] For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be

[37] The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience. Cf. *Feil* v. *FTC,* 285 F. 2d 879, 897 (CA9 1960). Thus, different degrees of regulation may be appropriate in different areas.

misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation. We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled. In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.

As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. See *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S., at 771. Advertising concerning transactions that are themselves illegal obviously may be suppressed. See *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376, 388 (1973). And the special problems of advertising on the electronic broadcast media will warrant special consideration. Cf. *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582 (DC 1971), summarily aff'd *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General,* 405 U. S. 1000 (1972).

The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

The judgment of the Supreme Court of Arizona is therefore affirmed in part and reversed in part.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

ADVERTISEMENT

DO YOU NEED A LAWYER?

LEGAL SERVICES AT VERY REASONABLE FEES

- **Divorce or legal separation--uncontested (both spouses sign papers)**

  $175.00 plus $20.00 court filing fee

- **Preparation of all court papers and instructions on how to do your own simple uncontested divorce**

  $100.00

- **Adoption--uncontested severance proceeding**

  $225.00 plus approximately $10.00 publication cost

- **Bankruptcy--non-business, no contested proceedings**

  Individual
  $250.00 plus $55.00 court filing fee

  Wife and Husband
  $300.00 plus $110.00 court filing fee

- **Change of Name**

  $95.00 plus $20.00 court filing fee

Information regarding other types of cases furnished on request

Legal Clinic of Bates & O'Steen
617 North 3rd Street
Phoenix, Arizona 85004
Telephone [602] 252-8888

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I am in general agreement with MR. JUSTICE POWELL's analysis and with Part II of the Court's opinion. I particularly agree with MR. JUSTICE POWELL's statement that "today's decision will effect profound changes in the practice of law." *Post,* at 389. Although the exact effect of those changes cannot now be known, I fear that they will be injurious to those whom the ban on legal advertising was designed to protect—the members of the general public in need of legal services.

Some Members of the Court apparently believe that the present case is controlled by our holding one year ago in *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748 (1976). However, I had thought that we made most explicit that our holding there rested on the fact that the advertisement of standardized, prepackaged, name-brand drugs was at issue. *Id.,* at 773 n. 25. In that context, the prohibition on price advertising, which had served a useful function in the days of individually compounded medicines, was no longer tied to the conditions which had given it birth. The same cannot be said with respect to legal services which, by necessity, must vary greatly from case to case. Indeed, I find it difficult, if not impossible, to identify categories of legal problems or services which are fungible in nature. For example, MR. JUSTICE POWELL persuasively demonstrates the fallacy of any notion that even an uncontested divorce can be "standard." *Post,* at 392–394. A "reasonable charge" for such a divorce could be $195, as the appellants wish to advertise, or it could reasonably be a great deal more, depending on such variables as child custody, alimony, support, or any property settlement. Because legal services can rarely, if ever, be "standardized" and because potential clients rarely know in advance what services they do in fact need, price advertising can never give the public an accurate picture on which to base its selection of an attorney. Indeed, in the context of legal

services, such incomplete information could be worse than no information at all.[1] It could become a trap for the unwary.

The Court's opinion largely disregards these facts on the unsupported assumptions that attorneys will not advertise anything but "routine" services—which the Court totally fails to identify or define—or, if they do advertise, that the bar and the courts will be able to protect the public from those few practitioners who abuse their trust. The former notion is highly speculative and, of course, does nothing to solve the problems that this decision will create; as to the latter, the existing administrative machinery of both the profession and the courts has proved wholly inadequate to police the profession effectively. See ABA Special Committee On Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970). To impose the enormous new regulatory burdens called for by the Court's decision on the presently deficient machinery of the bar and courts is unrealistic; it is almost predictable that it will create problems of unmanageable proportions. The Court thus takes a "great leap" into an unexplored, sensitive regulatory area where the legal profession and the courts have not yet learned to crawl, let alone stand up or walk. In my view, there is no need for this hasty plunge into a problem where not even the wisest of experts—if such experts exist—can move with sure steps.

---

[1] I express no view on MR. JUSTICE POWELL's conclusion that the advertisement of an attorney's initial consultation fee or his hourly rate would not be inherently misleading and thus should be permitted since I cannot understand why an "initial consultation" should have a different charge base from an hourly rate. *Post,* at 399–400. Careful study of the problems of attorney advertising—and none has yet been made—may well reveal that advertisements limited to such matters do not carry with them the potential for abuse that accompanies the advertisement of fees for particular services. However, even such limited advertisements should not be permitted without a disclaimer which informs the public that the fee charged in any particular case will depend on and vary according to the individual circumstances of that case. See ABA Code of Professional Responsibility DR 2–106 (B) (1976).

To be sure, the public needs information concerning attorneys, their work, and their fees. At the same time, the public needs protection from the unscrupulous or the incompetent practitioner anxious to prey on the uninformed. It seems to me that these twin goals can best be served by permitting the organized bar to experiment with and perfect programs which would announce to the public the probable *range* of fees for specifically defined services and thus give putative clients some idea of potential cost liability when seeking out legal assistance.[2] However, even such programs should be confined to the known and knowable, *e. g.*, the truly "routine" uncontested divorce which is defined to exclude any dispute over alimony, property rights, child custody or support, and should make clear to the public that the actual fee charged in any given case will vary according to the individual circumstances involved, see ABA Code of Professional Responsibility DR 2–106 (B) (1976), in order to insure that the expectations of clients are not unduly inflated. Accompanying any reform of this nature must be some type of *effective* administrative procedure to hear and resolve the grievances and complaints of disappointed clients.

Unfortunately, the legal profession in the past has approached solutions for the protection of the public with too much caution, and, as a result, too little progress has been made. However, as MR. JUSTICE POWELL points out, *post,* at 398–399, the organized bar has recently made some reforms in this sensitive area and more appear to be in the offing. Rather than allowing these efforts to bear fruit, the Court today opts for a Draconian "solution" which I believe will only breed more problems than it can conceivably resolve.

---

[2] The publication of such information by the organized bar would create no conflict with our holding in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975), so long as attorneys were under no obligation to charge within the range of fees described.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I agree with the Court that appellants' Sherman Act claim is barred by the *Parker* v. *Brown*, 317 U. S. 341 (1943), exemption and therefore join Part II of the Court's opinion. But I cannot join the Court's holding that under the First Amendment "truthful" newspaper advertising of a lawyer's prices for "routine legal services" may not be restrained. *Ante*, at 384. Although the Court appears to note some reservations (mentioned below), it is clear that within undefined limits today's decision will effect profound changes in the practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened. Although the Court's opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to the advertising of undefined "routine legal services." In my view, this result is neither required by the First Amendment, nor in the public interest.

I

Appellants, two young members of the Arizona Bar, placed an advertisement in a Phoenix newspaper apparently for the purpose of testing the validity of Arizona's ban on advertising by attorneys. The advertisement, reproduced *ante*, at 385, stated that appellants' "Legal Clinic" provided "legal services at very reasonable fees," and identified the following four legal services, indicating an exact price for each:

> (1) Divorce or legal separation—uncontested (both spouses sign papers): $175 plus $20 court filing fee.
>
> (2) Preparation of all court papers and instructions on how to do your own simple uncontested divorce: $100.

(3) Adoption—uncontested severance proceeding: $225 plus approximately $10 publication cost.

(4) Bankruptcy—non-business, no contested proceedings—individual: $250 plus $55 court filing fee; wife and husband: $300 plus $110 court filing fee.

(5) Change of Name—$95 plus $20 court filing fee.

The advertisement also stated that information regarding other types of cases would be furnished on request. Since it is conceded that this advertisement violated Disciplinary Rule 2–101 (B), incorporated in Rule 29 (a) of the Supreme Court of Arizona,[1] the question before us is whether the application of the disciplinary rule to appellants' advertisement violates the First Amendment.

The Court finds the resolution of that question in our recent decision in *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748 (1976). In that case, we held unconstitutional under the First and Fourteenth Amendments a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. We concluded that commercial speech to the effect that "I will sell you the X prescription drug at the Y price" was entitled to certain protection under the First Amendment, and found that the proffered justifications were inadequate to support the ban on price advertising. But we were careful to note that we were dealing in that case with price advertising of a *standardized product.* The Court specifically reserved judgment as to the constitutionality of state regulation of price advertising with respect to *professional services:*

> "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense

[1] The disciplinary rule is reproduced *ante,* at 355, and n. 5.

> standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.*, at 773 n. 25 (emphasis in original).[2]

This case presents the issue so reserved, and the Court resolves it on the assumption that what it calls "routine" legal services are essentially no different for purposes of First Amendment analysis from prepackaged prescription drugs. In so holding, the Court fails to give appropriate weight to the two fundamental ways in which the advertising of professional services presents a different issue from that before the Court with respect to tangible products: the vastly increased potential for deception and the enhanced difficulty of effective regulation in the public interest.

A

It has long been thought that price advertising of legal services inevitably will be misleading because such services are individualized with respect to content and quality and because the lay consumer of legal services usually does not know in advance the precise nature and scope of the services he requires. *Ante,* at 372. Although the Court finds some force in this reasoning and recognizes that "many services performed by attorneys are indeed unique," its first answer is the optimistic expression of hope that few lawyers "would or could advertise fixed prices for services of that type." *Ibid.* But the Court's basic response in view of the acknowledged potential for deceptive advertising of "unique" services is to divide the immense range of the professional product of

[2] THE CHIEF JUSTICE, concurring in *Virginia Pharmacy,* also emphasized the distinction between tangible products and professional services:

"The Court notes that roughly 95% of all prescriptions are filled with dosage units already prepared by the manufacturer and sold to the pharmacy in that form. . . . In dispensing these *prepackaged* items, the pharmacist performs largely a packaging rather than a compounding function of former times." 425 U. S., at 773–774 (emphasis in original).

lawyers into two categories: "unique" and "routine." The only insight afforded by the opinion as to how one draws this line is the finding that services similar to those in appellants' advertisement are routine: "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." *Ibid.* What the phrase "the like" embraces is not indicated. But the advertising of such services must, in the Court's words, flow "both freely and cleanly." *Ante,* at 384.

Even the briefest reflection on the tasks for which lawyers are trained and the variation among the services they perform should caution against facile assumptions that legal services can be classified into the routine and the unique. In most situations it is impossible—both for the client and the lawyer—to identify with reasonable accuracy in advance the nature and scope of problems that may be encountered even when handling a matter that at the outset seems routine. Neither quantitative nor qualitative measurement of the service actually needed is likely to be feasible in advance.[3]

This definitional problem is well illustrated by appellants' advertised willingness to obtain uncontested divorces for $195 each. A potential client can be grievously misled if he

[3] What legal services are "routine" depends on the eye of the beholder. A particular service may be quite routine to a lawyer who has specialized in that area for many years. The marital trust provisions of a will, for example, are routine to the experienced tax and estate lawyer; they may be wholly alien to the negligence litigation lawyer. And what the unsophisticated client may think is routine simply cannot be predicted. Absent even a minimal common understanding as to the service, and given the unpredictability in advance of what actually may be required, the advertising lawyer and prospective client often will have no meeting of the minds. Although widely advertised tangible products customarily vary in many respects, at least in the vast majority of cases prospective purchasers know the product and can make a preliminary comparative judgment based on price. But not even the lawyer doing the advertising can know in advance the nature and extent of services required by the client who responds to the advertisement. Price comparisons of designated services, therefore, are more likely to mislead than to inform.

reads the advertised service as embracing all of his possible needs. A host of problems are implicated by divorce. They include alimony; support and maintenance for children; child custody; visitation rights; interests in life insurance, community property, tax refunds, and tax liabilities; and the disposition of other property rights.[4] The processing of court papers—apparently the only service appellants provide for $100—is usually the most straightforward and least demanding aspect of the lawyer's responsibility in a divorce case. More important from the viewpoint of the client is the diagnostic and advisory function: the pursuit of relevant inquiries of which the client would otherwise be unaware, and advice with respect to alternative arrangements that might prevent irreparable dissolution of the marriage or otherwise resolve the client's problem.[5] Although those profes-

---

[4] It may be argued that many of these problems are not applicable for couples of modest means. This is by no means invariably true, even with respect to alimony, support and maintenance, and property questions. And it certainly is not true with respect to the more sensitive problems of child custody and visitation rights.

[5] A high percentage of couples seeking counsel as to divorce desire initially that it be uncontested. They often describe themselves as civilized people who have mutually agreed to separate; they want a quiet, out-of-court divorce without alimony. But experienced counsel knows that the initial spirit of amity often fades quickly when the collateral problems are carefully explored. Indeed, scrupulous counsel—except in the rare case—will insist that the parties have separate counsel to assure that the rights of each, and those of children, are protected adequately. In short, until the lawyer has performed his first duties of diagnosis and advice as to rights, it is usually impossible to know whether there can or will be an uncontested divorce. As President Mark Harrison of the State Bar of Arizona testified:

"I suppose you can get lucky and have three clients come in in response to [appellants' advertisement] who have no children; no real property; no real disagreement, and you can handle such an uncontested divorce, and do a proper job for a [pre]determined, . . . prestated price.

. . . .

"[T]he inherent vice [is] that you can't know in advance, what special

sional functions are not included within appellants' packaged routine divorce, they frequently fall within the concept of "advice" with which the lay person properly is concerned when he or she seeks legal counsel. The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product.[6] As a result, the type of advertisement before us inescapably will mislead many who respond to it. In the end, it will promote distrust of lawyers and disrespect for our own system of justice.

The advertising of specified services at a fixed price is not the only infirmity of the advertisement at issue.[7] Appellants also assert that these services are offered at "very reasonable fees." That Court finds this to be an accurate statement since the advertised fee fell at the lower end of the range of customary charges. But the fee customarily charged in the locality for similar services has never been considered the sole determinant of the reasonableness of a fee.[8] This is because reasonableness reflects both the quan-

---

problems the client who sees the advertisement will present, and if you are bound to a predetermined price . . . sooner or later you are going to have to inevitably sacrifice the quality of service you are able to render." App. 378–380.

[6] Similar complications surround the uncontested adoption and the simple bankruptcy.

[7] Use of the term "clinic" to describe a law firm of any size is unusual, and possibly ambiguous in view of its generally understood meaning in the medical profession. Appellants defend its use as justified by their plan to provide standardized legal services at low prices through the employment of automatic equipment and paralegals. But there is nothing novel or unusual about the use by law firms of automatic equipment, paralegals, and other modern techniques for serving clients at lower cost. Nor are appellants a public service law firm. They are in private practice, and though their advertising is directed primarily to clients with family incomes of less than $25,000, appellants do not limit their practice to this income level. *Id.*, at 82.

[8] For example, the American Bar Association's Code of Professional Responsibility specifies the "[f]actors to be considered as guides in deter-

tity and quality of the service. A $195 fee may be reasonable for one divorce and unreasonable for another; and a $195 fee may be reasonable when charged by an experienced divorce lawyer and unreasonable when charged by a recent law school graduate. For reasons that are not readily apparent, the Court today discards the more discriminating approach which the profession long has used to judge the reasonableness of a fee, and substitutes an approach based on market averages. Whether a fee is "very reasonable" is a matter of opinion, and not a matter of verifiable fact as the Court suggests. One unfortunate result of today's decision is that lawyers may feel free to use a wide variety of adjectives—such as "fair," "moderate," "low-cost," or "lowest in town"—to describe the bargain they offer to the public.

B

Even if one were to accept the view that some legal services are sufficiently routine to minimize the possibility of deception, there nonetheless remains a serious enforcement problem. The Court does recognize some problems. It notes that misstatements that may be immaterial in "other adver-

---

mining the reasonableness of a fee . . . ." DR 2–106 (B) (1976). These include:

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) The fee customarily charged in the locality for similar legal services.

"(4) The amount involved and the results obtained.

"(5) The time limitations imposed by the client or by the circumstances.

"(6) The nature and length of the professional relationship with the client.

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the service.

"(8) Whether the fee is fixed or contingent."

tising may be found quite inappropriate in legal advertising" precisely because "the public lacks sophistication concerning legal services." *Ante,* at 383. It also recognizes that "advertising claims as to the quality of services . . . are not susceptible of measurement or verification" and therefore "may be so likely to be misleading as to warrant restriction." *Ante,* at 383–384. After recognizing that problems remain in defining the boundary between deceptive and nondeceptive advertising, the Court then observes that the bar may be expected to have "a special role to play in assuring that advertising by attorneys flows both freely and cleanly." *Ante,* at 384.

The Court seriously understates the difficulties, and overestimates the capabilities of the bar—or indeed of any agency public or private—to assure with a reasonable degree of effectiveness that price advertising can at the same time be both unrestrained and truthful. *Ibid.* There are some 400,000 lawyers in this country. They have been licensed by the States, and the organized bars within the States—operating under codes approved by the highest courts acting pursuant to statutory authority—have had the primary responsibility for assuring compliance with professional ethics and standards. The traditional means have been disciplinary proceedings conducted initially by voluntary bar committees subject to judicial review. In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement in this country has proved to be extremely difficult. See generally ABA, Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970).

The Court's almost casual assumption that its authorization of price advertising can be policed effectively by the bar reflects a striking underappreciation of the nature and mag-

nitude of the disciplinary problem. The very reasons that tend to make price advertising of services inherently deceptive make its policing wholly impractical. With respect to commercial advertising, MR. JUSTICE STEWART, concurring in *Virginia Pharmacy,* noted that since "the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth." 425 U. S., at 780. But there simply is no way to test "empirically" the claims made in appellants' advertisement of legal services. There are serious difficulties in determining whether the advertised services fall within the Court's undefined category of "routine services"; whether they are described accurately and understandably; and whether appellants' claim as to reasonableness of the fees is accurate. These are not factual questions for which there are "truthful" answers; in most instances, the answers would turn on relatively subjective judgments as to which there could be wide differences of opinion. These difficulties with appellants' advertisement will inhere in any comparable price advertisement of specific legal services. Even if public agencies were established to oversee professional price advertising, adequate protection of the public from deception, and of ethical lawyers from unfair competition, could prove to be a wholly intractable problem.

II

The Court emphasizes the need for information that will assist persons desiring legal services to choose lawyers. Under our economic system, advertising is the most commonly used and useful means of providing information as to goods and other services, but it generally has not been used with respect to legal and certain other professional services. Until today, controlling weight has been given to the danger that general advertising of such services too often would tend to mislead rather than inform. Moreover, there

has been the further concern that the characteristics of the legal profession thought beneficial to society—a code of professional ethics, an imbued sense of professional and public responsibility, a tradition of self-discipline, and duties as officers of the courts—would suffer if the restraints on advertising were significantly diluted.

Pressures toward some relaxation of the proscription against general advertising have gained force in recent years with the increased recognition of the difficulty that low- and middle-income citizens experience in finding counsel willing to serve at reasonable prices. The seriousness of this problem has not been overlooked by the organized bar. At both the national and state levels, the bar has addressed the need for expanding the availability of legal services in a variety of ways, including: (i) group legal service plans, increasingly used by unions, cooperatives, and trade associations; (ii) lawyer referral plans operated by local and state bars; (iii) bar-sponsored legal clinics; (iv) public service law firms; and (v) group insurance or prepaid service plans. Notable progress has been made over the past two decades in providing counsel for indigents charged with crime. Not insignificant progress also has been made through bar-sponsored legal aid and, more recently, the Federal Legal Services Corporation in providing counsel for indigents in civil cases. But the profession recognizes that less success has been achieved in assuring that persons who can afford to pay modest fees have access to lawyers competent and willing to represent them.[9]

---

[9] A major step forward was taken in 1965 with the initiation of the legal services program of the Office of Economic Opportunity, a program fully supported by the American Bar Association. The legal services program is now administered by the Federal Legal Services Corporation, created by Congress in 1976. Efforts by the profession to broaden the availability of legal services to persons of low- and middle-income levels also gained momentum in 1965.

Study and experimentation continue. Following a series of hearings in 1975, the American Bar Association amended its Code of Professional Responsibility to broaden the information, when allowed by state law, that a lawyer may provide in approved means of advertising. DR 2–102 (1976). In addition to the customary data published in legal directories, the amended regulation authorizes publication of the lawyer's fee for an initial consultation, the fact that other fee information is available on specific request, and the willingness of the attorney to accept credit cards or other credit arrangements. The regulation approves placement of such advertisements in the classified section of telephone directories, in the customary law lists and legal directories, and also in directories of lawyers prepared by consumer and other groups.

The Court observes, and I agree, that there is nothing inherently misleading in the advertisement of the cost of an initial consultation. Indeed, I would not limit the fee information to the initial conference. Although the skill and experience of lawyers vary so widely as to negate any equivalence between hours of service by different lawyers, variations in quality of service by duly licensed lawyers are inevitable. Lawyers operate, at least for the purpose of internal control and accounting, on the basis of specified hourly rates, and upon request—or in an appropriate case—most lawyers are willing to undertake employment at such rates. The advertisement of these rates, in an appropriate medium, duly designated, would not necessarily be misleading if this fee information also made clear that the total charge for the representation would depend on the number of hours devoted to the client's problem—a variable difficult to predict. Where the price content of the advertisement is limited to the finite item of rate per hour devoted to the client's problem, the likelihood of deceiving or misleading is consider-

ably less than when specific services are advertised at a fixed price.

III

Although I disagree strongly with the Court's holding as to price advertisements of undefined—and I believe undefinable—routine legal services, there are reservations in its opinion worthy of emphasis since they may serve to narrow its ultimate reach. First, the Court notes that it has not addressed "the peculiar problems associated with advertising claims relating to the *quality* of legal services." *Ante,* at 366. There are inherent questions of quality in almost any type of price advertising by lawyers, and I do not view appellants' advertisement as entirely free from quality implications. Nevertheless the Court's reservation in this respect could be a limiting factor.

Second, as in *Virginia Pharmacy,* the Court again notes that there may be reasonable restrictions on the time, place, and manner of commercial price advertising. In my view, such restrictions should have a significantly broader reach with respect to professional services than as to standardized products. This Court long has recognized the important state interests in the regulation of professional advertising. *Head* v. *New Mexico Board,* 374 U. S. 424 (1963); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955); *Semler* v. *Dental Examiners,* 294 U. S. 608 (1935).[10] And as to lawyers, the

[10] Although *Semler* v. *Dental Examiners* involved a due process issue rather than a First Amendment challenge, the distinction drawn in that case between the advertisement of professional services and commodities is highly relevant. Mr. Chief Justice Hughes, writing for the Court, stated:

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only com-

Court recently has noted that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " [11] *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 792 (1975). Although the opinion today finds these interests insufficient to justify prohibition of all price advertising, the state interests recognized in these cases should be weighed carefully

---

petency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards." 294 U. S., at 612.

This distinction, addressed specifically to advertising, has never been questioned by this Court until today. Indeed, *Semler* was recently cited with approval in *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 792–793 (1975).

[11] The Court's opinion is not without an undertone of criticism of lawyers and the legal profession for their opposition to price advertising: *e. g.,* (i) the reference to the profession "condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients," *ante,* at 371; and (ii) the implication that opposition to advertising derives from the view that lawyers "belittle the person who earns his living by the strength of his arm" and "somehow [are] 'above' trade," *ante,* at 371–372. This indiscriminate criticism is unjustified. Lawyers are not hermits and society would suffer if they were. Members of the legal profession customarily are leaders in the civic, charitable, cultural, and political life of most communities. Indeed, the professional responsibility of lawyers is thought to include the duty of civic and public participation. As a profession, lawyers do differ from other callings. "This is not a fancied conceit, but a cherished tradition, the preservation of which is essential to the lawyer's reverence for his calling." H. Drinker, Legal Ethics 211 (1963) (footnote omitted). There certainly can be pride in one's profession without belittling those who perform other tasks essential to an ongoing society.

in any future consideration of time, place, and manner restrictions.[12]

Finally, the Court's opinion does not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." *Ante,* at 384. I view this as at least some recognition of the potential for deception inherent in fixed-price advertising of specific legal services. This recognition, though ambiguous in light of other statements in the opinion, may be viewed as encouragement to those who believe—as I do—that if we are to have price advertisement of legal services, the public interest will require the most particularized regulation.

IV

The area into which the Court now ventures has, until today, largely been left to self-regulation by the profession within the framework of canons or standards of conduct prescribed by the respective States and enforced where necessary by the courts. The problem of bringing clients and lawyers together on a mutually fair basis, consistent with the public interest, is as old as the profession itself. It is one of considerable complexity, especially in view of the constantly evolving nature of the need for legal services. The problem has not been resolved with complete satisfaction despite diligent and thoughtful efforts by the organized bar and others over a period of many years, and there is no

---

[12] The Court speaks specifically only of newspaper advertising, but it is clear that today's decision cannot be confined on a principled basis to price advertisements in newspapers. No distinction can be drawn between newspapers and a rather broad spectrum of other means—for example, magazines, signs in buses and subways, posters, handbills, and mail circulations. But questions remain open as to time, place, and manner restrictions affecting other media, such as radio and television.

reason to believe that today's best answers will be responsive to future needs.

In this context, the Court's imposition of hard and fast constitutional rules as to price advertising is neither required by precedent nor likely to serve the public interest. One of the great virtues of federalism is the opportunity it affords for experimentation and innovation, with freedom to discard or amend that which proves unsuccessful or detrimental to the public good. The constitutionalizing—indeed the affirmative encouraging—of competitive price advertising of specified legal services will substantially inhibit the experimentation that has been underway and also will limit the control heretofore exercised over lawyers by the respective States.

I am apprehensive, despite the Court's expressed intent to proceed cautiously, that today's holding will be viewed by tens of thousands of lawyers as an invitation—by the public-spirited and the selfish lawyers alike—to engage in competitive advertising on an escalating basis. Some lawyers may gain temporary advantages; others will suffer from the economic power of stronger lawyers, or by the subtle deceit of less scrupulous lawyers.[13] Some members of the public may

[13] It has been suggested that price advertising will benefit younger lawyers and smaller firms, as well as the public, by enabling them to compete more favorably with the larger, established firms. The overtones of this suggestion are antitrust rather than First Amendment in principle. But whatever the origin, there is reason seriously to doubt the validity of the premise. With the increasing complexity of legal practice, perhaps the strongest trend in the profession today is toward specialization. Many small firms will limit their practice to intensely specialized areas; the larger, institutionalized firms are likely to have a variety of departments, each devoted to a special area of the law. The established specialist and the large law firm have advantages that are not inconsiderable if price competition becomes commonplace. They can advertise truthfully the areas in which they practice; they enjoy economies of scale that may justify lower prices; and they often possess the economic power to disadvantage the weaker or more inexperienced firms in any advertising

benefit marginally, but the risk is that many others will be victimized by simplistic price advertising of professional services "almost infinite [in] variety and nature . . . ." *Virginia Pharmacy Board,* 425 U. S., at 773 n. 25. Until today, in the long history of the legal profession, it was not thought that this risk of public deception was required by the marginal First Amendment interests asserted by the Court.

MR. JUSTICE REHNQUIST, dissenting in part.

I join Part II of the Court's opinion holding that appellants' Sherman Act claim is barred by the *Parker* v. *Brown,* 317 U. S. 341 (1943), state-action exemption. Largely for the reasons set forth in my dissent in *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748, 781 (1976), however, I dissent from Part III because I cannot agree that the First Amendment is infringed by Arizona's regulation of the essentially commercial activity of advertising legal services. *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942); *Breard* v. *Alexandria,* 341 U. S. 622 (1951). See *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376 (1973).

I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services. I would hold quite simply that the appellants' advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.

I think my Brother POWELL persuasively demonstrates in his opinion that the Court's opinion offers very little guidance as to the extent or nature of permissible state regulation of professions such as law and medicine. I would join

---

competition. Whether the potential for increased concentration of law practice in a smaller number of larger firms would be detrimental to the public is not addressed by the Court.

his opinion except for my belief that once the Court took the first step down the "slippery slope" in *Virginia Pharmacy Board, supra,* the possibility of understandable and workable differentiations between protected speech and unprotected speech in the field of advertising largely evaporated. Once the exception of commercial speech from the protection of the First Amendment which had been established by *Valentine* v. *Chrestensen, supra,* was abandoned, the shift to case-by-case adjudication of First Amendment claims of advertisers was a predictable consequence.

While I agree with my Brother POWELL that the effect of today's opinion on the professions is both unfortunate and not required by the First and Fourteenth Amendments, I cannot join the implication in his opinion that some forms of legal advertising may be constitutionally protected. The *Valentine* distinction was constitutionally sound and practically workable, and I am still unwilling to take even one step down the "slippery slope" away from it.

I therefore join Parts I and II of the Court's opinion, but dissent from Part III and from the judgment.

238-670 O - 79 - 28

DAYTON BOARD OF EDUCATION ET AL. *v.* BRINKMAN ET AL.

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

No. 76–539. Argued April 26, 1977—Decided June 27, 1977

In this school desegregation case the District Court after an evidentiary hearing held that petitioner Dayton, Ohio, School Board had engaged in racial discrimination in the operation of the city's schools. On the basis of a "cumulative violation" of the Equal Protection Clause that the court found, which was composed of three elements, *viz.*, (1) substantial racial imbalance in student enrollment patterns throughout the school system; (2) the use of optional attendance zones allowing some white students to avoid attending predominantly black schools; and (3) the School Board's rescission in 1972 of resolutions passed by the previous Board that had acknowledged responsibility in the creation of segregative racial patterns and had called for various types of remedial measures, the District Court, following reversals by the Court of Appeals of more limited remedies, ultimately formulated and the Court of Appeals approved, a systemwide remedy. The plan required, beginning with the 1976–1977 school year, that the racial composition of each school in the district be brought within 15% of Dayton's 48%–52% black-white population ratio, to be accomplished by a variety of desegregation techniques, including the "pairing" of schools, the redefinition of attendance zones, and a variety of centralized special programs and "magnet schools." *Held:*

1. Judged most favorably to respondent parents of black children, the District Court's findings of constitutional violations did not suffice to justify the systemwide remedy. The finding that pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment absent a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Washington* v. *Davis,* 426 U. S. 229, 239. The court's finding as to the optional attendance zones applied to three high schools, and assuming that under *Washington* standards a violation was involved, only high school districting was implicated. And the conclusion that the Board's rescission action constituted a constitutional violation is of dubious soundness. It was thus not demonstrated that the systemwide

remedy, in effect imposed by the Court of Appeals, was necessary to "eliminate all vestiges of the state-imposed school segregation." Pp. 413–418.

2. In view of the confusion at various stages in this case as to the applicable principles and appropriate relief, the case must be remanded to the District Court. The ambiguous phrase "cumulative violation" used by both courts below, does not overcome the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed. More specific findings must be made, and if necessary, the record must be supplemented. Conclusions as to violations must be made in light of this Court's opinions here and in *Washington* v. *Davis, supra,* and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, and a remedy must be fashioned in light of the rule laid down in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, and elaborated on in *Hills* v. *Gautreaux,* 425 U. S. 284. In a case like this, where mandatory racial segregation has long since ceased, it must first be determined if the school board intended to, and did in fact, discriminate, and all appropriate additional evidence should be adduced; and only if systemwide discrimination is shown may there be a systemwide remedy. Meanwhile, the present plan should remain in effect for the coming school year subject to further District Court orders as additional evidence might warrant. Pp. 418–421.

539 F. 2d 1084, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 421. BRENNAN, J., filed an opinion concurring in the judgment, *post,* p. 421. MARSHALL, J., took no part in the consideration or decision of the case.

David C. Greer argued the cause for petitioners. With him on the brief was *Leo F. Krebs.*

Louis R. Lucas argued the cause for respondents. With him on the brief were *Paul R. Dimond, Nathaniel R. Jones, Robert A. Murphy, Norman J. Chachkin, William E. Caldwell,* and *Richard Austin.**

---

*Briefs of *amici curiae* urging affirmance were filed by *Attorney General Bell, Acting Solicitor General Friedman, Assistant Attorney General Days, Deputy Solicitor General Wallace, Brian K. Landsberg,* and *Joel L. Selig*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This school desegregation action comes to us after five years and two round trips through the lower federal courts.[1] Those protracted proceedings have been devoted to the formulation of a remedy for actions of the Dayton Board of Education found to be in violation of the Equal Protection Clause of the Fourteenth Amendment. In the decision now under review, the Court of Appeals for the Sixth Circuit finally approved a plan involving districtwide racial-distribution requirements, after rejecting two previous, less sweeping orders by the District Court. The plan required, beginning with the 1976–1977 school year, that the racial distribution of each school

for the United States, and by *Robert Allen Sedler, Joel M. Gora,* and *E. Richard Larson* for the American Civil Liberties Union.

Armistead W. Gilliam, Jr., filed a brief for the Ohio State Board of Education et al. as *amici curiae.*

[1] This action was filed on April 17, 1972, by parents of black children attending schools operated by the defendant Dayton Board of Education. After an expedited hearing between November 13 and December 1, 1972, the District Court for the Southern District of Ohio, on February 7, 1973, rendered findings of fact and conclusions of law directing the formulation of a desegregation plan. App. 1. On July 13, 1973, that court approved, with certain modifications, a plan proposed by the School Board. On appeal to the Court of Appeals for the Sixth Circuit, that court affirmed the findings of fact but reversed and remanded as to the proposed remedial plan. *Brinkman* v. *Gilligan,* 503 F. 2d 684 (CA6 1974).

The District Court then ordered the submission of new plans by the Board and by any other interested parties. App. 70. On March 10, 1975, it rejected a plan proposed by the plaintiffs, and, with some modifications, approved the Board's plan as modified and expanded in an effort to comply with the Court of Appeals mandate. *Id.,* at 73. On appeal, the Court of Appeals again reversed as to remedy and directed that the District Court "adopt a system-wide plan for the 1976–1977 school year . . . ." *Brinkman* v. *Gilligan,* 518 F. 2d 853 (1975).

Upon this second remand, the District Court, on December 29, 1975, ordered formulation of the plan whose terms are developed below. App. 99. On March 25, 1976, the details of the plan were approved by the District Court. *Id.,* at 114. In the decision now under review, the Court of Appeals affirmed. *Brinkman* v. *Gilligan,* 539 F. 2d 1084 (1976).

in the district be brought within 15% of the 48%–52% black-white population ratio of Dayton.[2] As finally formulated, the plan employed a variety of desegregation techniques, including the "pairing" [3] of schools, the redefinition of attendance zones, and a variety of centralized special programs and "magnet schools." We granted certiorari, 429 U. S. 1060 (1977), to consider the propriety of this court-ordered remedy in light of the constitutional violations which were found by the courts below.

Whatever public notice this case has received as it wended its way from the United States District Court for the Southern District of Ohio to this Court has been due to the fact that it represented an effort by minority plaintiffs to obtain relief from alleged unconstitutional segregation of the Dayton public schools said to have resulted from actions by the petitioner School Board. While we would by no means discount the importance of this aspect of the case, we think that the case is every bit as important for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system.

Indeed, the importance of the judicial administration as-

---

[2] The District Court said that it would deal on a case-by-case basis with failures to bring individual schools into compliance with this requirement. It also ordered that students already enrolled in the 10th and 11th grades be allowed to finish in their present high schools, and announced the following "guidelines" to be followed "whenever possible" in the case of elementary school students:

"1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

"2. Students should be transported to the nearest available school;

"3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter." App. 104.

[3] "Pairing" is the designation of two or more schools with contrasting racial composition for an exchange program where a large proportion of the students in each school attend the paired school for some period. In the plan adopted by the District Court, it was the primary remedy used in the case of elementary schools.

pects of the case are heightened by the presence of the substantive issues on which it turns. The proper observance of the division of functions between the federal trial courts and the federal appellate courts is important in every case. It is especially important in a case such as this where the District Court for the Southern District of Ohio was not simply asked to render judgment in accordance with the law of Ohio in favor of one private party against another; it was asked by the plaintiffs, parents of students in the public school system of a large city, to restructure the administration of that system.

There is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional violations on the part of school officials are proved. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189 (1973); *Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971). But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley*, 418 U. S. 717, 741–742 (1974); *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 50 (1973); *Wright* v. *Council of City of Emporia, supra*, at 469. It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. Cf. *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

The lawsuit was begun in April 1972, and the District Court filed its original decision on February 7, 1973. The District Court first surveyed the past conduct of affairs by the Dayton School Board, and found "isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system." [4] It

[4] The court pointed out that since 1888 Ohio law as construed by the Ohio Supreme Court has forbidden separate public schools for black and white children. See Ohio Rev. Code Ann. § 3313.48 (1972); *Board of Education* v. *State*, 45 Ohio St. 555, 16 N. E. 373 (1888).

cited instances of physical segregation in the schools during the early decades of this century,[5] but concluded that "[b]oth by reason of the substantial time that [had] elapsed and because these practices have ceased, . . . the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy."

The District Court also found that as recently as the 1950's, faculty hiring had not been on a racially neutral basis, but that "[b]y 1963, under a policy designated as one of 'dynamic gradualism,' at least one black teacher had been assigned to all eleven high schools and to 35 of the 66 schools in the entire system." It further found that by 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. The court's conclusion with respect to faculty hiring was that pursuant to a 1971 agreement with the Department of Health, Education, and Welfare, "the teaching staff of the Dayton public schools became and still remains substantially integrated." [6]

The District Court noted that Dunbar High School had been established in 1933 as a black high school, taught by black teachers and attended by black pupils. At the time of its creation there were no attendance zones in Dayton and students were permitted liberal transfers, so that attendance at Dunbar was voluntary. The court found that Dunbar continued to exist as a citywide all-black high school until it closed in 1962.

---

[5] "Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in high schools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference." App. 2–3 (footnote omitted).

[6] The court also considered employment of nonteaching personnel, and observed that blacks made up a proportion of the nonteaching, nonadministrative personnel equal to the proportion of black students in the district, though in certain occupations they were represented at a substantially lower rate.

Turning to more recent operations of the Dayton public schools, the District Court found that the "great majority" of the 66 schools were imbalanced and that, with one exception,[7] the Dayton School Board had made no affirmative effort to achieve racial balance within those schools. But the court stated that there was no evidence of racial discrimination in the establishment or alteration of attendance boundaries or in the site selection and construction of new schools and school additions. It considered the use of optional attendance zones [8] within the district, and concluded that in the majority of cases the "optional zones had no racial significance at the time of their creation." It made a somewhat ambiguous finding as to the effect of some of the zones in the past,[9] and concluded that although none of the optional elementary school attendance zones today "have any significant potential effects in terms of increased racial separation," the same cannot be said of the optional high school zones. Two zones in particular, "those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past." [10]

---

[7] The court noted that a concerted effort had been made in the past few years to enroll more black students at the Patterson Co-op High School.

[8] An optional zone is an area between two attendance zones, the student residents of which are free to choose which of the two schools they wish to attend.

[9] The District Court found that three optional high school zones "may have" had racial significance at the time of their creation.

[10] The following information about those zones is contained in an appendix to the District Court opinion:

High Schools	Date of creation	% black population	
		At date of creation	1972–73
Roosevelt/	1951	31.5	100.0
Colonel White	(extended 1958)	0.0	54.6
Kiser/	1962	2.7	9.8
Colonel White		1.1	54.6

The court found no evidence that the district's "freedom of enrollment" policy had "been unfairly operated or that black students [had] been denied transfers because of their race." Finally the court considered action by a newly elected Board on January 3, 1972, rescinding resolutions, passed by the previous Board, which had acknowledged a role played by the Board in the creation of segregative racial patterns and had called for various types of remedial measures. The District Court's ultimate conclusion was that the "racially imbalanced schools, optional attendance zones, and recent Board action . . . are cumulatively in violation of the Equal Protection Clause."

The District Court's use of the phrase "cumulative violation" is unfortunately not free from ambiguity. Treated most favorably to the respondents, it may be said to represent the District Court's opinion that there were three separate although relatively isolated instances of unconstitutional action on the part of petitioners. Treated most favorably to the petitioners, however, they must be viewed in quite a different light. The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board. *Washington* v. *Davis,* 426 U. S. 229, 239 (1976). The District Court's finding as to the effect of the optional attendance zones for the three Dayton high schools, assuming that it was a violation under the standards of *Washington* v. *Davis, supra,* appears to be so only with respect to high school districting. *Swann,* 402 U. S., at 15. The District Court's conclusion that the Board's rescission of previously adopted School Board resolutions was itself a constitutional violation is also of questionable validity.

The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman* v. *Mulkey,* 387 U. S.

369 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this action, wherein that court said:

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. Hunter v. Erickson, 393 U. S. 385 . . . (1969); Gomillion v. Lightfoot, 364 U. S. 339 . . . (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution." *Brinkman* v. *Gilligan,* 503 F. 2d 684, 697 (1974).

Judged most favorably to the petitioners, then, the District Court's findings of constitutional violations did not, under our cases, suffice to justify the remedy imposed. Nor is light cast upon the District Court's finding by its repeated use of the phrase "cumulative violation." We realize, of course, that the task of factfinding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multimembered public bodies are of necessity difficult, cf. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252 (1977), and the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

We think it accurate to say that the District Court's formulation of a remedy on the basis of the three-part "cumula-

tive violation" was certainly not based on an unduly cautious understanding of its authority in such a situation. The remedy which it originally propounded in light of these findings of fact included requirements that optional attendance zones be eliminated, and that faculty assignment practices and hiring policies with respect to classified personnel be tailored to achieve representative racial distribution in all schools.[11] The one portion of the remedial plan submitted by the School Board which the District Court refused to accept without change was that which dealt with so-called "freedom of enrollment priorities." The court ordered that, as applied to high schools, new students at each school be chosen at random from those wishing to attend.[12] The Board was required to furnish transportation for all students who chose to attend a high school outside the attendance area of their residence.

Both the plaintiffs and the defendant School Board appealed the order of the District Court to the United States Court of Appeals for the Sixth Circuit. *Brinkman* v. *Gilligan, supra.* That court considered at somewhat greater length

---

[11] The District Court's first plan also contained the following provisions:

(V) Establishment of four citywide elementary science centers the enrollment of which would approximate the existing black-white ratio of students in the system;

(VI) Combination of two high schools into a unified cooperative school with districtwide attendance areas;

(VII) Formation of elementary and high school all-city bands, orchestras, and choruses;

(VIII) Provisions for scheduling of integrated athletics;

(IX) Establishment of a minority language program for education of staff;

(X) Utilization of the Living Arts Center for inter-racial experiences in art, creative writing, dance, and drama;

(XI) Creation of centers for rumor control, school guidance, and area learning. See App. 35–36.

[12] The court thus eliminated a provision within the Board plan which gave first priority to students residing within the school's attendance zone.

than had the District Court both the historical instances of alleged racial discrimination by the Dayton School Board and the circumstances surrounding the adoption of the Board's resolutions and the subsequent rescission of those resolutions. This consideration was in a purely descriptive vein: no findings of fact made by the District Court were reversed as having been clearly erroneous, and the Court of Appeals engaged in no factfinding of its own based on evidence adduced before the District Court. The Court of Appeals then focused on the District Court's finding of a three-part "cumulative" constitutional violation consisting of racially imbalanced schools, optional attendance zones, and the rescission of the Board resolutions. It found these to be "amply supported by the evidence."

Plaintiffs in the District Court, respondents here, had cross-appealed from the order of the District Court, contending that the District Court had erred in failing to make further findings tending to show segregative actions on the part of the Dayton School Board, but the Court of Appeals found it unnecessary to pass on these contentions. The Court of Appeals also stated that it was unnecessary to "pass on the question of whether the rescission [of the Board resolutions] by itself was a violation of" constitutional rights. It did discuss at length what it described as "serious questions" as to whether Board conduct relating to staff assignment, school construction, grade structure and reorganization, and transfers and transportation, should have been included within the "cumulative violation" found by the District Court. But it did no more than discuss these questions; it neither upset the factual findings of the District Court nor reversed the District Court's conclusions of law.

Thus, the Court of Appeals, over and above its historical discussion of the Dayton school situation, dealt with and upheld only the three-part "cumulative violation" found by the District Court. But it nonetheless reversed the District Court's

approval of the School Board plan as modified by the District Court, because the Court of Appeals concluded that "the remedy ordered . . . is inadequate, considering the scope of the cumulative violations." While it did not discuss the specifics of any plan to be adopted on remand, it repeated the admonition that the court's duty is to eliminate "all vestiges of state-imposed school segregation." *Keyes,* 413 U. S., at 202; *Swann,* 402 U. S., at 15.

Viewing the findings of the District Court as to the three-part "cumulative violation" in the strongest light for the respondents, the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy which it apparently did. There had been no showing that such a remedy was necessary to "eliminate all vestiges of the state-imposed school segregation." It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution. *Spencer* v. *Kugler,* 404 U. S. 1027 (1972); *Swann, supra,* at 24. The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of "fruit of the poisonous tree," since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.

On appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52 (a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact

but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the District Court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the District Court's findings of fact or reversing its conclusions of law.

The Court of Appeals did not actually specify a remedy, but did, in increasingly strong language in subsequent opinions, require that any plan eliminate systemwide patterns of one-race schools predominant in the district. *Brinkman* v. *Gilligan,* 518 F. 2d 853, 855 (1975). In the face of this commandment, the District Court, after twice being reversed, observed:

> "This court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. Based upon the plans of both the plaintiff and defendant the assumption must be that the transportation of approximately 15,000 students on a regular and permanent basis will be required."

We think that the District Court would have been insensitive indeed to the nuances of the repeated reversals of its orders by the Court of Appeals had it not reached this conclusion. In effect, the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court, taking those findings of violations in the light most favorable to respondents.

This is not to say that the last word has been spoken as to the correctness of the District Court's findings as to unconstitutionally segregative actions on the part of the petitioners. As we have noted, respondents appealed from the initial decision and order of the District Court, asserting that additional violations should have been found by that court. The

Court of Appeals found it unnecessary to pass upon the respondents' contentions in its first decision, and respondents have not cross-petitioned for certiorari in this Court from the decision of the Court of Appeals. Nonetheless, they are entitled under our precedents to urge any grounds which would lend support to the judgment below, and we think that their contentions of unconstitutionally segregative actions, in addition to those found as fact by the District Court, fall into this category. In view of the confusion at various stages in this case, evident from the opinions both of the Court of Appeals and the District Court, as to the applicable principles and appropriate relief, the case must be remanded to the District Court for the making of more specific findings and, if necessary, the taking of additional evidence.

If the only deficiency in the record before us were the failure of the Court of Appeals to pass on respondents' assignments of error respecting the initial rulings of the District Court, it would be appropriate to remand the case. But we think it evident that supplementation of the record will be necessary. Apart from what has been said above with respect to the use of the ambiguous phrase "cumulative violation" by both courts, the disparity between the evidence of constitutional violations and the sweeping remedy finally decreed requires supplementation of the record and additional findings addressed specifically to the scope of the remedy. It is clear that the presently mandated remedy cannot stand upon the basis of the violations found by the District Court.

The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings and conclusions as to violations in the light of this opinion, *Washington* v. *Davis,* 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252 (1977). It must then fashion a remedy in the light of the rule laid down in *Swann,* and elaborated upon in *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). The power of the federal courts to

restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised "only on the basis of a constitutional violation." ' [*Milliken* v. *Bradley*], 418 U. S., at 738, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16. See *Rizzo* v. *Goode*, 423 U. S. 362, 377. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' 418 U. S., at 744; *Swann, supra*, at 16." *Id.*, at 293–294. See also *Austin Independent School Dist.* v. *United States*, 429 U. S. 990, 991 (1976) (POWELL, J., concurring).

The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the School Board which are intended to, and did in fact, discriminate against minority pupils, teachers, or staff. *Washington* v. *Davis, supra.* All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U. S., at 213.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as "cumulative violation" than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

While we have found that the plan implicitly, if not explicitly, imposed by the Court of Appeals was erroneous on the present state of the record, it is undisputed that it has been in effect in the Dayton school system during the present year without creating serious problems. While a school board and a school constituency which attempt to comply with a plan to the best of their ability should not be penalized, we think that the plan finally adopted by the District Court should remain in effect for the coming school year subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion.

The judgment of the Court of Appeals is vacated, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

MR. JUSTICE STEVENS, concurring.

With the caveat that the relevant finding of intent in a case of this kind necessarily depends primarily on objective evidence concerning the effect of the Board's action, rather than the subjective motivation of one or more members of the Board, see *Washington* v. *Davis,* 426 U. S. 229, 253–254 (STEVENS, J., concurring), I join the Court's opinion.

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court today reaffirms the authority of the federal courts "to grant appropriate relief of this sort [*i. e.,* busing] when constitutional violations on the part of school officials are proved. *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973) . . . ." *Ante,* at 410. In this case, however, the violations actually found by the District Court were not sufficient to justify the remedy imposed. Indeed,

none of the parties contends otherwise. Respondents nowhere argue that the three "cumulative violations" should by themselves be sufficient to support the comprehensive, systemwide busing order imposed. Instead, they urge us to find that other, additional actions by the School Board appearing in the record should be used to support the result. The United States, as *amicus curiae,* concedes that the "three-part 'cumulative' violation found by the district court does not support its remedial order," Brief for United States as *Amicus Curiae* 21, and also urges us to affirm the busing order by resort to other, additional evidence in the record. Under this circumstance, I agree with the result reached by the Court. I do so because it is clear from the holding in this case, and that in *Milliken* v. *Bradley, ante,* at 288, also decided today, that the "broad and flexible equity powers" of district courts to remedy unlawful school segregation continue unimpaired.

This case thus does not turn upon any doubt of power in the federal courts to remedy state-imposed segregation. Rather, as the Court points out, it turns upon the "proper allocation of functions between the district courts and the courts of appeals within the federal judicial system." *Ante,* at 409. As the Court recognizes, the task of the district courts and courts of appeals is a particularly difficult one in school desegregation cases, *ante,* at 420. Although the efforts of both the District Court and the Court of Appeals in this protracted litigation deserve our commendation, it is plain that the proceedings in the two courts resulted in a remedy going beyond the violations so far found.

On remand, the task of the District Court, subject to review by the Court of Appeals, will be to make further findings of fact from evidence already in the record, and, if appropriate, as supplemented by additional evidence. The additional facts, combined with those upon which the violations already found are based, must then be evaluated to determine what relief is appropriate to remedy the re-

sulting unconstitutional segregation. In making this determination, the courts of course "need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system." *Milliken* v. *Bradley, ante,* at 283.

Although the three violations already found are not of themselves sufficient to support the broad remedial order entered below, this is not to say that the three violations are insignificant. While they are not sufficient to justify the remedy imposed when considered solely as unconstitutional *actions,* they clearly are very significant as indicia of *intent* on the part of the School Board. As we emphasized in *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U. S. 189, 207 (1973): "Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system." Once segregative intent is found, the District Court may more readily conclude that not only blatant, but also subtle actions—and in some circumstances even inaction—justify a finding of unconstitutional segregation that must be redressed by a remedial busing order such as that imposed in this case.

If it is determined on remand that the School Board's unconstitutional actions had a "systemwide impact," then the court should order a "systemwide remedy." *Ante,* at 420. Under *Keyes,* once a school board's actions have created a segregated dual school system, then the school board "has the affirmative duty to desegregate the entire system 'root and branch.'" 413 U. S., at 213. Or, as stated by the Court today in *Milliken,* the school board must "take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.'" *Ante,* at 290 (quoting *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15 (1971)). A judicial decree to accomplish this result must be formulated with great sensitivity to the practicalities of the

situation, without ever losing sight of the paramount importance of the constitutional rights being enforced. The District Court must be mindful not only of its "authority to grant appropriate relief," *ante,* at 410, but also of its duty to remedy fully those constitutional violations it finds. It should be flexible but unflinching in its use of its equitable powers, always conscious that it is the rights of individual schoolchildren that are at stake, and that it is the constitutional right to equal treatment for all races that is being protected.

NIXON v. ADMINISTRATOR OF GENERAL SERVICES ET AL.

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

No. 75–1605. Argued April 20, 1977—Decided June 28, 1977

After appellant had resigned as President of the United States, he executed a depository agreement with the Administrator of General Services that provided for the storage near appellant's California home of Presidential materials (an estimated 42 million pages of documents and 880 tape recordings) accumulated during appellant's terms of office. Under this agreement, neither appellant nor the General Services Administration (GSA) could gain access to the materials without the other's consent. Appellant was not to withdraw any original writing for three years, although he could make and withdraw copies. After the initial three-year period he could withdraw any of the materials except tape recordings. With respect to the tape recordings, appellant agreed not to withdraw the originals for five years and to make reproductions only by mutual agreement. Following this five-year period the Administrator would destroy such tapes as appellant directed, and all of the tapes were to be destroyed at appellant's death or after the expiration of 10 years, whichever occurred first. Shortly after the public announcement of this agreement, a bill was introduced in Congress designed to abrogate it, and about three months later this bill was enacted as the Presidential Recordings and Materials Preservation Act (Act) and was signed into law by President Ford. The Act directs the Administrator of GSA to take custody of appellant's Presidential materials and have them screened by Government archivists in order to return to appellant those personal and private in nature and to preserve those having historical value and to make the materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person may invoke." The Administrator is also directed to promulgate regulations to govern eventual public access to some of the materials. These regulations must take into account seven guidelines specified by § 104 (a) of the Act, including, *inter alia,* the need to protect any person's opportunity to assert any legally or constitutionally based right or privilege and the need to return to appellant or his family materials that are personal and private in nature. No such public-access regulations have yet become effective. The day after the

Act was signed into law, appellant filed an action in District Court challenging the Act's constitutionality on the grounds, *inter alia,* that on its face it violates (1) the principle of separation of powers; (2) the Presidential privilege; (3) appellant's privacy interests; (4) his First Amendment associational rights; and (5) the Bill of Attainder Clause, and seeking declaratory and injunctive relief against enforcement of the Act. Concluding that since no public-access regulations had yet taken effect it could consider only the injury to appellant's constitutionally protected interests allegedly caused by the taking of the Presidential materials into custody and their screening by Government archivists, the District Court held that appellant's constitutional challenges were without merit and dismissed the complaint. *Held:*

1. The Act does not on its face violate the principle of separation of powers. Pp. 441–446.

(a) The Act's regulation of the Executive Branch's function in the control of the disposition of Presidential materials does not in itself violate such principle, since the Executive Branch became a party to the Act's regulation when President Ford signed the Act into law and President Carter's administration, acting through the Solicitor General, urged affirmance of the District Court's judgment. Moreover, the function remains in the Executive Branch in the person of the GSA Administrator and the Government archivists, employees of that branch. P. 441.

(b) The separate powers were not intended to operate with absolute independence, but in determining whether the Act violates the separation-of-powers principle the proper inquiry requires analysis of the extent to which the Act prevents the Executive Branch from accomplishing its constitutionally assigned functions, and only where the potential for disruption is present must it then be determined whether that impact is justified by an overriding need to promote objectives within Congress' constitutional authority. Pp. 441–443.

(c) There is nothing in the Act rendering it unduly disruptive of the Executive Branch, since that branch remains in full control of the Presidential materials, the Act being facially designed to ensure that the materials can be released only when release is not barred by privileges inhering in that branch. Pp. 443–446.

2. Neither does the Act on its face violate the Presidential privilege of confidentiality. Pp. 446–455.

(a) In view of the specific directions to the GSA Administrator in § 104 (a) of the Act to take into account, in determining public access to the materials, "the need to protect any party's opportunity to assert any constitutionally based right or privilege," and the need to return to

appellant his purely private materials, there is no reason to believe that the restrictions on public access ultimately established by regulation will not be adequate to preserve executive confidentiality. Pp. 449–451.

(b) The mere screening of the materials by Government archivists, who have previously performed the identical task for other former Presidents without any suggestion that such activity in any way interfered with executive confidentiality, will not impermissibly interfere with candid communication of views by Presidential advisers and will be no more of an intrusion into Presidential confidentiality than the *in camera* inspection by the District Court approved in *United States* v. *Nixon*, 418 U. S. 683. Pp. 451–452.

(c) Given the safeguards built into the Act to prevent disclosure of materials that implicate Presidential confidentiality, the requirement that appellant's personal and private materials be returned to him, and the minimal nature of the intrusion into the confidentiality of the Presidency resulting from the archivists' viewing such materials in the course of their screening process, the claims of Presidential privilege must yield to the important congressional purposes of preserving appellant's Presidential materials and maintaining access to them for lawful governmental and historical purposes. Pp. 452–454.

3. The Act does not unconstitutionally invade appellant's right of privacy. While he has a legitimate expectation of privacy in his personal communications, the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, his lack of expectation of privacy in the overwhelming majority of the materials (he having conceded that he saw no more than 200,000 items), and the virtual impossibility of segregating the apparently small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, the unblemished record of the archivists for discretion, and the likelihood that the public-access regulations to be promulgated will further moot appellant's fears that his materials will be reviewed by "a host of persons," it is apparent that appellant's privacy claim has no merit. Pp. 455–465.

4. The Act does not significantly interfere with or chill appellant's First Amendment associational rights. His First Amendment claim is clearly outweighed by the compelling governmental interests promoted by the Act in preserving the materials. Since archival screening is the least restrictive means of identifying the materials to be returned to appellant, the burden of that screening is the measure of the First Amendment claim, and any such burden is speculative in light of the Act's provisions protecting appellant from improper public disclosures

and guaranteeing him full judicial review before any public access is permitted. Pp. 465–468.

5. The Act does not violate the Bill of Attainder Clause. Pp. 468–484.

(a) However expansive is the prohibition against bills of attainder, it was not intended to serve as a variant of the Equal Protection Clause, invalidating every Act by Congress or the States that burdens some persons or groups but not all other plausible individuals. While the Bill of Attainder Clause serves as an important bulwark against tyranny, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all. Pp. 468–471.

(b) The Act's specificity in referring to appellant by name does not automatically offend the Bill of Attainder Clause. Since at the time of the Act's passage Congress was only concerned with the preservation of appellant's materials, the papers of former Presidents already being housed in libraries, appellant constituted a legitimate class of one, and this alone can justify Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering in the Public Documents Act the further consideration of generalized standards to govern his successors. Pp. 471–472.

(c) Congress, by lodging appellant's materials in the GSA's custody pending their screening by Government archivists and the promulgation of further regulations, did not "inflict punishment" within the historical meaning of bills of attainder. Pp. 473–475.

(d) Evaluated in terms of Congress' asserted proper purposes of the Act to preserve the availability of judicial evidence and historically relevant materials, the Act is one of nonpunitive legislative policymaking, and there is no evidence in the legislative history or in the provisions of the Act showing a congressional intent to punish appellant. Pp. 475–484.

408 F. Supp. 321, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, MARSHALL, and STEVENS, JJ., joined; in all but Part VII of which WHITE, J., joined; in all but Parts IV and V of which POWELL, J., joined; and in Part VII of which BLACKMUN, J., joined. STEVENS, J., filed a concurring opinion, *post,* p. 484. WHITE, J., *post,* p. 487, BLACKMUN, J., *post,* p. 491, and POWELL, J., *post,* p. 492, filed opinions concurring in part and concurring in the judgment. BURGER, C. J., *post,* p. 504, and REHNQUIST, J., *post,* p. 545, filed dissenting opinions.

Herbert J. Miller, Jr., and *Nathan Lewin* argued the cause

for appellant. With them on the briefs were *R. Stan Mortenson, Raymond G. Larroca, Martin D. Minsker,* and *William H. Jeffress, Jr.*

Solicitor General McCree argued the cause for the federal appellees. On the brief were former *Acting Solicitor General Friedman, Acting Assistant Attorney General Babcock, Deputy Assistant Attorney General Goldbloom, Robert E. Kopp,* and *Anthony J. Steinmeyer. Robert E. Herzstein* argued the cause for appellees Reporters Committee for Freedom of the Press et al. With him on the brief were *Andrew S. Krulwich, Mark J. Spooner, Peter T. Grossi, Jr.,* and *Leonard B. Simon. Leon Friedman, John H. F. Shattuck,* and *Joel M. Gora* filed a brief for appellees Hellman et al. *William A. Dobrovir* and *Andra N. Oakes* filed a brief for appellee Anderson.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Title I of Pub. L. 93–526, 88 Stat. 1695, note following 44 U. S. C. § 2107 (1970 ed., Supp. V), the Presidential Recordings and Materials Preservation Act (hereafter Act), directs the Administrator of General Services, an official of the Executive Branch, to take custody of the Presidential papers and tape recordings of appellant, former President Richard M. Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained. The question for decision is whether Title I is unconstitutional on its face as a violation of (1) the separation of powers; (2) Presidential privilege doctrines; (3) appellant's privacy interests; (4) appellant's First Amendment associational rights; or (5) the Bill of Attainder Clause.

On December 19, 1974, four months after appellant resigned as President of the United States, his successor, President Gerald R. Ford, signed Pub. L. 93–526 into law. The next

day, December 20, 1974, appellant filed this action in the District Court for the District of Columbia, which under § 105 (a) of the Act has exclusive jurisdiction to entertain complaints challenging the Act's legal or constitutional validity, or that of any regulation promulgated by the Administrator. Appellant's complaint challenged the Act's constitutionality on a number of grounds and sought declaratory and injunctive relief against its enforcement. A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2282, 2284.[1] Because regulations required by § 104 of the Act governing public access to the materials were not yet effective, the District Court held that questions going to the possibility of future public release under regulations yet to be published were not ripe for review. It found that there was "no need and no justification for this court now to reach constitutional claims directed at the regulations . . . the promulgation of [which] might eliminate, limit, or cast [the constitutional claims] in a different light." 408 F. Supp. 321, 336 (1976). Accordingly, the District Court limited review "to consideration of the propriety of injunctive relief against the alleged facial unconstitutionality of the statute," *id.*, at 335, and held that the challenges to the facial constitutionality of the Act were without merit. It therefore dismissed the complaint. *Id.*, at 374–375. We noted probable jurisdiction, 429 U. S. 976 (1976). We affirm.

I

The Background

The materials at issue consist of some 42 million pages of documents and some 880 tape recordings of conversations. Upon his resignation, appellant directed Government archivists to pack and ship the materials to him in California. This

[1] For proceedings prior to convention of the three-judge court, see *Nixon* v. *Richey*, 168 U. S. App. D. C. 169, 513 F. 2d 427, on reconsideration, 168 U. S. App. D. C. 172, 513 F. 2d 430 (1975). See also *Nixon* v. *Sampson*, 389 F. Supp. 107 (DC 1975).

shipment was delayed when the Watergate Special Prosecutor advised President Ford of his continuing need for the materials. At the same time, President Ford requested that the Attorney General give his opinion respecting ownership of the materials. The Attorney General advised that the historical practice of former Presidents and the absence of any governing statute to the contrary supported ownership in the appellant, with a possible limited exception.[2] 43 Op. Atty. Gen. No. 1 (1974), App. 220–230. The Attorney General's opinion emphasized, however:

> "Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity." *Id.*, at 226.

On September 8, 1974, after issuance of the Attorney General's opinion, the Administrator of General Services, Arthur F. Sampson, announced that he had signed a depository agreement with appellant under the authority of 44 U. S. C. § 2107. 10 Weekly Comp. of Pres. Doc. 1104 (1974). We shall also refer to the agreement as the Nixon-Sampson agreement. See *Nixon* v. *Sampson*, 389 F. Supp. 107, 160–162 (DC 1975) (App. A). The agreement recited that appellant retained "all legal and equitable title to the Materials, including all literary property rights," and that the materials accordingly were to be "deposited temporarily" near appellant's California home in an "existing facility belonging to the United States." *Id.*, at 160. The agreement stated further that appellant's purpose was "to donate" the materials to the United States "with appropriate

---

[2] No opinion was given respecting ownership of certain permanent files retained by the Chief Executive Clerk of the White House from administration to administration. The Attorney General was unable definitively to determine their status on the basis of then-available information. 43 Op. Atty. Gen. No. 1 (1974), App. 228.

restrictions." *Ibid.* It was provided that all of the materials "shall be placed within secure storage areas to which access can be gained only by use of two keys," one in appellant's possession and the other in the possession of the Archivist of the United States or members of his staff. With exceptions not material here, appellant agreed "not to withdraw from deposit any originals of the materials" for a period of three years, but reserved the right to "make reproductions" and to authorize other persons to have access on conditions prescribed by him. After three years, appellant might exercise the "right to withdraw from deposit without formality any or all of the Materials . . . and to retain . . . [them] for any purpose . . ." determined by him. *Id.*, at 161.

The Nixon-Sampson agreement treated the tape recordings separately. They were donated to the United States "effective September 1, 1979," and meanwhile "shall remain on deposit." It was provided however that "[s]ubsequent to September 1, 1979 the Administrator shall destroy such tapes as [Mr. Nixon] may direct" and in any event the tapes "shall be destroyed at the time of [his] death or on September 1, 1984, whichever event shall first occur." *Ibid.* Otherwise the tapes were not to be withdrawn, and reproductions would be made only by "mutual agreement." *Id.*, at 162. Access until September 1, 1979, was expressly reserved to appellant, except as he might authorize access by others on terms prescribed by him.

Public announcement of the agreement was followed 10 days later, September 18, by the introduction of S. 4016 by 13 Senators in the United States Senate. The bill, which became Pub. L. 93–526 and was designed, *inter alia,* to abrogate the Nixon-Sampson agreement, passed the Senate on October 4, 1974. It was awaiting action in the House of Representatives when on October 17, 1974, appellant filed suit in the District Court seeking specific enforcement of the Nixon-Sampson agreement. That action was consolidated with other suits seeking access to Presidential materials pur-

suant to the Freedom of Information Act, 5 U. S. C. § 552 (1970 ed. and Supp. V), and also seeking injunctive relief against enforcement of the agreement. *Nixon* v. *Sampson, supra.*[3] The House passed its version of the Senate bill on December 3, 1974. The final version of S. 4016 was passed on December 9, 1974, and President Ford signed it into law on December 19.

II

The Act

Public Law 93–526 has two Titles. Title I, the challenged Presidential Recordings and Materials Preservation Act, consists of §§ 101 through 106. Title II, the Public Documents Act, amends Chapter 33 of Title 44, United States Code, to add §§ 3315 through 3324 thereto, and establish the National Study Commission on Records and Documents of Federal Officials.

Section 101 (a) of Title I directs that the Administrator of General Services, notwithstanding any other law or agreement or understanding (*e. g.*, the Nixon-Sampson agreement), "shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

> "(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

---

[3] The Court of Appeals for the District of Columbia Circuit stayed any order effectuating the decision in *Nixon* v. *Sampson* pending decision of the three-judge court whether under §105 (a) the instant case was to "have priority on the docket of [the District] court over other cases," *Nixon* v. *Richey*, 168 U. S. App. D. C., at 173, 177, 188–190, 513 F. 2d, at 431, 435, 446–448. The three-judge court was of the view that "the central purpose of Congress, in relation to all pending litigation, is to have an early and prior determination of the Act's constitutionality" and therefore did not request dissolution of the stay until entry of judgment. 408 F. Supp., at 333–334, n. 10.

"(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

"(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974."

Section 101 (b) provides that notwithstanding any such agreement or understanding, the Administrator also "shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials [as defined by 44 U. S. C. § 2101] of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974."

Section 102 (a) prohibits destruction of the tapes or materials except as may be provided by law, and § 102 (b) makes them available (giving priority of access to the Office of the Watergate Special Prosecutor) in response to court subpoena or other legal process, or for use in judicial proceedings. This was made subject, however, "to any rights, defenses, or privileges which the Federal Government or any person may invoke . . . ." Section 102 (c) affords appellant, or any person designated by him in writing, access to the recordings and materials for any purpose consistent with the Act "subsequent and subject to the regulations" issued by the Administrator under § 103. See n. 46, *infra*. Section 102 (d) provides for access according to § 103 regulations by any agency or department in the Executive Branch for lawful Government use. Section 103 requires custody of the tape recordings and materials to be maintained in Washington except as may otherwise be necessary to carry out the Act, and directs that the Administrator promulgate regulations necessary to assure their protection from loss or destruction and to prevent access to them by unauthorized persons.

Section 104, in pertinent part, directs the Administrator to promulgate regulations governing public access to the tape recordings and materials. Section 104 (a) requires submission of proposed regulations to each House of Congress, the regulations to take effect under § 104 (b)(1) at the end of 90 legislative days unless either the House or the Senate adopts a resolution disapproving them. The regulations must take into account seven factors specified in § 104 (a), namely:

> "(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';
>
> "(2) the need to make such recordings and materials available for use in judicial proceedings;
>
> "(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings to information relating to the Nation's security;
>
> "(4) the need to protect every individual's right to a fair and impartial trial;
>
> "(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
>
> "(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and
>
> "(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance."

Section 105 (a) vests the District Court for the District of Columbia with exclusive jurisdiction not only to hear

constitutional challenges to the Act, but also to hear challenges to the validity of any regulation, and to decide actions involving questions of title, ownership, custody, possession, or control of any tape or materials, or involving payment of any award of just compensation required by § 105 (c) when a decision of that court holds that any individual has been deprived by the Act of private property without just compensation. Section 105 (b) is a severability provision providing that any decision invalidating a provision of the Act or a regulation shall not affect the validity or enforcement of any other provision or regulation. Section 106 authorizes appropriation of such sums as may be necessary to carry out the provisions of the Title.

III

The Scope of the Inquiry

The District Court correctly focused on the Act's requirement that the Administrator of General Services administer the tape recordings and materials placed in his custody only under regulations promulgated by him providing for the orderly processing of such materials for the purpose of returning to appellant such of them as are personal and private in nature, and of determining the terms and conditions upon which public access may eventually be had to those remaining in the Government's possession. The District Court also noted that in designing the regulations, the Administrator must consider the need to protect the constitutional rights of appellant and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained. 408 F. Supp., at 334–340. This construction is plainly required by the wording of §§ 103 and 104.[4]

[4] This interpretation has abundant support in the legislative history of the Act. Senator Javits, one of the sponsors of S. 4016, stated:

"[The criteria of § 104 (a)] endeavor to protect due process for individ-

Regulations implementing §§ 102 and 103, which did not require submission to Congress, and which regulate access and screening by Government archivists, have been promulgated, 41 CFR § 105–63 (1976). Public-access regulations that must be submitted to Congress under § 104 (a) have not, however, become effective. The initial set proposed by the Administrator was disapproved pursuant to § 104 (b) (1) by Senate Resolution. S. Res. 244, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. 28609–28614 (1975). The Senate also disapproved seven provisions of a proposed second set, although that set had been withdrawn. S. Res. 428, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. 10159–10160 (1976). The House disapproved six provisions of a third set. H. R. Res. 1505, 94th Cong., 2d Sess. (1976). The Administrator is of the view that regulations cannot become effective except as a package and consequently is preparing a fourth set for submission to Congress. Brief for Federal Appellees 8–9, n. 4.

---

uals who may be named in the papers as well as any privilege which may be involved in the papers, and of course the necessary access of the former President himself.

"In short, the argument that the bill authorizes absolute unrestricted public access does not stand up in the face of the criteria and the requirement for the regulations which we have inserted in the bill today." 120 Cong. Rec. 33860 (1974).

Senator Nelson, the bill's draftsman, agreed that the primary purpose to provide for the American people a historical record of the Watergate events "should not override all regard for the rights of the individual to privacy and a fair trial." *Id.*, at 33851. Senator Ervin, also a sponsor and floor manager of the bill, stated:

"Nobody's right is affected by this bill, because it provides, as far as privacy is concerned, that the regulations of the Administrator shall take into account . . . [the] opportunity to assert any legally or constitutionally based right which would prevent or otherwise limit access to the tape recordings and other materials." *Id.*, at 33969.

See also *id.*, at 33960 (remarks of Sen. Ervin); *id.*, at 37902–37903 (remarks of Rep. Brademas).

The District Court therefore concluded that as no regulations under § 104 had yet taken effect, and as such regulations once effective were explicitly made subject to judicial review under § 105, the court could consider only the injury to appellant's constitutionally protected interests allegedly worked by the taking of his Presidential materials into custody for screening by Government archivists. 408 F. Supp., at 339–340. Judge McGowan, writing for the District Court, quoted the following from *Watson* v. *Buck,* 313 U. S. 387, 402 (1941):

> "No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." 408 F. Supp., at 336.

Only this Term we applied this principle in an analogous situation in declining to adjudicate the constitutionality of regulations of the Administrator of the Environmental Protection Agency that were in process of revision, stating: "For [the Court] to review regulations not yet promulgated, the final form of which has been only hinted at, would be wholly novel." *EPA* v. *Brown,* 431 U. S. 99, 104 (1977). See also *Thorpe* v. *Housing Authority,* 393 U. S. 268, 283–284 (1969); *Rosenberg* v. *Fleuti,* 374 U. S. 449, 451 (1963); *United States* v. *Raines,* 362 U. S. 17, 20–22 (1960); *Harmon* v. *Brucker,* 355

U. S. 579 (1958). We too, therefore, limit our consideration of the merits of appellant's several constitutional claims to those addressing the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists.

The constitutional questions to be decided are, of course, of considerable importance. They touch the relationship between two of the three coordinate branches of the Federal Government, the Executive and the Legislative, and the relationship of appellant to his Government. They arise in a context unique in the history of the Presidency and present issues that this Court has had no occasion heretofore to address. Judge McGowan, speaking for the District Court, comprehensively canvassed all the claims, and in a thorough opinion, concluded that none had merit. Our independent examination of the issues brings us to the same conclusion, although our analysis differs somewhat on some questions.

IV

Claims Concerning the Autonomy of the Executive Branch

The Act was the product of joint action by the Congress and President Ford, who signed the bill into law. It is therefore urged by intervenor-appellees that, in this circumstance, the case does not truly present a controversy concerning the separation of powers, or a controversy concerning the Presidential privilege of confidentiality, because, it is argued, such claims may be asserted only by incumbents who are presently responsible to the American people for their action. We reject the argument that only an incumbent President may assert such claims and hold that appellant, as a former President, may also be heard to assert them. We further hold, however, that neither his separation-of-powers claim nor his claim of breach of constitutional privilege has merit.

Appellant argues broadly that the Act encroaches upon the

Presidential prerogative to control internal operations of the Presidential office and therefore offends the autonomy of the Executive Branch. The argument is divided into separate but interrelated parts.

First, appellant contends that Congress is without power to delegate to a subordinate officer of the Executive Branch the decision whether to disclose Presidential materials and to prescribe the terms that govern any disclosure. To do so, appellant contends, constitutes, without more, an impermissible interference by the Legislative Branch into matters inherently the business solely of the Executive Branch.

Second, appellant contends, somewhat more narrowly, that by authorizing the Administrator to take custody of all Presidential materials in a "broad, undifferentiated" manner, and authorizing future publication except where a privilege is affirmatively established, the Act offends the presumptive confidentiality of Presidential communications recognized in *United States* v. *Nixon,* 418 U. S. 683 (1974). He argues that the District Court erred in two respects in rejecting this contention. Initially, he contends that the District Court erred in distinguishing incumbent from former Presidents in evaluating appellant's claim of confidentiality. Appellant asserts that, unlike the very specific privilege protecting against disclosure of state secrets and sensitive information concerning military or diplomatic matters, which appellant concedes may be asserted only by an incumbent President, a more generalized Presidential privilege survives the termination of the President-adviser relationship much as the attorney-client privilege survives the relationship that creates it. Appellant further argues that the District Court erred in applying a balancing test to his claim of Presidential privilege and in concluding that, notwithstanding the fact that some of the materials might legitimately be included within a claim of Presidential confidentiality, substantial public interests outweighed and justified the limited

inroads on Presidential confidentiality necessitated by the Act's provision for Government custody and screening of the materials. Finally, appellant contends that the Act's authorization of the process of screening the materials itself violates the privilege and will chill the future exercise of constitutionally protected executive functions, thereby impairing the ability of future Presidents to obtain the candid advice necessary to the conduct of their constitutionally imposed duties.

A

Separation of Powers

We reject at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality. Moreover, the control over the materials remains in the Executive Branch. The Administrator of General Services, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees.

Appellant's argument is in any event based on an interpretation of the separation-of-powers doctrine inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system. True, it has been said that "each of the three general departments of government [must remain] entirely free from the control or

coercive influence, direct or indirect, of either of the others . . . ," *Humphrey's Executor* v. *United States,* 295 U. S. 602, 629 (1935), and that "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." *Id.,* at 630. See also *O'Donoghue* v. *United States,* 289 U. S. 516 (1933); *Springer* v. *Philippine Islands,* 277 U. S. 189, 201 (1928).

But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story [5] was expressly affirmed by this Court only three years ago in *United States* v. *Nixon, supra.* There the same broad argument concerning the separation of powers was made by appellant in the context of opposition to a subpoena *duces tecum* of the Watergate Special Prosecutor for certain Presidential tapes and documents of value to a pending criminal investigation. Although acknowledging that each branch of the Government has the duty initially to interpret the Constitution for itself, and that its interpretation of its powers is due

[5] Madison in The Federalist No. 47, reviewing the origin of the separation-of-powers doctrine, remarked that Montesquieu, the "oracle" always consulted on the subject,

"did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, pp. 325–326 (J. Cooke ed. 1961) (emphasis in original).

Similarly, Mr. Justice Story wrote:

"[W]hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree." 1 J. Story, Commentaries on the Constitution § 525 (M. Bigelow, 5th ed. 1905).

great respect from the other branches, 418 U. S., at 703, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 635 (1952).

> "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, *but the separate powers were not intended to operate with absolute independence.*" 418 U. S., at 707 (emphasis supplied).

Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight departments of government," 408 F. Supp., at 342.[6] Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States* v. *Nixon,* 418 U. S., at 711–712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Ibid.*

It is therefore highly relevant that the Act provides for custody of the materials in officials of the Executive Branch and that employees of that branch have access to the materials only "for lawful Government use, subject to the [Adminis-

[6] See also, *e. g.,* 1 K. Davis, Administrative Law Treatise § 1.09 (1958); G. Gunther, Cases and Materials on Constitutional Law 400 (9th ed. 1975); L. Jaffe, Judicial Control of Administrative Action 28–30 (1965); Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1387–1391 (1974); Ratner, Executive Privilege, Self Incrimination, and the Separation of Powers Illusion, 22 UCLA L. Rev. 92–93 (1974).

trator's] regulations." § 102 (d); 41 CFR §§ 105–63.205, 105–63.206, and 105–63.302 (1976). For it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function. While the materials may also be made available for use in judicial proceedings, this provision is expressly qualified by any rights, defense, or privileges that any person may invoke including, of course, a valid claim of executive privilege. *United States* v. *Nixon, supra.* Similarly, although some of the materials may eventually be made available for public access, the Act expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege," § 104 (a)(5), and to return purely private materials to appellant, § 104 (a)(7). These provisions plainly guard against disclosures barred by any defenses or privileges available to appellant or the Executive Branch.[7] And appellant himself concedes that the Act "does not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it." Brief for Appellant 119. The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch.

Thus, whatever are the future possibilities for constitutional

[7] The District Court correctly interpreted the Act to require meaningful notice to appellant of archival decisions that might bring into play rights secured by § 104 (a)(5). 408 F. Supp., at 340 n. 23. Such notice is required by the Administrator's regulations, 41 CFR § 105–63.205 (1976), which provide: "The Administrator of General Services or his designated agent will provide former President Nixon or his designated attorney or agent prior notice of, and allow him to be present during, each authorized access."

conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face. And, of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, *e. g.*, the Freedom of Information Act, 5 U. S. C. § 552 (1970 ed. and Supp. V); the Privacy Act of 1974, 5 U. S. C. § 552 (a) (1970 ed., Supp. V); the Government in the Sunshine Act, 5 U. S. C. § 552b (1976 ed.); the Federal Records Act, 44 U. S. C. § 2101 *et seq.;* and a variety of other statutes, *e. g.*, 13 U. S. C. §§ 8–9 (census data); 26 U. S. C. § 6103 (tax returns). Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy. Cf. *EPA* v. *Mink,* 410 U. S. 73, 83 (1973); *FAA Administrator* v. *Robertson,* 422 U. S. 255 (1975).[8] Similar congressional power

[8] We see no reason to engage in the debate whether appellant has legal title to the materials. See Brief for Appellant 90. Such an inquiry is irrelevant for present purposes because § 105 (c) assures appellant of just compensation if his economic interests are invaded, and, even if legal title is his, the materials are not thereby immune from regulation. It has been accepted at least since Mr. Justice Story's opinion in *Folsom* v. *Marsh,* 9 F. Cas. 342, 347 (No. 4,901) (CC Mass. 1841), that regardless of where legal title lies, "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers." Appellant's suggestion that the *Folsom* principle does not go beyond materials concerning national security and current Government business is negated by Mr. Justice Story's emphasis that it also extended to materials "embracing *historical* . . . information." *Ibid.* (Emphasis added.) Significantly, no such limitation was suggested in the Attorney General's opinion to President Ford. Although indicating a view that the materials belonged to appellant, the opinion acknowledged that "Presidential materials" without qualification "are peculiarly affected by a public interest" which may justify subjecting "the absolute ownership rights" to certain

to regulate Executive Branch documents exists in this instance, a power that is augmented by the important interests that the Act seeks to attain. See *infra,* at 452–454.

B

Presidential Privilege

Having concluded that the separation-of-powers principle is not necessarily violated by the Administrator's taking custody of and screening appellant's papers, we next consider appellant's more narrowly defined claim that the Presidential privilege shields these records from archival scrutiny. We start with what was established in *United States* v. *Nixon, supra*—that the privilege is a qualified one.[9] Appellant had argued in that case that *in camera* inspection by the District Court of Presidential documents and materials subpoenaed by the Special Prosecutor would itself violate the privilege without regard to whether the documents were protected from public disclosure. The Court disagreed, stating that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege . . . ." [10]

"limitations directly related to the character of the documents as records of government activity." 43 Op. Atty. Gen. No. 1 (1974), App. 220–230.

On the other hand, even if legal title rests in the Government, appellant is not thereby foreclosed from asserting under § 105 (a) a claim for return of private materials retained by the Administrator in contravention of appellant's rights and privileges as specified in § 104 (a) (5).

[9] Like the District Court, we do not distinguish between the qualified "executive" privilege recognized in *United States* v. *Nixon* and the "Presidential" privilege to which appellant refers, except to note that appellant does not argue that the privilege he claims extends beyond the privilege recognized in that case. See 408 F. Supp., at 343 n. 24.

[10] *United States* v. *Nixon* recognized that there is a legitimate governmental interest in the confidentiality of communications between high Government officials, *e. g.,* those who advise the President, and that "[h]uman experience teaches that those who expect public dissemination

418 U. S., at 706. The Court recognized that the privilege of confidentiality of Presidential communications derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities,[11] but distinguished a President's "broad, undifferentiated claim of public interest in the confidentiality of such [communications]" from the more particularized and less qualified privilege relating to the need "to protect military, diplomatic, or sensitive national security secrets . . . ." *Ibid.* The Court held that in the case of the general privilege of confidentiality of Presidential communications, its importance must be balanced against the inroads of the privilege upon the effective functioning of the Judicial Branch. This balance was struck against the claim of privilege in that case because the Court determined that the intrusion into the confidentiality of Presidential communications resulting from *in camera* inspection by the District Court, "with all the protection that a district court will be obliged to provide," would be minimal and therefore that the claim was outweighed by "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch . . . ." *Id.*, at 706–707.

Unlike *United States* v. *Nixon,* in which appellant asserted a claim of absolute Presidential privilege against inquiry by the coordinate Judicial Branch, this case initially involves appellant's assertion of a privilege against the very

---

of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." 418 U. S., at 705.

[11] Indeed, the opinion noted, *id.,* at 705 n. 15, that Government confidentiality has been a concern from the time of the Constitutional Convention in 1787, the meetings of which were conducted in private, 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi–xxv (1911), and the records of which were sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). See generally C. Warren, The Making of the Constitution 134–139 (1937).

Executive Branch in whose name the privilege is invoked. The nonfederal appellees rely on this apparent anomaly to contend that only an incumbent President can assert the privilege of the Presidency. Acceptance of that proposition would, of course, end this inquiry. The contention draws on *United States* v. *Reynolds,* 345 U. S. 1, 7–8 (1953), where it was said that the privilege "belongs to the Government and must be asserted by it: it can neither be claimed nor waived by a private party." The District Court believed that this statement was strong support for the contention, but found resolution of the issue unnecessary. 408 F. Supp., at 343–345. It sufficed, said the District Court, that the privilege, if available to a former President, was at least one that "carries much less weight than a claim asserted by the incumbent himself." *Id.,* at 345.

It is true that only the incumbent is charged with performance of the executive duty under the Constitution. And an incumbent may be inhibited in disclosing confidences of a predecessor when he believes that the effect may be to discourage candid presentation of views by his contemporary advisers. Moreover, to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, see *United States* v. *Nixon,* 418 U. S., at 714; cf. *Eastland* v. *United States Servicemen's Fund,* 421 U. S. 491, 501–503 (1975); *Dombrowski* v. *Eastland,* 387 U. S. 82, 84–85 (1967) (*per curiam*), a former President is in less need of it than an incumbent. In addition, there are obvious political checks against an incumbent's abuse of the privilege.

Nevertheless, we think that the Solicitor General states the sounder view, and we adopt it:

> "This Court held in *United States* v. *Nixon* . . . that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he

can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure." Brief for Federal Appellees 33.

At the same time, however, the fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. This necessarily follows, for it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly.

The appellant may legitimately assert the Presidential privilege, of course, only as to those materials whose contents fall within the scope of the privilege recognized in *United States* v. *Nixon, supra.* In that case the Court held that the privilege is limited to communications "in performance of [a President's] responsibilities," 418 U. S., at 711, "of his office," *id.,* at 713, and made "in the process of shaping policies and making decisions," *id.,* at 708. Of the estimated 42 million pages of documents and 880 tape recordings whose custody is at stake, the District Court concluded that the appellant's claim of Presidential privilege could apply at most to the 200,000 items with which the appellant was personally familiar.

The appellant bases his claim of Presidential privilege in this case on the assertion that the potential disclosure of

communications given to the appellant in confidence would adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking. We are called upon to adjudicate that claim, however, only with respect to the process by which the materials will be screened and catalogued by professional archivists. For any eventual public access will be governed by the guidelines of § 104, which direct the Administrator to take into account "the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege," § 104 (a)(5), and the need to return purely private materials to the appellant, § 104 (a)(7).

In view of these specific directions, there is no reason to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve executive confidentiality. An absolute barrier to all outside disclosure is not practically or constitutionally necessary. As the careful research by the District Court clearly demonstrates, there has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited their papers in Presidential libraries (an example appellant has said he intended to follow) for governmental preservation and eventual disclosure.[12] The

[12] The District Court found that in the Hoover Library there are no restrictions on Presidential papers, although some restrictions exist with respect to personal and private materials, and in the Roosevelt Library, less than 0.5% of the materials is restricted. There is no evidence in the record as to the percentage of materials currently under restriction in the Truman or Eisenhower Libraries, but in the Kennedy Library, 85% of the materials has been processed, and of the processed materials, only 0.6% is under donor (as distinguished from security-related) restriction. In the Johnson Library, review of nonclassified materials is virtually complete, and more than 99% of all nonsecurity classified materials is unrestricted. In each of the Presidential libraries, provision has been made for the removal of the restrictions with the passage of time. 408 F. Supp., at 346 n. 31.

screening processes for sorting materials for lodgment in these libraries also involved comprehensive review by archivists, often involving materials upon which access restrictions ultimately have been imposed. 408 F. Supp., at 347. The expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office.

We are thus left with the bare claim that the mere screening of the materials by the archivists will impermissibly interfere with candid communication of views by Presidential advisers.[13] We agree with the District Court that, thus framed, the question is readily resolved. The screening constitutes a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns. These very personnel have performed the identical task in each of the Presidential

[13] Aside from the public access eventually to be provided under § 104, the Act mandates two other access routes to the materials. First, under § 102(b), access is available in accordance with lawful process served upon the Administrator. As we have noted, see n. 7, *supra,* the appellant is to be advised prior to any access to the materials, and he is thereafter free to review the specific materials at issue, see § 102 (c); 41 CFR § 105–63.301 (1976), in order to determine whether to assert any rights, privileges, or defenses. Section 102 (b) expressly conditions ultimate access by way of lawful process upon the right of appellant to invoke any rights, defenses, or privileges.

Second, § 102 (d) of the Act states: "Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials . . . for lawful Government use . . . ." The District Court eschewed a broad reading of that section as permitting wholesale access by any executive official for any conceivable executive purpose. Instead, it construed § 102 (d) in light of Congress' presumed intent that the Act operate within constitutional bounds—an intent manifested throughout the statute, see 408 F. Supp., at 337 n. 15. The District Court thus interpreted § 102(d), and in particular the phrase "lawful use," as requiring that once appellant is notified of requested access by an executive official, see n. 7, *supra,* he be allowed to assert any constitutional right or privilege that in his view would bar access. See 408 F. Supp., at 338 n. 18. We agree with that interpretation.

libraries without any suggestion that such activity has in any way interfered with executive confidentiality. Indeed, in light of this consistent historical practice, past and present executive officials must be well aware of the possibility that, at some time in the future, their communications may be reviewed on a confidential basis by professional archivists. Appellant has suggested no reason why review under the instant Act, rather than the Presidential Libraries Act, is significantly more likely to impair confidentiality, nor has he called into question the District Court's finding that the archivists' "record for discretion in handling confidential material is unblemished." 408 F. Supp., at 347.

Moreover, adequate justifications are shown for this limited intrusion into executive confidentiality comparable to those held to justify the *in camera* inspection of the District Court sustained in *United States* v. *Nixon, supra.* Congress' purposes in enacting the Act are exhaustively treated in the opinion of the District Court. The legislative history of the Act clearly reveals that, among other purposes, Congress acted to establish regular procedures to deal with the perceived need to preserve the materials for legitimate historical and governmental purposes.[14] An incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations.[15] Nor should the American people's ability to recon-

---

[14] From its exhaustive survey of the legislative history, the District Court concluded that the public interests served by the Act could be merged under "the rubric of preservation of an accurate and complete historical record." *Id.*, at 348–349.

[15] S. Rep. No. 93–1181, pp. 3–5 (1974); H. R. Rep. No. 93–1507, p. 3 (1974); 120 Cong. Rec. 37904 (remarks of Rep. Abzug). See also § 102 (d) of the Act.

Presidents in the past have had to apply to the Presidential libraries of their predecessors for permission to examine records of past govern-

struct and come to terms with their history be truncated by an analysis of Presidential privilege that focuses only on the needs of the present.[16] Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial interests by entrusting the materials to expert handling by trusted and disinterested professionals.

Other substantial public interests that led Congress to seek to preserve appellant's materials were the desire to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant's resignation, and Congress' need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation. Thus by preserving these materials, the Act may be thought to aid the legislative process and thus to be within the scope of Congress' broad investigative power, see, *e. g., Eastland* v. *United States Servicemen's Fund,* 421 U. S. 491 (1975). And, of course, the Congress repeatedly referred to the importance of the materials to the Judiciary in the event that they shed light upon issues in civil or criminal litigation, a social

---

mental actions relating to current governmental problems. See 408 F. Supp., at 351–352. Although it appears that most such requests have been granted, Congress could legitimately conclude that the situation was unstable and ripe for change. It is clear from the face of the Act that making the materials available for the ongoing conduct of Presidential policy was at least one of the objectives of the Act. See § 102 (d).

[16] S. Rep. No. 93–1181, pp. 1, 3 (1974); H. R. Rep. No. 93–1507, pp. 2–3, 8 (1974); Hearing on GSA Regulations Implementing Presidential Recordings and Materials Preservation Act before the Senate Committee on Government Operations, 94th Cong., 1st Sess., 256 (1975); 120 Cong. Rec. 31549–31550 (1974) (remarks of Sen. Nelson); *id.,* at 33850–33851; *id.,* at 33863 (remarks of Sen. Ervin); *id.,* at 33874–33875 (remarks of Sen. Huddleston); *id.,* at 33875–33876 (remarks of Sen. Ribicoff); *id.,* at 33876 (remarks of Sen. Muskie); *id.,* at 33964–33965 (remarks of Sen. Nelson); *id.,* at 37900–37901 (remarks of Rep. Brademas). See also §§ 101 (b)(1), 104 (a)(7) of the Act.

interest that cannot be doubted. See *United States* v. *Nixon*, *supra*.[17]

In light of these objectives, the scheme adopted by Congress for preservation of the appellant's Presidential materials cannot be said to be overbroad. It is true that among the voluminous materials to be screened by archivists are some materials that bear no relationship to any of these objectives (and whose prompt return to appellant is therefore mandated by § 104 (a)(7)). But these materials are commingled with other materials whose preservation the Act requires, for the appellant, like his predecessors, made no systematic attempt to segregate official, personal, and private materials. 408 F. Supp., at 355. Even individual documents and tapes often intermingle communications relating to governmental duties, and of great interest to historians or future policymakers, with private and confidential communications. *Ibid.*

Thus, as in the Presidential libraries, the intermingled state of the materials requires the comprehensive review and classification contemplated by the Act if Congress' important objectives are to be furthered. In the course of that process, the archivists will be required to view the small fraction of the materials that implicate Presidential confidentiality, as well as personal and private materials to be returned to appellant. But given the safeguards built into the Act to prevent disclosure of such materials and the minimal nature of the intrusion into the confidentiality of the Presidency, we believe that the claims of Presidential privilege clearly must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes.

---

[17] As to these several objectives of the legislature, see S. Rep. No. 93–1181, pp. 1, 3–4, 6 (1974); H. R. Rep. No. 93–1507, pp. 2–3, 8 (1974); 120 Cong. Rec. 31549–31550 (1974) (remarks of Sen. Nelson); *id.*, at 33849–33851; *id.*, at 37900–37901 (remarks of Rep. Brademas); *id.*, at 37905 (remarks of Rep. McKinney). See also §§ 102 (b), 104 (a) of the Act.

In short, we conclude that the screening process contemplated by the Act will not constitute a more severe intrusion into Presidential confidentiality than the *in camera* inspection by the District Court approved in *United States* v. *Nixon,* 418 U. S., at 706. We must, of course, presume that the Administrator and the career archivists concerned will carry out the duties assigned to them by the Act. Thus, there is no basis for appellant's claim that the Act "reverses" the presumption in favor of confidentiality of Presidential papers recognized in *United States* v. *Nixon.* Appellant's right to assert the privilege is specifically preserved by the Act. The guideline provisions on their face are as broad as the privilege itself. If the broadly written protections of the Act should nevertheless prove inadequate to safeguard appellant's rights or to prevent usurpation of executive powers, there will be time enough to consider that problem in a specific factual context. For the present, we hold, in agreement with the District Court, that the Act on its face does not violate the Presidential privilege.

V

Privacy

Appellant concedes that when he entered public life he voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public spotlight. See, *e. g., New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). He argues, however, that he was not thereby stripped of all legal protection of his privacy, and contends that the Act violates fundamental rights of expression and privacy guaranteed to him by the First, Fourth, and Fifth Amendments.[18]

---

[18] Insofar as appellant argues a privacy claim based upon the First Amendment, see Part VI, *infra.* In joining this part of the opinion, MR. JUSTICE STEWART adheres to his views on privacy as expressed in his concurring opinion in *Whalen* v. *Roe,* 429 U. S. 589, 607 (1977).

The District Court treated appellant's argument as addressed only to the process by which the screening of the materials will be performed. "Since any claim by [appellant] that his privacy will be invaded by public access to private materials must be considered premature when it must actually be directed to the regulations once they become effective, we need not consider how the materials will be treated after they are reviewed." 408 F. Supp., at 358. Although denominating the privacy claim "[t]he most troublesome challenge that plaintiff raises . . . ," *id.*, at 357, the District Court concluded that the claim was without merit. The court reasoned that the proportion of the 42 million pages of documents and 880 tape recordings implicating appellant's privacy interests was quite small since the great bulk of the materials related to appellant's conduct of his duties as President, and were therefore materials to which great public interest attached. The touchstone of the legality of the archival processing, in the District Court's view, was its reasonableness. Balancing the public interest in preserving the materials touching appellant's performance of his official duties against the invasion of appellant's privacy that archival screening necessarily entails, the District Court concluded that the Act was not unreasonable and hence not facially unconstitutional:

> "Here, we have a processing scheme without which national interests of overriding importance cannot be served . . . ." *Id.*, at 364.

Thus, the Act "is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of nonprivate documents and materials related to government objectives. The processing contemplated by the Act—at least as narrowed by carefully tailored regulations—represents the least intrusive manner in which to provide an adequate level of promotion of government interests of over-

riding importance." *Id.*, at 367. We agree with the District Court that the Act does not unconstitutionally invade appellant's right of privacy.

One element of privacy has been characterized as "the individual interest in avoiding disclosure of personal matters . . . ." *Whalen* v. *Roe,* 429 U. S. 589, 599 (1977). We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity. Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening. 408 F. Supp., at 360.[19] We may assume with the District

[19] The District Court, 408 F. Supp., at 360 n. 54, surveyed evidence in the record respecting depository restrictions for all Presidents since President Hoover. It is unclear whether President Hoover actually excluded any of his personal and private materials from the scope of his gift, although his offer to deposit materials in a Presidential library reserved the right to do so. President Franklin D. Roosevelt also indicated his intention to select certain materials from his papers to be retained by his family. Because of his death, this function was performed by designated individuals and by his secretary. Again the record is unclear as to how many materials were removed. A number of personal documents deemed to be personal family correspondence were turned over to the Roosevelt family library in 1948, later returned to the official library in 1954–1955, and have been on loan to the family since then. It is unclear to what extent these materials were reviewed by the library personnel.

President Truman withheld from deposit the personal file maintained in the White House by his personal secretary. This file was deposited with the library upon his death in 1974, although the terms of his will excluded a small number of items determined by the executors of his will to pertain to personal or business affairs of the Truman family. President Eisenhower's offer to deposit his Presidential materials excluded materials determined by him or his representative to be personal or private. President Kennedy's materials deposited with GSA did not include certain

Court, for the purposes of this case, that this pattern of *de facto* Presidential control and congressional acquiescence gives rise to appellant's legitimate expectation of privacy in such materials. *Katz* v. *United States,* 389 U. S. 347, 351–353 (1967).[20] This expectation is independent of the question of ownership of the materials, an issue we do not reach. See n. 8, *supra.* But the merit of appellant's claim of invasion of his privacy cannot be considered in the abstract; rather, the claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening. *Camara* v. *Municipal Court,* 387 U. S. 523, 534–539 (1967); *Terry* v. *Ohio,* 392 U. S. 1, 21 (1968).[21] Under this test, the privacy interest asserted by appellant is weaker than that found wanting in the recent decision of *Whalen* v. *Roe, supra.* Emphasizing the precautions utilized by New York State to prevent the unwarranted disclosure of private medical information retained in a state computer bank system, *Whalen* rejected a constitutional objection to New York's program on privacy grounds. Not only does the Act challenged here mandate regulations similarly aimed at preventing undue dissemination of private materials but, unlike *Whalen,* the Government will not even retain long-term control over

---

materials relating to his private affairs, and some recordings of meetings involving President Kennedy, although physically stored in the Kennedy Library, have not yet been turned over to the library or reviewed by Government archivists. President Johnson's offer to deposit materials excluded items which he determined to be of special or private interest pertaining to personal or family affairs.

[20] Even if prior Presidents had declined to assert their privacy interests in such materials, their failure to do so would not necessarily bind appellant, for privacy interests are not solely dependent for their constitutional protection upon established practice of governmental toleration.

[21] We agree with the District Court that the Fourth Amendment's warrant requirement is not involved. 408 F. Supp., at 361–362.

such private information; rather, purely private papers and recordings will be returned to appellant under § 104 (a)(7) of the Act.

The overwhelming bulk of the 42 million pages of documents and the 880 tape recordings pertain, not to appellant's private communications, but to the official conduct of his Presidency. Most of the 42 million pages were prepared and seen by others and were widely circulated within the Government. Appellant concedes that he saw no more than 200,000 items, and we do not understand him to suggest that his privacy claim extends to items he never saw. See *United States* v. *Miller,* 425 U. S. 435 (1976). Further, it is logical to assume that the tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency. And, of course, appellant cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public. *United States* v. *Dionisio,* 410 U. S. 1, 14 (1973); *Katz* v. *United States, supra,* at 351. Therefore, appellant's privacy claim embracing, for example, "extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files," 408 F. Supp., at 359, relates only to a very small fraction of the massive volume of official materials with which they are presently commingled.[22]

[22] Some materials are still in appellant's possession, as the Administrator has not yet attempted to act on his authority under § 101 (b)(1) to take custody of them. See Brief for Federal Appellees 4 n. 1. Moreover, the Solicitor General conceded at oral argument that there are certain purely private materials which "should be returned to [appellant] once . . identified." Tr. of Oral Arg. 58–59. The District Court enjoined the Government from "processing, disclosing, inspecting, transferring, or otherwise disposing of any materials . . . which might fall within the coverage of . . . the . . . Act. . . ." 408 F. Supp., at 375. As the District Court's stay is no longer in effect, the Government should now promptly disclaim any interest in materials conceded to be appellant's purely private communications and deliver them to him.

The fact that appellant may assert his privacy claim as to only a small fraction of the materials of his Presidency is plainly relevant in judging the reasonableness of the screening process contemplated by the Act, but this of course does not, without more, require rejection of his privacy argument. *Id.*, at 359. Although the Act requires that the regulations promulgated by the Administrator under § 104 (a) take into account appellant's legally and constitutionally based rights and privileges, presumably including his privacy rights, § 104 (a)(5), and also take into account the need to return to appellant his private materials, § 104 (a)(7),[23] the identity and separation of these purely private matters can be achieved, as all parties concede, only by screening all of the materials.

Appellant contends that the Act therefore is tantamount to a general warrant authorizing search and seizure of all of his Presidential "papers and effects." Such "blanket authority," appellant contends, is precisely the kind of abuse that the Fourth Amendment was intended to prevent, for " 'the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists [in] rummaging about among his effects to secure evidence against him.' " Brief for Appellant 148, quoting *United States* v. *Poller*, 43 F. 2d 911, 914 (CA2 1930). Thus, his brief continues, at 150–151:

> "[Appellant's] most private thoughts and communications, both written and spoken, will be exposed to and reviewed by a host of persons whom he does not know and

---

[23] The Solicitor General implied at oral argument that the requirement of the guidelines directing the Administrator to consider the need to return to appellant "for his sole custody and use . . . materials which are not [Watergate related] . . . and are not otherwise of general historical significance," § 104 (a)(7), is further qualified by the requirement under §§ 102 (b) and 104 (a)(5), that the regulations promulgated by the Administrator take into account the need to protect appellant's rights, defenses, or privileges. Tr. of Oral Arg. 37–38.

did not select, and in whom he has no reason to place his confidence. This group will decide what is personal, to be returned to [him], and what is historical, to be opened for public review." [24]

Appellant principally relies on *Stanford* v. *Texas,* 379 U. S. 476 (1965), but that reliance is misplaced. *Stanford* invalidated a search aimed at obtaining evidence that an individual had violated a "sweeping and many-faceted law which, among other things, outlaws the Communist Party and creates various individual criminal offenses, each punishable by imprisonment for up to 20 years." *Id.,* at 477. The search warrant authorized a search of his private home for books, records, and other materials concerning illegal Communist activities. After spending more than four hours in Stanford's house, police officers seized half of his books which included works by Sartre, Marx, Pope John XXIII, Mr. Justice Hugo Black, Theodore Draper, and Earl Browder, as well as private documents including a marriage certificate, insurance policies, household bills and receipts, and personal correspondence. *Id.,* at 479–480. *Stanford* held this to be an unconstitutional general search.

The District Court concluded that the Act's provisions for

---

[24] Appellant argues that screening under the Act contrasts with the screening procedures followed by earlier Presidents who, "in donating materials to Presidential libraries, have been able . . . to participate in the selection of persons who would review the materials for classification purposes." Brief for Appellant 151 n. 68. We are unable to say that the record substantiates this assertion. The record is most complete with respect to President Johnson, who appears to have recommended the individual who was later selected as Director of the Johnson Library, but seems not to have played any role in the selection of the archivists actually performing the day-to-day processing. 408 F. Supp., at 365 n. 60. Moreover, we agree with the District Court that it is difficult to see how professional archivists performing a screening task under proper standards would be meaningfully affected in the performance of their duties by loyalty to individuals or institutions. *Ibid.*

custody and screening could not be analogized to a general search and that *Stanford,* therefore, did not require the Act's invalidation. 408 F. Supp., at 366–367, n. 63. We agree. Only a few documents among the vast quantity of materials seized in *Stanford* were even remotely related to any legitimate government interest. This case presents precisely the opposite situation: the vast proportion of appellant's Presidential materials are official documents or records in which appellant concedes the public has a recognized interest. Moreover, the Act provides procedures and orders the promulgation of regulations expressly for the purpose of minimizing the intrusion into appellant's private and personal materials. Finally, the search in *Stanford* was an intrusion into an individual's home to search and seize personal papers in furtherance of a criminal investigation and designed for exposure in a criminal trial. In contrast, any intrusion by archivists into appellant's private papers and effects is undertaken with the sole purpose of separating private materials to be returned to appellant from nonprivate materials to be retained and preserved by the Government as a record of appellant's Presidency.

Moreover, the screening will be undertaken by Government archivists with, as the District Court noted, "an unblemished record for discretion," 408 F. Supp., at 365. That review can hardly differ materially from that contemplated by appellant's intention to establish a Presidential library, for Presidents who have established such libraries have found that screening by professional archivists was essential. Although the District Court recognized that this contemplation of archival review would not defeat appellant's expectation of privacy, the court held that it does indicate that "in the special situation of documents accumulated by a President during his tenure and reviewed by professional government personnel, pursuant to a process employed by past Presidents, any intrusion into privacy interests is less substantial than it might appear at first." *Ibid.* (citation omitted).

The District Court analogized the screening process contemplated by the Act to electronic surveillance conducted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510 *et seq.* 408 F. Supp., at 363. We think the analogy is apt. There are obvious similarities between the two procedures. Both involve the problem of separating intermingled communications, (1) some of which are expected to be related to legitimate Government objectives, (2) some of which are not, and (3) for which there is no means to segregate the one from the other except by reviewing them all. Thus the screening process under the Act, like electronic surveillance, requires some intrusion into private communications unconnected with any legitimate governmental objectives. Yet this fact has not been thought to render surveillance under the Omnibus Act unconstitutional. Cf., *e. g., United States* v. *Donovan,* 429 U. S. 413 (1977); *Berger* v. *New York,* 388 U. S. 41 (1967). See also 408 F. Supp., at 363–364.

Appellant argues that this analogy is inappropriate because the electronic surveillance procedure was carefully designed to meet the constitutional requirements enumerated in *Berger* v. *New York, supra,* including (1) prior judicial authorization, (2) specification of particular offenses said to justify the intrusion, (3) specification "with particularity" of the conversations sought to be seized, (4) minimization of the duration of the wiretap, (5) termination once the conversation sought is seized, and (6) a showing of exigent circumstances justifying use of the wiretap procedure. Brief for Appellant 157. Although the parallel is far from perfect, we agree with the District Court that many considerations supporting the constitutionality of the Omnibus Act also argue for the constitutionality of this Act's materials screening process. For example, the Omnibus Act permits electronic surveillance only to investigate designated crimes that are serious in nature, 18 U. S. C. § 2516, and only when normal investigative techniques have failed or are likely to do so, § 2518 (3)(c). Similarly,

the archival review procedure involved here is designed to serve important national interests asserted by Congress, and the unavailability of less restrictive means necessarily follows from the commingling of the documents.[25] Similarly, just as the Omnibus Act expressly requires that interception of nonrelevant communications be minimized, § 2518 (5), the Act's screening process is designed to minimize any privacy intrusions, a goal that is further reinforced by regulations which must take those interests into account.[26] The fact that apparently only a minute portion of the materials implicates appellant's privacy interests [27] also negates any conclusion that

[25] Appellant argues that, unlike electronic surveillance, where success depends upon the subject's ignorance of its existence, appellant could have been allowed to separate his personal from official materials. But Congress enacted the Act in part to displace the Nixon-Sampson agreement that expressly provided for automatic destruction of the tape recordings in the event of appellant's death and that allowed appellant complete discretion in the destruction of materials after the initial three-year storage period.

Moreover, appellant's view of what constitutes official as distinguished from personal and private materials might differ from the view of Congress, the Executive Branch, or a reviewing court. Not only may the use of disinterested archivists lead to application of uniform standards in separating private from nonprivate communications, but the Act provides for judicial review of their determinations. This would not be the case as to appellant's determinations.

[26] The District Court found, 408 F. Supp., at 364 n. 58, and we agree, that it is irrelevant that Title III, unlike this Act, requires adherence to a detailed warrant requirement, 18 U. S. C. § 2518. That requirement is inapplicable to this Act, since we deal not with standards governing a generalized right to search by law enforcement officials or other Government personnel but with a particularized legislative judgment, supplemented by judicial review, similar to condemnation under the power of eminent domain, that certain materials are of value to the public.

[27] The fact that the overwhelming majority of the materials is relevant to Congress' lawful objectives is in contrast to the experience under the Omnibus Crime Control Act. A recent report on surveillance conducted under the Omnibus Act indicates that for the calendar year 1976 more than one-half of all wire intercepts authorized by judicial order

the screening process is an unreasonable solution to the problem of separating commingled communications.

In sum, appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, see § 104 (a)(7), the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant's fears that his materials will be reviewed by "a host of persons," [28] Brief for Appellant 150, we are compelled to agree with the District Court that appellant's privacy claim is without merit.

VI

First Amendment

During his Presidency appellant served also as head of his national political party and spent a substantial portion of

---

yielded only nonincriminating communications. Administrative Office of the U. S. Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, Jan. 1, 1976, to Dec. 31, 1976, p. XII (Table 4).

[28] Throughout this litigation appellant has claimed that his privacy will necessarily be unconstitutionally invaded because the screening requires a staff of "over one hundred archivists, accompanied by lawyers, technicians and secretaries [who] will have a right to review word-by-word five and one-half years of a man's life . . . ." Tr. of Oral Arg. 16. The size of the staff is, of course, necessarily a function of the enormous quantity of materials involved. But clearly not all engaged in the screening will examine each document. The Administrator initially proposed that only one archivist examine most documents. See 408 F. Supp., at 365 n. 59.

his working time on partisan political matters. Records arising from his political activities, like his private and personal records, are not segregated from the great mass of materials. He argues that the Act's archival screening process therefore necessarily entails invasion of his constitutionally protected rights of associational privacy and political speech. As summarized by the District Court: "It is alleged that the Act invades the private formulation of political thought critical to free speech and association, imposing sanctions upon past expressive activity, and more significantly, limiting that of the future because individuals who learn the substance of certain private communications by [appellant]—especially those critical of themselves—will refuse to associate with him. The Act is furthermore said to chill [his] expression because he will be 'saddled' with prior positions communicated in private, leaving him unable to take inconsistent positions in the future." 408 F. Supp., at 367–368.

The District Court, viewing these arguments as in essence a claim that disclosure of the materials violated appellant's associational privacy, and therefore as not significantly different in structure from appellant's privacy claim, again treated the arguments as limited to the constitutionality of the Act's screening process. *Id.*, at 368. As was true with respect to the more general privacy challenge, only a fraction of the materials can be said to raise a First Amendment claim. Nevertheless, the District Court acknowledged that appellant would "appear . . . to have a legitimate expectation that he would have an opportunity to remove some of the sensitive political documents before any government screening took place." *Ibid.* The District Court concluded, however, that there was no reason to believe that the mandated regulations when promulgated would not adequately protect against public access to materials implicating appellant's privacy in political association, and that "any burden arising solely from review by professional and discreet archivists is not significant." The court therefore held that the Act does not signifi-

cantly interfere with or chill appellant's First Amendment rights. *Id.*, at 369. We agree with the District Court's conclusion.

It is, of course, true that involvement in partisan politics is closely protected by the First Amendment, *Buckley* v. *Valeo*, 424 U. S. 1 (1976), and that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.*, at 64. But a compelling public need that cannot be met in a less restrictive way will override those interests, *Kusper* v. *Pontikes*, 414 U. S. 51, 58–59 (1973); *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960), "particularly when the 'free functioning of our national institutions' is involved." *Buckley* v. *Valeo*, *supra*, at 66. Since no less restrictive way than archival screening has been suggested as a means for identification of materials to be returned to appellant, the burden of that screening is presently the measure of his First Amendment claim. *Id.*, at 84. The extent of any such burden, however, is speculative in light of the Act's terms protecting appellant from improper public disclosures and guaranteeing him full judicial review before any public access is permitted. §§ 104 (a)(5), 104 (a)(7), 105 (a).[29] As the District Court concluded, the First Amendment

---

[29] Appellant argues that *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150–151 (1969); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Staub* v. *Baxley*, 355 U. S. 313, 319–321 (1958); *Thomas* v. *Collins*, 323 U. S. 516, 538–541 (1945); and *Lovell* v. *Griffin*, 303 U. S. 444, 452–453 (1938), support his contention that "[a] statute which vests such broad authority [with respect to First Amendment rights] is unconstitutional on its face, and the party subjected to it may treat it as a nullity *even if its actual implementation would not harm him.*" Brief for Appellant 169. The argument is without merit. Those cases involved regulations that permitted public officials in their arbitrary discretion to impose prior restraints on expressional or associational activities. In contrast, the Act is concerned only with materials that record past activities and with a screening process guided by longstanding archival screening standards.

claim is clearly outweighed by the important governmental interests promoted by the Act.

For the same reasons, we find no merit in appellant's argument that the Act's scheme for custody and archival screening of the materials "necessarily inhibits [the] freedom of political activity [of future Presidents] and thereby reduces the 'quantity and diversity' of the political speech and association that the Nation will be receiving from its leaders." Brief for Appellant 168. It is significant, moreover, that this concern has not deterred President Ford from signing the Act into law, or President Carter from urging this Court's affirmance of the judgment of the District Court.

VII

Bill of Attainder Clause

A

Finally, we address appellant's argument that the Act constitutes a bill of attainder proscribed by Art. I, § 9, of the Constitution.[30] His argument is that Congress acted on the premise that he had engaged in "'misconduct,'" was an "'unreliable custodian'" of his own documents, and generally was deserving of a *"legislative judgment* of blameworthiness," Brief for Appellant 132–133. Thus, he argues, the Act is pervaded with the key features of a bill of attainder: a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. See *United States* v. *Brown,* 381

[30] Article I, § 9, applicable to Congress, provides that "[n]o Bill of Attainder or ex post facto Law shall be passed," and Art. I, § 10, applicable to the States, provides that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law . . . ." The linking of bills of attainder and *ex post facto* laws is explained by the fact that a legislative denunciation and condemnation of an individual often acted to impose retroactive punishment. See Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, pp. 92–93 (1956).

U. S. 437, 445, 447 (1965); *United States* v. *Lovett,* 328 U. S. 303, 315–316 (1946); *Ex parte Garland,* 4 Wall. 333, 377 (1867); *Cummings* v. *Missouri,* 4 Wall. 277, 323 (1867).

Appellant's argument relies almost entirely upon *United States* v. *Brown, supra,* the Court's most recent decision addressing the scope of the Bill of Attainder Clause. It is instructive, therefore, to sketch the broad outline of that case. *Brown* invalidated § 504 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 504, that made it a crime for a Communist Party member to serve as an officer of a labor union. After detailing the infamous history of bills of attainder, the Court found that the Bill of Attainder Clause was an important ingredient of the doctrine of "separation of powers," one of the organizing principles of our system of government. 381 U. S., at 442–443. Just as Art. III confines the Judiciary to the task of adjudicating concrete "cases or controversies," so too the Bill of Attainder Clause was found to "reflect . . . the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." 381 U. S., at 445. *Brown* thus held that § 504 worked a bill of attainder by focusing upon easily identifiable members of a class—members of the Communist Party—and imposing on them the sanction of mandatory forfeiture of a job or office, long deemed to be punishment within the contemplation of the Bill of Attainder Clause. See, *e. g., United States* v. *Lovett, supra,* at 316; *Cummings* v. *Missouri, supra,* at 320.

Brown, Lovett, and earlier cases unquestionably gave broad and generous meaning to the constitutional protection against bills of attainder. But appellant's proposed reading is far broader still. In essence, he argues that *Brown* establishes that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class

that is not defined at a proper level of generality. The Act in question therefore is faulted for singling out appellant, as opposed to all other Presidents or members of the Government, for disfavored treatment.

Appellant's characterization of the meaning of a bill of attainder obviously proves far too much. By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality.[31] Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. *United States* v. *Lovett, supra,* at 324 (Frankfurter, J., concurring).[32]

---

[31] In this case, for example, appellant faults the Act for taking custody of his papers but not those of other Presidents. Brief for Appellant 130. But even a congressional definition of the class consisting of all Presidents would have been vulnerable to the claim of being overly specific, since the definition might more generally include all members of the Executive Branch, or all members of the Government, or all in possession of Presidential papers, or all in possession of Government papers. This does not dispose of appellant's contention that the Act focuses upon him with the requisite degree of specificity for a bill of attainder, see *infra,* at 471–472, but it demonstrates that simple reference to the breadth of the Act's focus cannot be determinative of the reach of the Bill of Attainder Clause as a limitation upon legislative action that disadvantages a person or group. See, *e. g., United States* v. *Brown,* 381 U. S. 437, 474–475 (1965) (WHITE, J., dissenting); n. 34, *infra.*

[32] "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation."

However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine,[33] invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals.[34] In short, while the Bill of Attainder Clause serves as an important "bulwark against tyranny," *United States* v. *Brown*, 381 U. S., at 443, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

Thus, in the present case, the Act's specificity—the fact that

---

[33] We observe that appellant originally argued that "for similar reasons" the Act violates both the Bill of Attainder Clause and equal protection of the laws. Jurisdictional Statement 27–28. He has since abandoned reliance upon the equal protection argument, apparently recognizing that mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment, *New Orleans* v. *Dukes*, 427 U. S. 297 (1976); *Katzenbach* v. *Morgan*, 384 U. S. 641, 657 (1966), even if the law disadvantages an individual or identifiable members of a group, see, *e. g.*, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955) (opticians); *Daniel* v. *Family Ins. Co.*, 336 U. S. 220 (1949) (insurance agents). "For similar reasons" the mere specificity of a law does not call into play the Bill of Attainder Clause. Cf. Comment, The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification, 54 Calif. L. Rev. 212, 234–236 (1966); but see Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L. J. 330 (1962).

[34] *Brown* recognized this by making clear that conflict-of-interest laws, which inevitably prohibit conduct on the part of designated individuals or classes of individuals, do not contravene the bill of attainder guarantee. *Brown* specifically noted the validity of § 32 of the Banking Act of 1933, 12 U. S. C. § 78, which disqualified identifiable members of a group—officers and employees of underwriting organizations—from serving as officers of Federal Reserve banks, 381 U. S., at 453. Other valid federal conflict-of-interest statutes which also single out identifiable members of groups to bear burdens or disqualifications are collected, *id.*, at 467–468, n. 2 (WHITE, J., dissenting). See also *Regional Rail Reorganization Act Cases*, 419 U. S. 102 (1974) (upholding transfer of rail properties of eight railroad companies to Government-organized corporation).

it refers to appellant by name—does not automatically offend the Bill of Attainder Clause. Indeed, viewed in context, the focus of the enactment can be fairly and rationally understood. It is true that Title I deals exclusively with appellant's papers. But Title II casts a wider net by establishing a special commission to study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal officials. In this light, Congress' action to preserve only appellant's records is easily explained by the fact that at the time of the Act's passage, only his materials demanded immediate attention. The Presidential papers of all former Presidents from Hoover to Johnson were already housed in functioning Presidential libraries. Congress had reason for concern solely with the preservation of appellant's materials, for he alone had entered into a depository agreement, the Nixon-Sampson agreement, which by its terms called for the destruction of certain of the materials. Indeed, as the federal appellees argue, "appellant's depository agreement . . . created an imminent danger that the tape recordings would be destroyed if appellant, who had contracted phlebitis, were to die." Brief for Federal Appellees 41. In short, appellant constituted a legitimate class of one, and this provides a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors.

Moreover, even if the specificity element were deemed to be satisfied here, the Bill of Attainder Clause would not automatically be implicated. Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences. Rather, we must inquire further whether Congress, by lodging appellant's materials in the custody of the General Services Administration pending their screening by Government archivists and the promulgation of further regulations, "inflict[ed] punishment" within the constitu-

tional proscription against bills of attainder. *United States* v. *Lovett,* 328 U. S., at 315; see also *United States* v. *Brown, supra,* at 456–460; *Cummings* v. *Missouri,* 4 Wall., at 320.

B

1

The infamous history of bills of attainder is a useful starting point in the inquiry whether the Act fairly can be characterized as a form of punishment leveled against appellant. For the substantial experience of both England and the United States with such abuses of parliamentary and legislative power offers a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of Art. I, § 9. A statutory enactment that imposes any of those sanctions on named or identifiable individuals would be immediately constitutionally suspect.

In England a bill of attainder originally connoted a parliamentary Act sentencing a named individual or identifiable members of a group to death.[35] Article I, § 9, however, also

[35] See, for example, the 1685 attainder of James, Duke of Monmouth, for high treason: "WHEREAS James duke of Monmouth has in an hostile manner invaded this kingdom, and is now in open rebellion, levying war against the king, contrary to the duty of his allegiance; Be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this parliament assembled, and by the authority of the same, That the said *James* duke of *Monmouth* stand and be convicted and attainted of high treason, and that he suffer pains of death, and incur all forfeitures as a traitor convicted and attainted of high treason." 1 Jac. 2, c. 2 (1685) (emphasis omitted).

The attainder of death was usually accompanied by a forfeiture of the condemned person's property to the King and the corruption of his blood, whereby his heirs were denied the right to inherit his estate. Blackstone traced the practice of *"corruption of blood"* to the Norman conquest He considered the practice an "oppressive mark of feudal

proscribes enactments originally characterized as bills of pains and penalties, that is, legislative Acts inflicting punishment other than execution. *United States* v. *Lovett, supra,* at 323–324 (Frankfurter, J., concurring); *Cummings* v. *Missouri, supra,* at 323; Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, p. 97 (1956). Generally addressed to persons considered disloyal to the Crown or State, "pains and penalties" historically consisted of a wide array of punishments: commonly included were imprisonment,[36] banishment,[37] and the punitive confiscation of property by the sovereign.[38] Our country's own experience with bills of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal. See, *e. g., Cummings* v. *Missouri, supra* (barring

---

tenure" and hoped that it "may in process of time be abolished by act of parliament." 4 W. Blackstone Commentaries *388. The Framers of the United States Constitution responded to this recommendation. Art. III, § 3.

[36] See, *e. g.,* 10 & 11 Will. 3, c. 13 (1701): "An Act for continuing the Imprisonment of *Counter* and others, for the late horrid Conspiracy to assassinate the Person of his sacred Majesty."

[37] See, *e. g., Cooper* v. *Telfair,* 4 Dall. 14 (1800) (" 'all and every the persons, named and included in the said act [declaring persons guilty of treason] are banished from the said state [Georgia]' "); 2 R. Wooddeson, A Systematical View of the Laws of England 638–639 (1792) (banishment of Lord Clarendon and the Bishop Atterbury). See *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168, n. 23 (1963).

[38] Following the Revolutionary War, States often seized the property of alleged Tory sympathizers. See, *e. g., James's Claim,* 1 Dall. 47 (1780) ("*John Parrock* was attainted of *High Treason,* and his estate seized and advertised for sale"); *Respublica* v. *Gordon,* 1 Dall. 233 (1788) ("attainted of treason for adhering to the king of *Great Britain,* in consequence of which his estate was confiscated to the use of the commonwealth . . .").

clergymen from ministry in the absence of subscribing to a loyalty oath); *United States* v. *Lovett, supra* (barring named individuals from Government employment); *United States* v. *Brown, supra* (barring Communist Party members from offices in labor unions).

Needless to say, appellant cannot claim to have suffered any of these forbidden deprivations at the hands of the Congress. While it is true that Congress ordered the General Services Administration to retain control over records that appellant claims as his property,[39] § 105 of the Act makes provision for an award by the District Court of "just compensation." This undercuts even a colorable contention that the Government has punitively confiscated appellant's property, for the "owner [thereby] is to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States* v. *Reynolds,* 397 U. S. 14, 16 (1970); accord, *United States* v. *Miller,* 317 U. S. 369, 373 (1943). Thus, no feature of the challenged Act falls within the historical meaning of legislative punishment.

2

But our inquiry is not ended by the determination that the Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause. Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee. The Court, therefore, often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive

[39] In fact, it remains unsettled whether the materials in question are the property of appellant or of the Government. See n. 8, *supra.*

legislative purposes.[40] *Cummings* v. *Missouri,* 4 Wall., at 319–320; *Hawker* v. *New York,* 170 U. S. 189, 193–194 (1898); *Dent* v. *West Virginia,* 129 U. S. 114, 128 (1889); *Trop* v. *Dulles,* 356 U. S. 86, 96–97 (1958) (plurality opinion); *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168–169 (1963). Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.

Application of the functional approach to this case leads to rejection of appellant's argument that the Act rests upon a congressional determination of his blameworthiness and a desire to punish him. For, as noted previously, see *supra,* at 452–454, legitimate justifications for passage of the Act are readily apparent. First, in the face of the Nixon-Sampson agreement which expressly contemplated the destruction of some of appellant's materials, Congress stressed the need to preserve "[i]nformation included in the materials of former President Nixon [that] is needed to complete the prosecutions

[40] In determining whether punitive or nonpunitive objectives underlie a law, *United States* v. *Brown* established that punishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct. 381 U. S., at 458–459. This view is consistent with the traditional purposes of criminal punishment, which also include a preventive aspect. See, *e. g.,* H. Packer, The Limits of the Criminal Sanction 48–61 (1968). In *Brown* the element of punishment was found in the fact that "the purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as guilty of subversive acts and associations and therefore unfit to fill [union] positions . . . ." 381 U. S., at 460. Thus, *Brown* left undisturbed the requirement that one who complains of being attainted must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct. Indeed, just three Terms later, *United States* v. *O'Brien,* 391 U. S. 367, 383 n. 30 (1968), which, like *Brown,* was also written by Mr. Chief Justice Warren, reconfirmed the need to examine the purposes served by a purported bill of attainder in determining whether it in fact represents a punitive law.

of Watergate-related crimes." H. R. Rep. No. 93–1507, p. 2 (1974). Second, again referring to the Nixon-Sampson agreement, Congress expressed its desire to safeguard the "public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance. The information in these materials will be of great value to the political health and vitality of the United States." *Ibid.*[41] Indeed, these same objectives are stated in the text of the Act itself, § 104 (a), note following 44 U. S. C. § 2107 (1970 ed., Supp. V), where Congress instructs the General Services Administration to promulgate regulations that further these ends and at the same time protect the constitutional and legal rights of any individual adversely affected by the Administrator's retention of appellant's materials.

Evaluated in terms of these asserted purposes, the law plainly must be held to be an act of nonpunitive legislative policymaking. Legislation designed to guarantee the availability of evidence for use at criminal trials is a fair exercise of Congress' responsibility to the "due process of law in the fair administration of criminal justice," *United States* v. *Nixon,* 418 U. S., at 713, and to the functioning of our adversary legal system which depends upon the availability of relevant evidence in carrying out its commitments both to fair play and to the discovery of truth within the bounds set by law. *Branzburg* v. *Hayes,* 408 U. S. 665, 688 (1972); *Blackmer* v. *United States,* 284 U. S. 421, 438 (1932); *Blair* v. *United States,* 250 U. S. 273, 281 (1919). Similarly, Congress' in-

[41] The Senate pointed to these same objectives in nullifying the Nixon-Sampson agreement: "[1] To begin with, prosecutors, defendants, and the courts probably would be deprived of crucial evidence bearing on the defendants' innocence or guilt of the Watergate crimes for which they stand accused. [2] Moreover, the American people would be denied full access to all facts about the Watergate affair, and the efforts of Congress, the executive branch, and others to take measures to prevent a recurrence of the Watergate affair may be inhibited." S. Rep. No. 93–1181, p. 4 (1974).

terest in and expansive authority to act in preservation of monuments and records of historical value to our national heritage are fully established. *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668 (1896); *Roe* v. *Kansas,* 278 U. S. 191 (1929).[42] A legislature thus acts responsibly in seeking to accomplish either of these objectives. Neither supports an implication of a legislative policy designed to inflict punishment on an individual.

3

A third recognized test of punishment is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish. See, *e. g., United States* v. *Lovett,* 328 U. S., at 308–314; *Kennedy* v. *Mendoza-Martinez, supra,* at 169–170. The District Court unequivocally found: "There is no evidence presented to us, nor is there any to be found in the legislative record, to indicate that Congress' design was to impose a penalty upon Mr. Nixon . . . as punishment for alleged past wrongdoings. . . . The legislative history leads to only one conclusion, namely, that the Act before us is regulatory and not punitive in character." 408 F. Supp., at 373 (emphasis omitted). We find no cogent reason for disagreeing with this conclusion.

First, both Senate and House Committee Reports, in formally explaining their reasons for urging passage of the Act, expressed no interest in punishing or penalizing appellant. Rather, the Reports justified the Act by reference to objectives that fairly and properly lie within Congress' legislative competence: preserving the availability of judicial evidence and

[42] These cases upheld exercises of the power of eminent domain in preserving historical monuments and like facilities for public use. The power of eminent domain, however, is not restricted to tangible property or realty but extends both to intangibles and to personal effects as involved here. See *Cincinnati* v. *Louisville & Nashville R. Co.,* 223 U. S. 390, 400 (1912); *Porter* v. *United States,* 473 F. 2d 1329 (CA5 1973).

of historically relevant materials. *Supra,* at 476–478. More specifically, it seems clear that the actions of both Houses of Congress were predominantly precipitated by a resolve to undo the recently negotiated Nixon-Sampson agreement, the terms of which departed from the practice of former Presidents in that they expressly contemplated the destruction of certain Presidential materials.[43] Along these lines, H. R. Rep. No. 93–1507, *supra,* at 2, stated: "Despite the overriding public interest in preserving these materials . . . [the] Administrator of General Services entered into an agreement . . . which, if implemented, could seriously limit access to these records and . . . result in the destruction of a substantial portion of them." See also S. Rep. No. 93–1181, p. 4 (1974). The relevant Committee Reports thus cast no aspersions on appellant's personal conduct and contain no condemnation of his behavior as meriting the infliction of punishment. Rather, they focus almost exclusively on the meaning and effect of an agreement recently announced by the General Services Administration which most Members of Congress perceived to be inconsistent with the public interest.

Nor do the floor debates on the measure suggest that Congress was intent on encroaching on the judicial function of punishing an individual for blameworthy offenses. When one of the opponents of the legislation, mischaracterizing the safeguards embodied in the bill,[44] stated that it is "one which partakes of the characteristics of a bill of attainder . . . ," 120

---

[43] Particularly troublesome was the provision of the agreement requiring the automatic destruction of tape recordings upon appellant's death.

[44] In condemning the enactment as a bill of attainder, Senator Hruska argued that the bill seizes appellant's papers and distributes them to litigants without affording appellant the opportunity judicially "to assert a defense or privilege to the production of the papers." 120 Cong. Rec. 33871 (1974). In fact, the Act expressly recognizes appellant's right to present all such defenses and privileges through an expedited judicial proceeding. See *infra,* at 481–482.

Cong. Rec. 33872 (1974) (Sen. Hruska), a key sponsor of the measure responded by expressly denying any intention of determining appellant's blameworthiness or imposing punitive sanctions:

> "This bill does not contain a word to the effect that Mr. Nixon is guilty of any violation of the law. It does not inflict any punishment on him. So it has no more relation to a bill of attainder . . . . than my style of pulchritude is to be compared to that of the Queen of Sheba." *Id.*, at 33959–33960 (Sen. Ervin).

In this respect, the Act stands in marked contrast to that invalidated in *United States* v. *Lovett,* 328 U. S., at 312, where a House Report expressly characterized individuals as "subversive . . . and . . . unfit . . . to continue in Government employment." H. R. Rep. No. 448, 78th Cong., 1st Sess., 6 (1943). We, of course, do not suggest that such a formal legislative announcement of moral blameworthiness or punishment is necessary to an unlawful bill of attainder. *United States* v. *Lovett, supra,* at 316. But the decided absence from the legislative history of any congressional sentiments expressive of this purpose is probative of nonpunitive intentions and largely undercuts a major concern that prompted the bill of attainder prohibition: the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or, worse still, lynch mob. Cf. Z. Chafee, *supra,* at 161.[45] No such legislative overreaching is involved here.

---

[45] The Court in *United States* v. *Brown,* 381 U. S., at 444, referred to Alexander Hamilton's concern that legislatures might cater to the "momentary passions" of a "'free people, in times of heat and violence . . . .'" In this case, it is obvious that the supporters of this Act steadfastly avoided inflaming or appealing to any "passions" in the community. Indeed, rather than seek expediently to impose punishment and to circumvent the courts, Congress expressly provided for access to the Judiciary for resolution of any constitutional and legal rights appellant might assert. S. Rep. No. 93–1181, pp. 2–6 (1974).

We also agree with the District Court that "specific aspects of the Act . . . just do not square with the claim that the Act was a punitive measure." 408 F. Supp., at 373. Whereas appellant complains that the Act has for some two years deprived him of control over the materials in question, Brief for Appellant 140, the Congress placed the materials under the auspices of the General Services Administration, § 101, note following 44 U. S. C. § 2107 (1970 ed., Supp. V), the same agency designated in the Nixon-Sampson agreement as depository of the documents for a minimum three-year period, App. 40. Whereas appellant complains that the Act deprives him of "ready access" to the materials, Brief for Appellant 140, the Act provides that "Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials . . . ," § 102 (c).[46] The District Court correctly construed this as safeguarding appellant's right to inspect, copy, and use the materials in issue, 408 F. Supp., at 375, paralleling the right to "make reproductions" contained in the Nixon-Sampson agreement, App. 40. And even if we assume that there is merit in appellant's complaint that his property has been confiscated, Brief for Appellant 140, the Act expressly provides for the payment of just compensation under § 105 (c); see *supra,* at 475.

Other features of the Act further belie any punitive interpretation. In promulgating regulations under the Act, the General Services Administration is expressly directed by Congress to protect appellant's or "any party's opportunity to assert any legally or constitutionally based right or privilege . . . ." § 104 (a)(5). More importantly, the Act preserves for appellant all of the protections that inhere in a judicial proceeding, for § 105 (a) not only assures district

[46] Regulations guaranteeing appellant's unrestricted access to the materials have been promulgated by the Administrator and have not been challenged. See 41 CFR § 105–63.3 (1976).

court jurisdiction and judicial review over all his legal claims, but commands that any such challenge asserted by appellant "shall have priority on the docket of such court over other cases." A leading sponsor of the bill emphasized that this expedited treatment is expressly designed "to protect Mr. Nixon's property, or other legal rights . . . ." 120 Cong. Rec. 33854 (1974) (Sen. Ervin). Finally, the Congress has ordered the General Services Administration to establish regulations that recognize "the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to" the articulated objectives of the Act, § 104 (a)(7). While appellant obviously is not set at ease by these precautions and safeguards, they confirm the soundness of the opinion given the Senate by the law division of the Congressional Research Service: "[B]ecause the proposed bill does not impose criminal penalties or other punishment, it would not appear to violate the Bill of Attainder Clause." 120 Cong. Rec. 33853 (1974).[47]

One final consideration should be mentioned in light of the unique posture of this controversy. In determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which that legislature (here Congress) could have achieved its legitimate nonpunitive objectives. Today, in framing his challenge to the Act, appellant contends that such an alternative was readily available:

> "If Congress had provided that the Attorney General or the Administrator of General Services could institute a civil suit in an appropriate federal court to enjoin disposi-

[47] In brief, the legislative history of the Act offers a paradigm of a Congress aware of constitutional constraints on its power and carefully seeking to act within those limitations. See generally Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585 (1975).

> tion . . . of presidential historical materials . . . by any person who could be shown to be an 'unreliable custodian' or who had 'engaged in misconduct' or who 'would violate a criminal prohibition,' the statute would have left to judicial determination, after a fair proceeding, the factual allegations regarding Mr. Nixon's blameworthiness." Brief for Appellant 137.

We have no doubt that Congress might have selected this course. It very well may be, however, that Congress chose not to do so on the view that a full-fledged judicial inquiry into appellant's conduct and reliability would be no less punitive and intrusive than the solution actually adopted. For Congress doubtless was well aware that just three months earlier, appellant had resisted efforts to subject himself and his records to the scrutiny of the Judicial Branch, *United States* v. *Nixon,* 418 U. S. 683 (1974), a position apparently maintained to this day.[48] A rational and fairminded Congress, therefore, might well have decided that the carefully tailored law that it enacted would be less objectionable to appellant than the alternative that he today appears to endorse. To be sure, if the record were unambiguously to demonstrate that the Act represents the infliction of legislative punishment, the fact that the judicial alternative poses its own difficulties would be of no constitutional significance. But the record suggests the contrary, and the unique choice that Congress faced buttresses our conclusion that the Act cannot fairly be read to inflict legislative punishment as forbidden by the Constitution.

We, of course, are not blind to appellant's plea that we

[48] For example, in his deposition taken in this case, appellant refused to answer questions pertaining to the accuracy and reliability of his prior public statements as President concerning the contents of the tape recordings and other materials in issue. He invoked a claim of privilege and asserted that the questions were irrelevant to the judicial inquiry. See, *e. g.,* App. 586–590.

recognize the social and political realities of 1974. It was a period of political turbulence unprecedented in our history. But this Court is not free to invalidate Acts of Congress based upon inferences that we may be asked to draw from our personalized reading of the contemporary scene or recent history. In judging the constitutionality of the Act, we may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect. We are persuaded that none of these factors is suggestive that the Act is a punitive bill of attainder, or otherwise facially unconstitutional. The judgment of the District Court is

Affirmed.

MR. JUSTICE STEVENS, concurring.

The statute before the Court does not apply to all Presidents or former Presidents. It singles out one, by name, for special treatment. Unlike all other former Presidents in our history, he is denied custody of his own Presidential papers; he is subjected to the burden of prolonged litigation over the administration of the statute; and his most private papers and conversations are to be scrutinized by Government archivists. The statute implicitly condemns him as an unreliable custodian of his papers. Legislation which subjects a named individual to this humiliating treatment must raise serious questions under the Bill of Attainder Clause.

Bills of attainder were typically directed at once powerful leaders of government. By special legislative Acts, Parliament deprived one statesman after another of his reputation, his property, and his potential for future leadership. The motivation for such bills was as much political as it was punitive—and often the victims were those who had been the most relentless in attacking their political enemies at the height of

their own power.[1] In light of this history, legislation like that before us must be scrutinized with great care.

Our cases "stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United States* v. *Lovett,* 328 U. S. 303, 315–316. The concept of punishment involves not only the character of the deprivation, but also the manner in which that deprivation is imposed. It has been held permissible for Congress to deprive Communist deportees, as a group, of their social security benefits, *Flemming* v. *Nestor,* 363 U. S. 603, but it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit. Cf. *id.,* at 614. The very

---

[1] At the debate on the impeachment of the Earl of Danby, the Earl of Carnarvon recounted this history:

"My Lords, I understand but little of Latin, but a good deal of English, and not a little of the English history, from which I have learnt the mischiefs of such kind of prosecutions as these, and the ill fate of the prosecutors. I shall go no farther back than the latter end of Queen Elizabeth's reign: At which time the Earl of Essex was run down by Sir Walter Raleigh, and your Lordships very well know what became of Sir Walter Raleigh. My Lord Bacon, he ran down Sir Walter Raleigh, and your Lordships know what became of my Lord Bacon. The Duke of Buckingham, he ran down my Lord Bacon, and your Lordships know what happened to the Duke of Buckingham. Sir Thomas Wentworth, afterwards Earl of Strafford, ran down the Duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the Earl of Strafford, and your Lordships know what became of Sir Harry Vane. Chancellor Hyde, he ran down Sir Harry Vane, and your Lordships know what became of the Chancellor. Sir Thomas Osborne, now Earl of Danby, ran down Chancellor Hyde; but what will become of the Earl of Danby, your Lordships best can tell. But let me see that man that dare run the Earl of Danby down, and we shall soon see what will become of him." (Footnote omitted.) As quoted in Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, p. 127 (1956).

specificity of the statute would mark it as punishment, for there is rarely any valid reason for such narrow legislation; and normally the Constitution requires Congress to proceed by general rulemaking rather than by deciding individual cases. *United States* v. *Brown,* 381 U. S. 437, 442–446.

Like the Court, however, I am persuaded that "appellant constituted a legitimate class of one . . . ." *Ante,* at 472. The opinion of the Court leaves unmentioned the two facts which I consider decisive in this regard. Appellant resigned his office under unique circumstances and accepted a pardon [2] for any offenses committed while in office. By so doing, he placed himself in a different class from all other Presidents. Cf. *Orloff* v. *Willoughby,* 345 U. S. 83, 90–91. Even though unmentioned, it would be unrealistic to assume that historic facts of this consequence did not affect the legislative decision.[3]

Since these facts provide a legitimate justification for the specificity of the statute, they also avoid the conclusion that this otherwise nonpunitive statute is made punitive by its specificity. If I did not consider it appropriate to take judicial notice of those facts, I would be unwilling to uphold the power of Congress to enact special legislation directed only at one former President at a time when his popularity was at its nadir. For even when it deals with Presidents or former Presidents, the legislative focus should be upon "the calling" rather than "the person." Cf. *Cummings* v. *Missouri,* 4 Wall. 277, 320. In short, in my view, this case will not be a precedent for future legislation which relates, not to the Office of President, but just to one of its occupants.

---

[2] See *Burdick* v. *United States,* 236 U. S. 79, 94.

[3] Cf. *Calder* v. *Bull,* 3 Dall. 386, 390:

"That Charles 1st. king of England, was beheaded; that Oliver Cromwell was Protecter of England; that Louis 16th, late King of France, was guillotined; are all facts, that have happened; but it would be nonsense to suppose, that the States were prohibited from making any law after either of these events, and with reference thereto."

Without imputing a similar reservation to the Court, I join its opinion with the qualification that these unmentioned facts have had a critical influence on my vote to affirm.

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

I concur in the judgment and, except for Part VII, in the Court's opinion. With respect to the bill of attainder issue, I concur in the result reached in Part VII; the statute does not impose "punishment" and is not, therefore, a bill of attainder. See *United States* v. *Brown,* 381 U. S. 437, 462 (1965) (WHITE, J., dissenting). I also append the following observations with respect to one of the many issues in this case.

It is conceded by all concerned that a very small portion of the vast collection of Presidential materials now in possession of the Administrator consists of purely private materials, such as diaries, recordings of family conversations, private correspondence—"personal property of any kind not involving the actual transaction of government business." Tr. of Oral Arg. 55. It is also conceded by the federal and other appellees that these private materials, once identified, must be returned to Mr. Nixon. *Id.,* at 38–40, 57–59. The Court now declares that "the Government [without awaiting a court order] should now promptly disclaim any interest in materials conceded to be appellant's purely private communications and deliver them to him." *Ante,* at 459 n. 22. I agree that the separation and return of these materials should proceed without delay. Furthermore, even if under the Act this process can occur only after the issuance of regulations under § 104 that are subject to congressional approval, surely regulations covering this narrow subject matter need not take long to effectuate.

Also, § 104 (a)(7) suggests that the private materials to be returned to Mr. Nixon are limited to those that "are not otherwise of general historical significance." But, as I see it, the validity of the Act would be questionable if mere historical

significance sufficed to withhold purely private letters or diaries; and in view of the other provisions of the Act, particularly § 104 (a)(5), it need not be so construed. Purely private materials, whether or not of historical interest, are to be delivered to Mr. Nixon. The federal and other appellees conceded as much at oral argument.*

---

*"QUESTION: Well now, suppose Mr. Nixon has prepared a diary every day and put down what, exactly what he did, and let's suppose that someone thought that was a purely personal account. Now, I can just imagine that someone might think that it nevertheless is of general historical significance.

"MR. McCREE: May I refer the Court to need No. 5? 'The need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials.'

"And I submit that this Act affords Richard M. Nixon the opportunity to assert the contention that this diary of his is personal and has not the kind of general historical significance that will permit his deprivation; and that would then have to be adjudicated in a court.

"QUESTION: Well, do—

"MR. McCREE: And ultimately this Court will answer that question.

"QUESTION: Well, how do you—so you would agree, then, that 104 must be construed—must be construed to sooner or later return to Mr. Nixon what we might call purely private papers?

"MR. McCREE: Indeed I do.

"QUESTION: Can you imagine any diary—thinking of Mr. Truman's diary, which, it is reported, was a result of being dictated every evening, after the day's work—can you conceive of any such material that would not be of general historical interest?

"MR. McCREE: I must concede, being acquainted with some historians, that it's difficult to conceive of anything that might not be of historical interest. But—

"[Laughter.]

"QUESTION: Yes. Archivists and historians, like journalists,—

"MR. McCREE: Indeed they are.

"QUESTION: —think that everything is.

"[Laughter.]

"MR. McCREE: But this legislation recognizes that a claim of privacy,

Similarly, although the Court relies to some extent on the statutory recognition of the constitutional right to compensation in the event it is determined that the Government has

---

a claim of privilege must be protected, and if the regulations are insufficient to do that, again a court will have an opportunity to address itself to a particular item such as the diary before it can be turned over.

"And for that reason, we suggest that the attack at this time is premature because the statute, in recognizing the right of privacy, is facially adequate. And the attack that was made the day after it became effective brought to this Court a marvelous opportunity to speculate about what might happen, but the regulations haven't even been promulgated and acquiesced in so that they have become effective.' Tr. of Oral Arg. 38–40.

"[Mr. HERZSTEIN, for the private appellees:]

"But there's just no question about the return of personal diaries, Dictabelts, so long as they are not the materials involved in the transaction of government business.

"Now, the statute, I agree, could have been drafted a little more clearly, but we think there are several points which make it quite clear that his personal materials are to be returned to him.

"One is the fact that statute refers to the presidential historical materials of Richard Nixon, not to the person[al] or private materials.

"The second is that, as Judge McCree mentioned, criterion 7 calls for a return of materials to him, and if you read those two in conjunction with the legislative history, there are statements on the Floor of the Senate, on the Floor of the House, and in the Committee Reports, indicating the expectation that Nixon's personal records would be returned to him.

"QUESTION: Could you give us a capsule summary of the difference between what you have just referred to as Nixon's personal records, which will be returned, and the matter which will not be returned?

"MR. HERZSTEIN: Well, yes. Certainly any personal letters, among his family or friends, certainly a diary made at the end of the day, as it were, after the event—

"QUESTION: Even though the Dictabelt was paid for out of White House appropriations?

"MR. HERZSTEIN: That's right. That doesn't bother us. I think it's incidental now. But we do have a different view on the tapes, which actually recorded the transaction of government business by government

confiscated Mr. Nixon's property, I would question whether a mere historical interest in purely private communications would be a sufficient predicate for taking them for public use. Historical considerations are normally sufficient grounds for condemning property, *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668 (1896); *Roe* v. *Kansas*, 278 U. S. 191

---

employees on government time and so on. The normal tapes that we've heard so much about.

"The Dictabelts, Mr. Nixon has said, are his personal diary. Instead of writing it down, in other words, he dictated it at the end of the day. And we think that's—

"QUESTION: I want to be sure about that concession, because this certainly is of historical interest.

"MR. HERZSTEIN: That's right, it is, but we do not feel it's covered by the statute. We have acknowledged that from the start.

"QUESTION: Is this concession shared by the Solicitor General, do you think?

"MR. HERZSTEIN: We believe it is.

"QUESTION: What about that?

"MR. McCREE: About the fact that the paper belongs to the government and so forth, we don't believe that makes a document a government documen[t]. We certainly agree with that.

"Beyond that, if the Court please—

"QUESTION: What about the Dictabelts representing his daily diary?

"MR. McCREE: I would think that's a personal matter that would be—should be returned to him once it was identified.

"QUESTION: Well, is there any problem about, right this very minute, of picking those up and giving them back to Mr. Nixon?

"MR. McCREE: I know of no problem. Whether it would have to await the adoption of the regulation, which has been stymied by Mr. Nixon's lawsuit, which has been delayed for three years,—

"QUESTION: How has that stymied the issuance of regulations, Mr. Solicitor General?

"MR. McCREE: One of the dispositions of the district court was to stay the effectiveness of regulations. Now, I think it held up principally the regulations for public access. The other regulations are not part of this record, and I cannot speak to the Court with any knowledge about them." *Id.*, at 57–59.

(1929); but whatever may be true of the great bulk of the materials in the event they are declared to be Mr. Nixon's property, I doubt that the Government is entitled to his purely private communications merely because it wants to preserve them and offers compensation.

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

My posture in this case is essentially that of MR. JUSTICE POWELL, *post,* p. 492. I refrain from joining his opinion, however, because I fall somewhat short of sharing his view, *post,* at 498 and 501–502, that the incumbent President's submission, made through the Solicitor General, that the Act serves rather than hinders the Chief Executive's Art. II functions, is *dispositive* of the separation-of-powers issue. I would be willing to agree that it is significant and that it is entitled to serious consideration, but I am not convinced that it is dispositive. The fact that President Ford signed the Act does not mean that he necessarily approved of its every detail. Political realities often guide a President to a decision not to veto.

One must remind oneself that our Nation's history reveals a number of instances where Presidential transition has not been particularly friendly or easy. On occasion it has been openly hostile. It is my hope and anticipation—as it obviously is of the others who have written in this case—that this Act, concerned as it is with what the Court describes, *ante,* at 472, as "a legitimate class of one," will not become a model for the disposition of the papers of each President who leaves office at a time when his successor or the Congress is not of his political persuasion.

I agree fully with my Brother POWELL when he observes, *post,* at 503, that the "difficult constitutional questions lie ahead" for resolution in the future. Reserving judgment on

those issues for a more appropriate time—certainly not now—I, too, join the judgment of the Court and agree with much of its opinion. I specifically join Part VII of the Court's opinion.

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I join the judgment of the Court and all but Parts IV and V of its opinion. For substantially the reasons stated by the Court, I agree that the Presidential Recordings and Materials Preservation Act (Act) on its face does not violate appellant's rights under the First, Fourth, and Fifth Amendments and the Bill of Attainder Clause.[1] For reasons quite different from those stated by the Court, I also would hold that the Act is consistent on its face with the principle of separation of powers.

I

The Court begins its analysis of the issues by limiting its inquiry to those constitutional claims that are addressed to "the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists." *Ante,* at 439. I agree that the inquiry must be limited in this manner, but I would add two qualifications that in my view further restrict the reach of today's decision.

First, Title I of Pub. L. 93–526 (the Act) does not purport to be a generalized provision addressed to the complex problem of disposition of the accumulated papers of Presidents or other federal officers. Unlike Title II of Pub. L. 93–526 (the Public Documents Act), which authorizes a study of that problem,

[1] Although I agree with much of Parts IV and V, I am unable to join those parts of the Court's opinion because of my uncertainty as to the reach of its extended discussion of the competing constitutional interests implicated by the Act.

Title I is addressed specifically and narrowly to the need to preserve the papers of former President Nixon after his resignation under threat of impeachment. It is legislation, as the Court properly observes, directed against "a legitimate class of one." *Ante,* at 472.

President Nixon resigned on August 9, 1974. Less than two weeks earlier, the House Judiciary Committee had voted to recommend his impeachment, H. R. Rep. No. 93–1305, pp. 10–11 (1974), including among the charges of impeachable offenses allegations that the President had obstructed investigation of the Watergate break-in and had engaged in other unlawful activities during his administration. *Id.,* at 1–4. One month after President Nixon's resignation, on September 8, 1974, President Ford granted him a general pardon for all offenses against the United States that he might have committed in his term of office.

On the same day, the Nixon-Sampson agreement was made public. The agreement provided for the materials to be deposited temporarily with the General Services Administration in a California facility, but gave the former President the right to withdraw or direct the destruction of any materials after an initial period of three years or, in the case of tape recordings, five years. During this initial period access would be limited to President Nixon and persons authorized by him, subject only to legal process ordering materials to be produced. Upon President Nixon's death, the tapes were to be destroyed immediately. 10 Weekly Comp. of Pres. Doc. 1104–1105 (1974).

Those who drafted and sponsored Title I in Congress uniformly viewed its provisions as emergency legislation, necessitated by the extraordinary events that led to the resignation and pardon and to the former President's arrangement for the disposition of his papers. Senator Nelson, for example, referred to the bill as "an emergency measure" whose prin-

cipal purpose was to assure "protective custody" of the materials. 120 Cong. Rec. 33848, 33850–33851 (1974).

> "[T]here is an urgency in the situation now before us. Under the existing agreement between the GSA and Mr. Nixon, if Mr. Nixon died tomorrow, those tapes—if I read the agreement correctly—are to be destroyed immediately; it is also possible that the Nixon papers could be destroyed by 1977. This would be a catastroph[e] from an historical standpoint." *Id.*, at 33857.

Senator Ervin similarly remarked:

> "This bill really deals with an emergency situation, because some of these documents are needed in the courts and by the general public in order that they might know the full story of what is known collectively as the Watergate affair." *Id.*, at 33855.

Efforts to apply the legislation more generally to all Presidents or to other federal officers were resisted on the Senate floor. Thus, speaking again of the unique needs created by the Nixon-Sampson agreement and the Watergate scandals, Senator Javits stressed that "we seek to deal in this particular legislation, only with this particular set of papers of this particular ex-President." *Id.*, at 33860. See generally S. Rep. No. 93–1181 (1974).

It is essential in addressing the constitutional issues before us not to lose sight of the limited justification for and objectives of this legislation. The extraordinary events that led to the resignation and pardon, and the agreement providing that the record of those events might be destroyed by President Nixon, created an impetus for congressional action that may—without overstatement—be termed unique. I therefore do not share my Brother REHNQUIST's foreboding that this Act "will daily stand as a veritable sword of Damocles over every succeeding President and his advisers." *Post*, at 545. If the study authorized by Title II should lead to

more general legislation, there will be time enough to consider its validity if a proper case comes before us.

My second reservation follows from the first. Because Congress acted in what it perceived to be an emergency, it concentrated on the immediate problem of establishing governmental custody for the purpose of safeguarding the materials. It deliberately left to the rulemaking process, and to subsequent judicial review, the difficult and sensitive task of reconciling the long-range interests of President Nixon, his advisors, the three branches of Government, and the American public, once custody was established. As the District Court observed:

> "The Act in terms merely directs GSA to take custody of the materials that fall within the scope of section 101, and to promulgate regulations after taking into consideration the seven factors listed in section 104 (a). Those factors provide broad latitude to the Administrator in establishing the processes and standards under which the materials will be reviewed and public access to them afforded. . . ." 408 F. Supp. 321, 335 (1976) (footnote omitted).

In view of the latitude that the Act gives to GSA in framing regulations, I agree with the District Court that the question to be resolved in this case is a narrow one: "Is the regulatory scheme enacted by Congress unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104 (a)?" *Id.*, at 334–335.

No regulations have yet taken effect under § 104 (a). *Ante,* at 437. In these circumstances, I believe it is appropriate to address appellant's constitutional claims, as did the District Court, with an eye toward the kind of regulations and screening practices that would be consistent with the Act and yet that would afford protection to the important

constitutional interests asserted. Section 104 (a)(5) of the Act directs the Administrator to take into account

> "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."

The District Court observed that in considering this factor, the Administrator might well provide for meaningful participation by appellant in the screening process and in the selection of the archivists who would review the materials. The court also observed that procedures might be adopted that would minimize any intrusion into private materials and that would permit appellant an opportunity to obtain administrative and judicial review of all proposed classifications of the materials. 408 F. Supp., at 339–340.[2] Finally,

---

[2] By way of illustration, the District Court observed that the following archival practices might be adopted to limit invasion of appellant's constitutionally protected interests:

"1. A practice of requiring archivists to make the minimal intrusion necessary to classify material. Identification by signature, the file within which material is found, general nature (as with diaries, or dictabelts serving the same function), a cursory glance at the contents, or other means could significantly limit infringement of plaintiff's interests without undermining the effectiveness of screening by governmental personnel. Participation by Mr. Nixon in preliminary identification of material that might be processed without word-by-word review would facilitate such a procedure.

"2. A practice of giving Mr. Nixon some voice in the designation of the personnel who will review the materials, perhaps by selecting from a body of archivists approved by the government.

"3. A practice of giving Mr. Nixon notice of all proposed classifications of materials and an opportunity to obtain administrative and judicial review of them, on constitutional or other grounds, before they are effectuated." 408 F. Supp., at 339–340 (footnotes omitted).

I agree with the views expressed by MR. JUSTICE WHITE, *ante*, at 487–491, on the need to return private materials to appellant.

the court noted that substantive restrictions on access might be adopted, consistent with traditional restrictions placed on access to Presidential papers, and that such restrictions could forbid public disclosure of any confidential communications between appellant and his advisors "for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications." *Id.*, at 338.[3]

I have no doubt that procedural safeguards and substantive restrictions such as these are within the authority of the Administrator to adopt under the broad mandate of § 104 (a). While there can be no positive assurance that such protections will in fact be afforded, we nonetheless may assume, in reviewing the facial validity of the Act, that all constitutional and legal rights will be given full protection. Indeed, that assumption is the basis on which I join today's judgment

---

[3] The District Court noted the existence of:

"a basic set of donor-imposed access restrictions that was first formulated by Herbert Hoover [and] followed by Presidents Eisenhower, Kennedy, and Johnson. Under this scheme the following materials would be restricted:

"1) materials that are security-classified;

"2) materials whose disclosure would be prejudicial to foreign affairs;

"3) materials containing statements made by or to a President in confidence;

"4) materials relating to the President's family, personal, or business affairs or to such affairs of individuals corresponding with the President;

"5) materials containing statements about individuals that might be used to embarrass or harass them or members of their families;

"6) such other materials as the President or his representative might designate as appropriate for restriction.

"President Franklin Roosevelt imposed restrictions very similar to numbers 1, 2, 4, and 5, and in addition restricted (a) investigative reports on individuals, (b) applications and recommendations for positions, and (c) documents containing derogatory remarks about an individual. President Truman's restrictions were like those of Hoover, Eisenhower, Kennedy, and Johnson, except that he made no provision, like number 6 above, for restriction merely at his own instance." 408 F. Supp., at 338–339 n. 19 (citations omitted).

upholding the facial validity of the Act. As the Court makes clear in its opinion, the Act plainly requires the Administrator, in designing the regulations, to "consider the need to protect the constitutional rights of appellant and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained." *Ante,* at 436.

II

I agree that the Act cannot be held unconstitutional on its face as a violation of the principle of separation of powers or of the Presidential privilege that derives from that principle. This is not a case in which the Legislative Branch has exceeded its enumerated powers by assuming a function reserved to the Executive under Art. II. *E. g., Buckley* v. *Valeo,* 424 U. S. 1 (1976); *Myers* v. *United States,* 272 U. S. 52 (1926). The question of governmental power in this case is whether the Act, by mandating seizure and eventual public access to the papers of the Nixon Presidency, impermissibly interferes with the President's power to carry out his Art. II obligations. In concluding that the Act is not facially invalid on this ground, I consider it dispositive in the circumstances of this case that the incumbent President has represented to this Court, through the Solicitor General, that the Act serves rather than hinders the Art. II functions of the Chief Executive.

I would begin by asking whether, putting to one side other limiting provisions of the Constitution, Congress has acted beyond the scope of its enumerated powers. Cf. *Reid* v. *Covert,* 354 U. S. 1, 70 (1957) (Harlan, J., concurring). Apart from the legislative concerns mentioned by the Court, *ante,* at 476–478, I believe that Congress unquestionably has acted within the ambit of its broad authority to investigate, to inform the public, and, ultimately, to legislate against suspected corruption and abuse of power in the Executive Branch.

This Court has recognized inherent power in Congress to pass appropriate legislation to "preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Burroughs* v. *United States,* 290 U. S. 534, 545 (1934). Congress has the power, for example, to restrict the political activities of civil servants, *e. g., CSC* v. *Letter Carriers,* 413 U. S. 548 (1973); to punish bribery and conflicts of interest, *e. g., Burton* v. *United States,* 202 U. S. 344 (1906); to punish obstructions of lawful governmental functions, *Haas* v. *Henkel,* 216 U. S. 462 (1910); and—with important exceptions—to make executive documents available to the public, *EPA* v. *Mink,* 410 U. S. 73 (1973). The Court also has recognized that in aid of such legislation Congress has a broad power "to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." *Watkins* v. *United States,* 354 U. S. 178, 200 n. 33 (1957). See also *Buckley* v. *Valeo, supra,* at 137–138; *Eastland* v. *United States Servicemen's Fund,* 421 U. S. 491 (1975).

The legislation before us rationally serves these investigative and informative powers. Congress legitimately could conclude that the Nixon-Sampson agreement, following the recommendation of impeachment and the resignation of President Nixon, might lead to destruction of those of the former President's papers that would be most likely to assure public understanding of the unprecedented events that led to the premature termination of the Nixon administration. Congress similarly could conclude that preservation of the papers was important to its own eventual understanding of whether that administration had been characterized by deficiencies susceptible of legislative correction. Providing for retention of the materials by the Administrator and for the selection of appropriate materials for eventual disclosure to the public was a rational means of serving these legitimate congressional objectives.

Congress still might be said to have exceeded its enumerated powers, however, if the Act could be viewed as an assumption by the Legislative Branch of functions reserved exclusively to the Executive by Art. II. In *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952), for example, the Court buttressed its conclusion that the President had acted beyond his power under Art. II by characterizing his seizure of the steel mills as an exercise of a "legislative" function reserved exclusively to Congress by Art. I. 343 U. S., at 588–589. And last Term we reaffirmed the fundamental principle that the appointment of executive officers is an "Executive" function that Congress is without power to vest in itself. *Buckley* v. *Valeo, supra,* at 124–141. But the Act before us presumptively avoids these difficulties by entrusting the task of ensuring that its provisions are faithfully executed to an officer of the Executive Branch.[4]

I therefore conclude that the Act cannot be held invalid on the ground that Congress has exceeded its affirmative grant of power under the Constitution. But it is further argued that Congress nonetheless has contravened the limitations on legislative power implicitly imposed by the creation of a coequal Executive Branch in Art. II. It is said that by opening up the operations of a past administration to eventual public scrutiny, the Act impairs the ability of present and future Presidents to obtain unfettered information and candid advice and thereby limits executive power in contravention of Art. II and the principle of separation of powers. I see no material distinction between such an argument and the collateral claim that the Act violates the Presidential privilege in confidential communications.

In *United States* v. *Nixon,* 418 U. S. 683 (1974) (*Nixon I*),

---

[4] The validity of the provision of § 104 (b) for possible disapproval of the Administrator's regulations by either House of Congress is not before us at this time. See 408 F. Supp., at 338 n. 17; Brief for Federal Appellees 26, and n. 11.

we recognized a presumptive, yet qualified, privilege for confidential communications between the President and his advisors. Observing that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process," *id.*, at 705, we recognized that a President's generalized interest in confidentiality is "constitutionally based" to the extent that it relates to "the effective discharge of a President's powers." *Id.*, at 711. We held nonetheless that "[t]he generalized assertion of privilege must yield to the demonstrated, specified need for evidence in a pending criminal trial." *Id.*, at 713.

Appellant understandably relies on *Nixon I*. Comparing the narrow scope of the judicial subpoenas considered there with the comprehensive reach of this Act—encompassing all of the communications of his administration—appellant argues that there is no "demonstrated, specific need" here that can outweigh the extraordinary intrusion worked by this legislation. On the ground that the result will be to destroy "the effective discharge of the President's powers," appellant urges that the Act be held unconstitutional on its face.

These arguments undoubtedly have considerable force, but I do not think they can support a decision invalidating this Act on its face. Section 1 of Art. II vests all of the executive power in the sitting President and limits his term of office to four years. It is his sole responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3. Here, as previously noted, President Carter has represented to this Court through the Solicitor General that the Act is consistent with "the effective discharge of the President's powers":

> "Far from constituting a breach of executive autonomy, the Act . . . is an appropriate means of ensuring that the Executive Branch will have access to the materials necessary to the performance of its duties." Brief for Federal Appellees 29.

This representation is similar to one made earlier on behalf of President Ford, who signed the Act. Motion of Federal Appellees to Affirm 15. I would hold that these representations must be given precedence over appellant's claim of Presidential privilege. Since the incumbent President views this Act as furthering rather than hindering effective execution of the laws, I do not believe it is within the province of this Court to hold otherwise.

This is not to say that a former President lacks standing to assert a claim of Presidential privilege. I agree with the Court that the former President may raise such a claim, whether before a court or a congressional committee. In some circumstances the intervention of the incumbent President will be impractical or his views unknown, and in such a case I assume that the former President's views on the effective operation of the Executive Branch would be entitled to the greatest deference. It is uncontroverted, I believe, that the privilege in confidential Presidential communications survives a change in administrations. I would only hold that in the circumstances here presented the incumbent, having made clear in the appropriate forum his opposition to the former President's claim, alone can speak for the Executive Branch.[5]

---

[5] There is at least some risk that political, and even personal, antagonisms could motivate Congress and the President to join in a legislative seizure and public exposure of a former President's papers without due regard to the long-range implications of such action for the Art. II functions of the Chief Executive. Even if such legislation did not violate the principle of separation of powers, it might well infringe individual liberties protected by the Bill of Attainder Clause or the Bill of Rights. But this is not the case before us. In passing this legislation, Congress acted to further legitimate objectives in circumstances that were wholly unique in the history of our country. The legislation was approved by President Ford, personally chosen by President Nixon as his successor, and is now also supported by President Carter. In view of the circumstances leading to its passage and the protection it provides for " 'any . . . consti-

I am not unmindful that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison,* 1 Cranch 137, 177 (1803). As we reiterated in *Nixon I:*

> " 'Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.' " 418 U. S., at 704, quoting *Baker* v. *Carr,* 369 U. S. 186, 211 (1962).

My position is simply that a decision to waive the privileges inhering in the Office of the President with respect to an otherwise valid Act of Congress is the President's alone to make under the Constitution.[6]

III

The difficult constitutional questions lie ahead. The President no doubt will see to it that the interests in confidentiality so forcefully urged by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST in their dissenting opinions are taken into account in the final regulations that are promulgated under

---

tutionally based right or privilege,' " *supra,* at 496, this Act on its face does not violate the personal constitutional rights asserted by appellant.

[6] Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 635–637 (1952) (Jackson, J., concurring):

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . ." (Footnote omitted.)

See also *Williams* v. *Suffolk Insurance Co.,* 13 Pet. 415, 420 (1839):

"[T]his Court ha[s] laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive."

§ 104 (a). While the incumbent President has supported the constitutionality of the Act as it is written, there is no indication that he will oppose appellant's assertions of Presidential privilege as they relate to the rules that will govern the screening process and the timing of disclosure, and particularly the restrictions that may be placed on certain documents and recordings. I emphasize that the validity of such assertions of Presidential privilege is not properly before us at this time.

Similarly, difficult and important questions concerning individual rights remain to be resolved. At stake are not only the rights of appellant but also those of other individuals whose First, Fourth, and Fifth Amendment interests may be implicated by disclosure of communications as to which a legitimate expectation of privacy existed. I agree with the Court that even in the councils of Government an individual "has a legitimate expectation of privacy in his personal communications," *ante,* at 465, and also that compelled disclosure of an individual's political associations, in and out of Government, can be justified only by "a compelling public need that cannot be met in a less restrictive way," *ante,* at 467. Today's decision is limited to the facial validity of the Act's provisions for retention and screening of the materials. The Court's discussion of the interests served by those provisions should not foreclose in any way the search that must yet be undertaken for means of assuring eventual access to important historical records without infringing individual rights protected by the First, Fourth, and Fifth Amendments.

MR. CHIEF JUSTICE BURGER, dissenting.

In my view, the Court's holding is a grave repudiation of nearly 200 years of judicial precedent and historical practice. That repudiation arises out of an Act of Congress passed in the aftermath of a great national crisis which culminated in the resignation of a President. The Act (Title I of Pub. L. 93–526) violates firmly established constitutional principles in several respects.

I find it very disturbing that fundamental principles of constitutional law are subordinated to what seem the needs of a particular situation. That moments of great national distress give rise to passions reminds us why the three branches of Government were created as separate and coequal, each intended as a check, in turn, on possible excesses by one or both of the others. The Court, however, has now joined a Congress, in haste to "do something," and has invaded historic, fundamental principles of the separate powers of coequal branches of Government. To "punish" one person, Congress—and now the Court—tears into the fabric of our constitutional framework.

Any case in this Court calling upon principles of separation of powers, rights of privacy, and the prohibitions against bills of attainder, whether urged by a former President—or any citizen—is inevitably a major constitutional holding. Mr. Justice Holmes, speaking of the tendency of "[g]reat cases like hard cases [to make] bad law," went on to observe the dangers inherent when

> "some accident of immediate overwhelming interest . . . appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401 (1904) (dissenting opinion).

Well-settled principles of law are bent today by the Court under that kind of "hydraulic pressure."

I

Separation of Powers

Appellant urges that Title I is an unconstitutional intrusion by Congress into the internal workings of the Office of the President, in violation of the constitutional principles of separation of powers. Three reasons support that conclusion.

The well-established principles of separation of powers, as developed in the decisions of this Court, are violated if Congress compels or coerces the President, in matters relating to the operation and conduct of his office.[1] Next, the Act is an exercise of executive—not legislative—power by the Legislative Branch. Finally, Title I works a sweeping modification of the constitutional privilege and historical practice of confidentiality of every Chief Executive since 1789.

A

As a threshold matter, we should first establish the standard of constitutional review by which Title I is to be judged. In the usual case, of course, legislation challenged in this Court benefits from a presumption of constitutionality. To survive judicial scrutiny a statutory enactment need only have a reasonable relationship to the promotion of an objective which the Constitution does not independently forbid, unless the legislation trenches on fundamental constitutional rights.

But where challenged legislation implicates fundamental constitutional guarantees, a far more demanding scrutiny is required. For example, this Court has held that the presumption of constitutionality does not apply with equal force where the very legitimacy of the composition of representative institutions is at stake. *Reynolds* v. *Sims*, 377 U. S. 533 (1964). Similarly, the presumption of constitutionality is lessened when the Court reviews legislation endangering fundamental constitutional rights, such as freedom of speech, or denying persons governmental rights or benefits because of race. Legislation touching substantially on these areas comes here bearing a heavy burden which its proponents must carry.

Long ago, this Court found the ordinary presumption of constitutionality inappropriate in measuring legislation directly impinging on the basic tripartite structure of our Government.

[1] Later, I will discuss the importance of the legislation's applicability to only one ex-President.

In *Kilbourn* v. *Thompson,* 103 U. S. 168, 192 (1881), Mr. Justice Miller observed for the Court that encroachments by Congress posed the greatest threat to the continued independence of the other branches.[2] Accordingly, he cautioned that the exercise of power by one branch directly affecting the potential independence of another "should be watched with vigilance, and when called in question before any other tribunal . . . should receive *the most careful scrutiny.*" *Ibid.* (Emphasis supplied.) See also *Buckley* v. *Valeo,* 424 U. S. 1 (1976).

Our role in reviewing legislation which touches on the fundamental structure of our Government is therefore akin to that which obtains when reviewing legislation touching on other fundamental constitutional guarantees. Because separation of powers is the base framework of our governmental system and the means by which all our liberties depend, Title I can be upheld only if it is necessary to secure some overriding governmental objective, and if there is no reasonable alternative which will trench less heavily on separation-of-powers principles.

B

Separation of powers is in no sense a formalism. It is the characteristic that distinguished our system from all others conceived up to the time of our Constitution. With federalism, separation of powers is "one of the two great structural principles of the American constitutional system . . . ." E. Corwin, The President 9 (1957). See also *Griswold* v. *Connecticut,* 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).

---

[2] In this, Mr. Justice Miller was but expressing the earlier opinion of Madison, who declared in The Federalist No. 48, p. 334 (J. Cooke ed., 1961):

"The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments."

In pursuit of that principle, executive power was vested in the President; no other offices in the Executive Branch, other than the Presidency and Vice Presidency, were mandated by the Constitution. Only two Executive Branch offices, therefore, are creatures of the Constitution; all other departments and agencies, from the State Department to the General Services Administration, are creatures of the Congress and owe their very existence to the Legislative Branch.[3]

The Presidency, in contrast, stands on a very different footing. Unlike the vast array of departments which the President oversees, the Presidency is in no sense a creature of the Legislature. The President's powers originate not from statute, but from the constitutional command to "take Care that the Laws be faithfully executed . . . ." These independent, constitutional origins of the Presidency have an important bearing on determining the appropriate extent of congressional power over the Chief Executive or his records and workpapers. For, although the branches of Government are obviously not divided into "watertight compartments," *Springer* v. *Philippine Islands,* 277 U. S. 189, 211 (1928) (Holmes, J., dissenting), the office of the Presidency, as a constitutional equal of Congress, must as a general proposition be free from Congress' *coercive* powers.[4] This is not simply an abstract proposition

---

[3] Statutes relating to departments or agencies created by Congress frequently are phrased in mandatory terms. For example, in the 1949 legislation creating the General Services Administration, Congress provided as follows:

"The Administrator is authorized *and directed* to coordinate and provide for the . . . efficient purchase, lease and maintenance of . . . equipment by Federal agencies." 40 U. S. C. § 759 (a).

Even with respect to international relations, Congress has affirmatively imposed certain *requirements* on the Secretary of State:

"The Secretary of State *shall furnish* to the Public Printer a correct copy of every treaty between the United States and any foreign government . . . ." 22 U. S. C. § 2660.

[4] Cf. MR. JUSTICE WHITE's discussion in *United States* v. *Brewster,* 408 U. S. 501, 558 (1972) (dissenting opinion), where he spoke of the

of political philosophy; it is a fundamental prohibition plainly established by the decisions of this Court.

A unanimous Court, including Mr. Chief Justice Taft, Mr. Justice Holmes, and Mr. Justice Brandeis stated:

> "The general rule is that neither department [of Government] may . . . control, direct or restrain the action of the other." *Massachusetts* v. *Mellon,* 262 U. S. 447, 488 (1923).

Similarly, in *O'Donoghue* v. *United States,* 289 U. S. 516, 530 (1933), the Court emphasized the need for each branch of Government to be free from the coercive influence of the other branches:

> "[E]ach department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, *directly or indirectly,* to, the coercive influence of either of the other departments."

In *Humphrey's Executor* v. *United States,* 295 U. S. 602, 629–630 (1935), the Court again held:

> "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, *direct or indirect,* of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers . . . ." (Emphasis supplied.)

Consistent with the principle of noncoercion, the unbroken practice since George Washington with respect to congressional demands for White House papers has been, in Mr. Chief Justice Taft's words, that "while either house [of Congress]

"evil" of "executive *control* of legislative behavior . . . ." (Emphasis supplied.)

may request information, it cannot compel it . . . ." W. Taft, The Presidency 110 (1916). President Washington established the tradition by declining to produce papers requested by the House of Representatives relating to matters of foreign policy:

> "To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." 1 Messages and Papers of the Presidents 195 (J. Richardson comp., 1899).

In noting the first President's practice, this Court stated in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320 (1936), that Washington's historic precedent was "a refusal the wisdom of which was recognized by the House itself and has never since been doubted." [5]

Part of our constitutional fabric, then, from the beginning has been the President's freedom from control or coercion by Congress, including attempts to procure documents that, though clearly pertaining to matters of important governmental interests, belong and pertain to the President. This freedom from Congress' coercive influence, in the words of *Humphrey's Executor,* "is implied in the very fact of the separation of the powers . . . ." 295 U. S., at 629–630. Moreover, it is not constitutionally significant that Congress has not directed that the papers be turned over to it for examination or retention, rather than to GSA. Separation of powers is fully implicated simply by Congress' mandating what disposition is to be made of the papers of another branch.

This independence of the three branches of Government, including control over the papers of each, lies at the heart of

---

[5] This Presidential prerogative has not been limited to foreign affairs, where, of course, secrecy and confidentiality may be of the utmost importance. See A. Bickel, The Morality of Consent 79 (1975); W. Taft, The Presidency 110 (1916).

this Court's broad holdings concerning the immunity of *congressional* papers from outside scrutiny. The Constitution, of course, expressly grants immunity to Members of Congress as to any "Speech or Debate in either House . . ."; yet the Court has refused to confine that Clause literally "to words spoken in debate." *Powell* v. *McCormack,* 395 U. S. 486, 502 (1969). Congressional papers, including congressional reports, have been held protected by the Clause in order " 'to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary.' " *Ibid.* In a word, to preserve the constitutionally rooted independence of each branch of Government, each branch must be able to control its own papers.

Title I is an unprecedented departure from the constitutional tradition of noncompulsion. The statute commands the head of a *legislatively* created department to take and maintain custody of appellant's Presidential papers, including many purely personal papers wholly unrelated to any operations of the Government. Title I does not concern itself in any way with materials belonging to departments of the Executive Branch created and controlled by Congress.

The Court brushes aside the fundamental principle of noncompulsion, abandoning outright the careful, previously unchallenged holdings of this Court in *Mellon, O'Donoghue* and *Humphrey's Executor.* In place of this firmly established doctrine,[6] the Court substitutes, without analysis, an ill-defined

[6] The Court's references to the historical understanding of separation-of-powers principles omit a crucial part of that history. Madison's statements in The Federalist No. 47 as to one department's exercising the *"whole* power" of another department do not purport to be his total treatment of the subject. The Federalist No. 48, two days later, states the central theme of Madison's view:

"It is equally evident, that neither [department] ought to possess directly or indirectly, an overruling influence over the others in the *administration of their respective powers.*" The Federalist No. 48, p. 332 (J. Cooke ed. 1961). (Emphasis supplied.)

Indeed, Madison expressly warned at length in No. 48 of the inevitable

"pragmatic, flexible approach." *Ante,* at 442. Recasting, for the immediate purposes of this case, our narrow holding in *United States* v. *Nixon,* 418 U. S. 683 (1974), see *infra,* at 515–516, the Court distills separation-of-powers principles into a simplistic rule which requires a "potential for disruption" or an "unduly disruptive" intrusion, before a measure will be held to trench on Presidential powers.[7]

The Court's approach patently ignores *Buckley* v. *Valeo,* where, only one year ago, we *unanimously* found a separation-of-powers violation without any allegation, much less a showing, of "undue disruption." There, we held that Congress could not impinge, even to the modest extent of six appointments to the Federal Election Commission, on the appointing powers of the President. We reached this conclusion in the face of the fact that President Ford had signed the bill into law.[8]

---

dangers of "encroachments" by the Legislative Branch upon the coordinate departments of Government.

But aside from the Court's highly selective discussion of the Framers' understanding, the Court cannot obscure the fact that this Court has never required, in order to show a separation-of-powers violation, that Congress usurped *the whole* of executive power. Any such requirement was rejected by the Court in *Buckley* v. *Valeo,* 424 U. S. 1 (1976). There, we held that Congress could not constitutionally exercise the President's appointing powers, even though under that statute the President had the power to appoint one-fourth of the Federal Election Commission members, and even though the President had "approved" the statute when he signed the bill into law.

[7] Nowhere is the standard clarified in the majority's opinion. We are left to guess whether only a "potential for disruption" is required or whether "undue disruption," whatever that may be, is required.

[8] The federal parties filed three briefs in *Buckley.* The main brief, styled the "Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae,*" explicitly stated that the method of appointment of four of the members of the Commission was unconstitutional. See pp. 6–7, 110–120. The Attorney General signed this portion of the brief as a party (see pp. 2, 103 n. 65). The Executive Branch therefore made it clear that, in its view, the statute was unconstitutional to the extent it reposed appointing powers in Congress. The second brief, styled the "Brief for

But even taking the "undue disruption" test as postulated, the Court engages in a facile analysis, as MR. JUSTICE REHNQUIST so well demonstrates. We are told, under the Court's view, that no "undue disruption" arises because GSA officials have taken custody of appellant's Presidential papers, and since, for the time being, only GSA and other Executive Branch officials will have access to them. *Ante,* at 443–444.

This analysis is superficial in the extreme. Separation-of-powers principles are no less eroded simply because *Congress* goes through a "minuet" of directing Executive Department employees, rather than the Secretary of the Senate or the Doorkeeper of the House, to possess and control Presidential papers. Whether there has been a violation of separation-of-powers principles depends, not on the identity of the custodians, but upon which branch has commanded the custodians to act. Here, Congress has given the command.

If separation-of-powers principles can be so easily evaded, then the constitutional separation is a sham.

Congress' power to regulate *Executive Department documents,* as contrasted with *Presidential papers,* under such measures as the Freedom of Information Act, 5 U. S. C. § 552 (1970 ed. and Supp. V), does not bear on the question. No one challenges Congress' power to provide for access to records of the Executive Departments which Congress itself created. But the Freedom of Information Act, the Privacy Act of 1974, and similar measures never contemplated mandatory production of Presidential papers. What is instructive, by contrast, is the nonmandatory, noncoercive manner in which Congress has previously legislated with respect to Presidential papers, by providing for Presidential libraries *at the option* of every

---

the Attorney General and the Federal Election Commission," generally defended the Act but took no position concerning the method of appointing the Commission. See p. 1 n. 1. The third brief was filed by the Commission on its own behalf only; it defended the appointment procedures, but it was not joined by the Attorney General and did not express the view of the President or of any other portion of the Executive Branch.

former President. Title I, however, breaches the nonmandatory tradition that has long been a vital incident of separation of powers.

C

The statute, therefore, violates separation-of-powers principles because it exercises a coercive influence by another branch over the Presidency. The legislation is also invalid on another ground pertaining to separation of powers; it is an attempt by Congress to exercise powers vested exclusively in the President—the power to control files, records, and papers of the office, which are comparable to the internal workpapers of Members of the House and Senate.

The general principle as to this aspect of separation of powers was stated in *Kilbourn* v. *Thompson:*

> "[E]ach [branch] shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.
>
> . . . . .
>
> "[A]s a general rule . . . the powers confided by the Constitution to one of these departments cannot be exercised by another." 103 U. S., at 191.

Madison also expressed this:

> "For this reason that Convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time." The Federalist No. 48, p. 335 (J. Cooke ed. 1961) (quoting Jefferson).

In the 1975 Term, in the face of a holding by a Court of Appeals that the separation-of-powers challenge was meritless, we unanimously invalidated an attempt by Congress to exercise appointing powers constitutionally vested in the Chief Executive. *Buckley* v. *Valeo,* 424 U. S., at 109–143.

The Constitution does not speak of Presidential papers, just as it does not speak of workpapers of Members of Congress or of judges.[9] But there can be no room for doubt that, up to now, it has been the implied prerogative of the President—as of Members of Congress and of judges—to memorialize matters, establish filing systems, and provide unilaterally for disposition of his workpapers. Control of Presidential papers is, obviously, a natural and necessary incident of the broad discretion vested in the President in order for him to discharge his duties.[10]

To be sure, we recognized a narrowly limited exception to Presidential control of Presidential papers in *United States* v. *Nixon,* 418 U. S. 683 (1974). But that case permits compulsory judicial intrusions only when a vital constitutional function, *i. e.,* the conduct of criminal proceedings, would be impaired *and* when the President makes no more "than a generalized claim of . . . public interest . . . ," *id.,* at 707, in maintaining complete control of papers and in preserving confidentiality. That case, in short, was essentially a conflict between the Judicial Branch and the President, where the effective functioning of both branches demanded an accommodation and where the prosecutorial and judicial demands upon the President were very narrowly restricted with great

[9] As to congressional papers, see *supra,* at 510–511. Despite the Constitution's silence as to the *papers* of the Legislative Branch, this Court had no difficulty holding those papers to be protected from control by other branches. See also MR. JUSTICE BRENNAN's dissenting opinion in *United States* v. *Brewster,* 408 U. S. 501, 532–533 (1972), where he quotes approvingly from *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881), and *Coffin* v. *Coffin,* 4 Mass. 1 (1808). In both of those cases, *written* materials by legislators were deemed to be protected by legislative immunity from intrusion or seizure.

[10] This discretion was exercised, as we have seen, by President Washington in the face of a congressional demand for production of his workpapers.

Obviously, *official documents* fall into an entirely different category and are not involved in this case.

specificity "to a limited number of conversations. . . ." Moreover, the request for production there was limited to materials that might themselves contain evidence of criminal activity of persons then under investigation or indictment. Finally, the intrusion was carefully limited to an *in camera* examination, under strict limits, by a single United States District Judge. That case does not stand for the proposition that the Judiciary is at liberty to order *all* papers of a President into custody of United States Marshals.[11]

United States v. *Nixon,* therefore, provides no authority for Congress' mandatory regulation of Presidential papers simply "to promote the general Welfare" which, of course, is a generalized purpose. No showing has been made, nor could it, that Congress' functions will be impaired by the former President's being allowed to control his own Presidential papers.[12] Without any threat whatever to its own functions, Congress has by this statute, as in *Buckley* v. *Valeo,* exercised authority entrusted to the Executive Branch.[13]

---

[11] Appellees, of course, would view that sort of intrusion as an intra-branch confrontation, since United States Marshals are officials of the Executive Branch, at least so long as the District Judge simply ordered the Marshals to take custody of and to review the documents without turning them over to the court. This is, of course, sheer sophistry.

[12] Of course, *United States* v. *Nixon* pertained only to the setting of Judicial-Executive conflict. Nothing in our holding suggests that, even if Congress needed Presidential documents in connection with its legislative functions, the constitutional tradition of Presidential control over Presidential documents in the face of legislative demands could be abrogated. We expressly stated in *Nixon* that "[w]e are not here concerned with the balance between . . . the confidentiality interest and congressional demands for information . . . ." 418 U. S., at 712 n. 19.

[13] In his concurring opinion, MR. JUSTICE POWELL concludes that Title I was addressed essentially to an "emergency" situation in the wake of appellant's resignation. But his opinion does not present any analysis as to whether this particular legislation, not *some* other legislation, is necessary to achieve that end. Since Title I commands confiscation of

D

Finally, in my view, the Act violates principles of separation of powers by intruding into the confidentiality of Presidential communications protected by the constitutionally based doctrine of Presidential privilege. A unanimous Court in *United States* v. *Nixon* could not have been clearer in holding that the privilege guaranteeing confidentiality of such communications derives from the Constitution, subject to compelled disclosure only in narrowly limited circumstances:

> "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U. S., at 708.

President Lyndon Johnson expressed the historic view of Presidential confidentiality in even stronger terms in a letter to the GSA Administrator: "[S]ince the President . . . is the recipient of many confidences from others, and since the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency, it will be necessary to withhold from public scrutiny certain papers and

---

all materials of an entire Presidential administration, Title I was simply not drafted to meet the specific emergency it purports to address. Besides omitting any discussion justifying the need for Title I, MR. JUSTICE POWELL's opinion relies entirely on the possibly limiting regulations to be promulgated at some future point by the GSA Administrator, which will protect "all constitutional and legal rights . . . ." *Ante*, at 497. This conclusion, of course, begs the precise question before us, which is whether the act of congressionally mandated seizure of all Presidential materials of one President violates the Constitution.

classes of papers for varying periods of time. Therefore . . . I hereby reserve the right to restrict the use and availability of any materials . . . for such time as I, in my sole discretion, may . . . specify . . . ." Hearing before a Subcommittee of the House Committee on Government Operations, on H. J. Res. 632, 89th Cong., 1st Sess., 17 (1965).

As a constitutionally based prerogative, Presidential privilege inures to the President himself; it is personal in the same sense as the privilege against compelled self-incrimination. Presidential privilege would therefore be largely illusory unless it could be interposed by the President against the countless thousands of persons in the Executive Branch, and most certainly if the executive officials are acting, as this statute contemplates, at the command of a different branch of Government.[14]

This statute requires that persons not designated or approved by the former President will review all Presidential papers. Even if the Government agents, in culling through the materials, follow the "advisory" suggestions offered by the District Court, the fact remains that their function abrogates the Presidential privilege. Congress has, in essence, commanded them to review and catalog thousands of papers and recordings that are undoubtedly privileged. Given that fact, it is clear that the Presidential privilege of one occupant of that office will have been rendered a nullity.[15]

---

[14] Civil service statutes aside, we know now that an executive official cannot replace all of his underlings on the basis of a patronage system. Thus, as a matter of constitutional law, a Chief Executive would not be at liberty to replace all Executive Branch officials with persons who, for political reasons, enjoy the President's trust and confidence. *Elrod* v. *Burns*, 427 U. S. 347 (1976).

[15] I cannot accept the argument pressed by appellees that review is rendered harmless by the fact that many of the documents *may* not be protected by Presidential privilege. How "harmless" review justifies manifestly "harmful" review escapes me.

E

There remains another inquiry under the issue of separation of powers. Does the fact that the Act applies only to a former President, described as "a legitimate class of one," *ante,* at 472, after he has left office, justify what would otherwise be unconstitutional if applicable to an incumbent President?

On the face of it, congressional regulation of the papers of a former President obviously will have less disruptive impact on the operations of an incumbent President than an effort at regulation or control over the same papers of an incumbent President. But this "remoteness" does not eliminate the separation-of-powers defects. First, the principle that a President must be free from coercion should apply to a former President, so long as Congress is inquiring or acting with respect to operations of the Government while the former President was in office.[16]

To the extent Congress is empowered to coerce a *former* President, every future President is at risk of denial of a large measure of the autonomy and independence contemplated by the Constitution and of the confidentiality attending it. *Myers* v. *United States,* 272 U. S. 52 (1926). Indeed, the President, if he is to have autonomy while in office, needs the assurance that Congress will not immediately be free to coerce him to open all his files and records and give an account of Presidential actions at the instant his successor is sworn in.[17] Absent the validity of the expectation of

---

[16] President Truman, for one, objected to Congress' efforts to coerce him after he was no longer in office in connection with matters pertaining to his administration. See *infra,* at 522.

[17] It would be the height of impertinence, after all, to serve a legislative subpoena on an outgoing President as he is departing from the inauguration of his successor. So too, the people would rightly be offended, and more important, so would the Constitution, by a congressional resolution, designed to ensure the smooth functioning of the Executive Branch, requiring a former President, upon leaving office, to remain in

privacy of such papers (save for a subpoena under *United States* v. *Nixon*), future Presidents and those they consult will be well advised to take into account the possibility that their most confidential correspondence, workpapers, and diaries may well be open to congressionally mandated review, with no time limit, should some political issue give rise to an interbranch conflict.

The Need for Confidentiality

The consequences of this development on what a President expresses to others in writing and orally are incalculable; perhaps even more crucial is the inhibiting impact on those to whom the President turns for information and for counsel, whether they are officials in the Government, business or labor leaders, or foreign diplomats and statesmen. I have little doubt that Title I—and the Court's opinion—will be the subject of careful scrutiny and analysis in the foreign offices of other countries whose representatives speak to a President on matters they prefer not to put in writing, but which may be memorialized by a President or an aide. Similarly, Title I may well be a "ghost" at future White House conferences, with conferees choosing their words more cautiously because of the enlarged prospect of compelled disclosure to others. A unanimous Court carefully took this into account in *United States* v. *Nixon:*

> "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." 418 U. S., at 708.

Washington, D. C., in order to be available for consultations with his successor for a prescribed period of time.

In this same vein, MR. JUSTICE POWELL argues that President Carter's representation to the Court through the Solicitor General that Title I enhances the efficiency of the Executive Branch is dispositive of appellant's separation-of-powers claim. This deference to the views of one administration, expressed approximately 100 days after its inception, as to the permanent structure of our Government is not supported by precedent and conflicts with 188 years of history. First, there is no principled basis for limiting this unique deference. If and when the one-House veto issue, for example, comes before us, are we to accept the opinion of the Department of Justice as to the effects of that legislative device on the Executive Branch's operations? Second, if Title I is thus efficacious, why did the President who signed this bill into law decide to establish a Presidential library in Ann Arbor, Mich., rather than turn all of his Presidential materials over to GSA for screening and retention in Washington, D. C., where the materials would be readily accessible to officials of the Executive Branch? And why, suddenly, is Congress' acquiescence in President Ford's actions consistent with the supposed foundation of Title I?

Third, as pointed out by MR. JUSTICE BLACKMUN, *ante,* at 491: "Political realities often guide a President to a decision not to veto" or, indeed, a decision not to challenge in court the actions of Congress. See n. 18, *infra.* Finally, it is perhaps not inappropriate to note that, on occasion, Presidents disagree with their predecessors on issues of policy. Some have believed in "Congressional Government"; others adhered to expansive notions of Presidential power. It is, I respectfully submit, a unique idea that this Court accept as controlling the representations of any administration on a constitutional question going to the permanent structure of Government.

Title I is also objectionable on separation-of-powers grounds, despite its applicability only to a former President, because compelling the disposition of all of a former President's papers

is a legislative exercise of what have historically been regarded as executive powers. Presidential papers do not, after all, instantly lose their nature quadrennially at high noon on January 20. Moreover, under Title I it is now the Congress, not the incumbent President,[18] that has decided what to do with *all* the papers of one entire administration.

Finally, the federal appellees concede that Presidential privilege, a vital incident of our separation-of-powers system, does not terminate instantly upon a President's departure from office. They candidly acknowledge that "the privilege survives the individual President's tenure," Brief for Federal Appellees 33, because of the vital public interests underlying the privilege. This principle, as all parties concede, finds explicit support in history; former President Truman in 1953 refused to provide information to the Congress on matters occurring during his administration, advising Congress:

> "It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, *it must be equally applicable to a President after his term of office has expired* when he is sought to be examined with respect to any acts occurring while he [was] President." 120 Cong. Rec. 33419 (1974). (Emphasis supplied.) [19]

---

[18] The fact that the President signs a bill into law, and thereafter defends it, without more, does not mean, of course, that the policy embodied in the legislation is that of the President, nor does it even mean that the President personally approves of the measure. When signing a bill into law, numerous Presidents have actually expressed disagreement with the legislation but felt constrained for a variety of reasons to permit the bill to become law. President Franklin D. Roosevelt repudiated the "Lovett Rider" later struck down by this Court in *United States* v. *Lovett*, 328 U. S. 303, 325 (1946) (Frankfurter, J., concurring). President Ford did not request this legislation in order to assure the effective functioning of the Executive Branch.

[19] Since by definition the concern is with former Presidents, I see no distinction in Congress' seeking to compel the appearance and testimony

To ensure institutional integrity and confidentiality, Presidents and their advisers must have assurance, as do judges and Members of Congress, that their internal communications will not become subject to retroactive legislation mandating intrusions into matters as to which there was a well-founded expectation of privacy when the communications took place. Just as Mr. Truman rejected congressional efforts to inquire of him, after he left office, as to his activities while President, this Court has always assumed that the immunity conferred by the Speech or Debate Clause is available to a Member of Congress after he leaves office. *United States* v. *Brewster,* 408 U. S. 501 (1972). It would therefore be illogical to conclude that the President loses all immunity from legislative coercion as to his Presidential papers from the moment he leaves office.

The Court correctly concedes that a former President retains the Presidential privilege after leaving office, *ante,* at 448–449; but it then concludes that several considerations cut against recognition of the privilege as to one former President. First, the Court places great emphasis on the fact that neither President Ford nor President Carter "supports appellant's claim . . . ." *Ante,* at 449. The relevance of that fact is not immediately clear. The validity of one person's constitutional privilege does not depend on whether some other holder of the same privilege supports his claim.[20] The fact that an *incumbent* President has signed or supports a particular measure cannot defeat a *former* President's claim of privilege. If the Court is correct today, it was wrong one year ago in *Buckley* v. *Valeo,* when we unanimously held that Presidential approval of the Federal Election Cam-

---

of a former President and in, alternatively, seeking to compel the production of Presidential papers over the former President's objection.

[20] Clients asserting the attorney-client privilege have not, up to now, been foreclosed from interposing the privilege unless a similarly situated client is willing to support the particular claim.

paign Act could not validate an unconstitutional invasion of Presidential appointing authority.

Second, the Court suggests that many of the papers are unprivileged. Of the great volume of pages, appellant estimated that he saw only about 200,000 items while he was President. Several points are relevant in this regard. We do not know how many pages the 200,000 items represent; the critical factor is that all papers are presumptively privileged. Regardless of the number of pages, the fact remains that the 200,000 items that the President personally reviewed or prepared while in office obviously have greater historical value than the mass of routine papers coming to the White House. Mountains of Government reports tucked away in Presidential files will not likely engage the interest of archivists or historians, since most such reports are not historically important and are, in any event, available elsewhere. Rather, archivists and historians will want to find and preserve the materials that reflect the President's internal decisionmaking processes. Those are precisely the papers which will be subjected to the most intensive review and which have always been afforded absolute protection. The Court's analytically void invocation of sheer numbers cannot mask the fact that the targets of the review are privileged papers, diaries, and conversations.

I agree that, under *United States* v. *Nixon,* the Presidential privilege is qualified. From that premise, however, the Court leaps to the conclusion that future regulations governing *public access* to the materials are sufficient to protect that qualified privilege. The Act does indeed provide for a number of safeguards before the public at large obtains access to the materials. See § 104 (a). But the Court cannot have it both ways. The opinion expressly recognizes again and again that *public access is not now the issue.* The constitutionality of a statute cannot rest on the presumed validity of regulations not yet issued; moreover, no regulations governing public access can remedy the statute's basic flaw of

permitting Congress to seize the confidential papers of a President.

F

In concluding that Title I on its face violates the principle of separation of powers, I do not address the issue whether some circumstances might justify legislation for the disposition of Presidential papers without the President's consent. Here, nothing remotely like the *particularized need* we found in *United States* v. *Nixon* has been shown with respect to these Presidential papers. No one has suggested that Congress will find its own "core" functioning impaired by lack of the impounded papers, as we expressly found the judicial function would be impaired by lack of the material subpoenaed in *United States* v. *Nixon*.

I leave to another day the question whether, under exigent circumstances, a *narrowly defined* congressional demand for Presidential materials might be justified. But Title I fails to satisfy either the required narrowness demanded by *United States* v. *Nixon* or the requirement that the coequal powers of the Presidency not be injured by congressional legislation.

II

Privacy

The discussion of separation of powers concerns, of course, the structure of government, not the rights of the sole individual ostensibly affected by this legislation. But Title I touches not only upon the independence of a coordinate branch of government, it also affects, in the most direct way, the basic rights of one named individual. The statute provides, as we have seen, for governmental custody over—and review of—all of the former President's written and recorded materials at the time he left office, including diary recordings and conversations in his private residences outside Washington, D. C. § 101 (a)(2).

The District Court was deeply troubled by this admittedly

unprecedented intrusion. Its opinion candidly acknowledged that the personal-privacy claim was the "most troublesome" point raised by this unique statute.[21] In addition to communications and memoranda reflecting the President's confidential deliberations, the District Court admitted that the materials subject to GSA review included highly personal communications.

> "Among all of the papers and tape recordings falling within the Act, however, are some papers and materials containing extremely private communications between [Mr. Nixon] and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files. . . . Segregating those that are private from those that are not private requires rather comprehensive screening, and archivists entrusted with that duty will be required to read or listen to private communications." 408 F. Supp. 321, 359 (DC 1976).

A

Given this admitted intrusion, the legislation before us must be subjected to the most searching kind of judicial scrutiny.[22] Statutes that trench on fundamental liberties, like

[21] The District Court concluded its discussion of the privacy challenge as follows: "We would be less than candid were we to state that we find it as easy to dispose of Mr. Nixon's privacy claims as his claim of presidential privilege." 408 F. Supp., at 367.

[22] Although the District Court expressly concluded that the former President had a "legitimate expectation" that his Presidential materials would not be subject to "comprehensive review by government personnel without his consent," *id.*, at 361, the Court nonetheless deemed the compulsory intrusion permissible given the constitutionality of the federal wiretap statute, 18 U. S. C. §§ 2510–2520, which of course permits substantial governmental intrusions into the privacy of individuals. Not only is this analogy imperfect, as the District Court itself admitted, 408 F. Supp., at 364, but this analysis fails to apply the "exacting scrutiny" called for by our decisions. Above all, the present statute fails to provide *any* of the

those affecting significantly the structure of our government, are not entitled to the same presumption of constitutionality we normally accord legislation. *Moore* v. *East Cleveland,* 431 U. S. 494, 499 (1977). The burden of justification is reversed; the burden rests upon government, not on the individual whose liberties are affected, to justify the measure. *Abood* v. *Detroit Board of Education,* 431 U. S. 209, 263–264 (1977) (POWELL, J., concurring in judgment). We recently reaffirmed the standard of review in such cases as one of "exacting scrutiny."

> "We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest . . . . [W]e have required that the subordinating interests of the State must survive exacting scrutiny." *Buckley* v. *Valeo,* 424 U. S., at 64.

B

Constitutional analysis must, of course, take fully into account the nature of the Government's interests underlying challenged legislation. Once those interests are identified, we must then focus on the nature of the individual interests affected by the statute. *Id.,* at 14–15. Finally, we must decide whether the Government's interests are of sufficient weight to subordinate the individual's interests, and, if so, whether the Government has nonetheless employed unnecessarily broad means for achieving its purposes. *Lamont* v. *Postmaster General,* 381 U. S. 301, 310 (1965) (BRENNAN, J., concurring).

Two governmental interests are asserted as the justification for this statute: to ensure the general efficiency of the Execu-

---

stringent safeguards, including a warrant, mandated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Indeed, the District Court flatly admitted as much. *Ibid.*

tive Branch's operations [23] and to preserve historically significant papers and tape recordings for posterity.[24] Both these purposes are legitimate and important. Yet, there was no serious suggestion by Congress that the operations of the Executive Branch would actually be impaired unless, contrary to nearly 200 years' past practice, all Presidential papers of the one named incumbent were required by law to be impounded in the sole control of Government agents. The statute on its face, moreover, does not purport to address a particularized need, such as the need to secure Presidential papers concerning the Middle East, the SALT talks, or problems in Panama.[25] Indeed, the congressionally perceived "need" is a

---

[23] Administrative efficiency is obviously a highly desirable goal. See, *e. g., Dixon* v. *Love,* 431 U. S. 105, 114 (1977); *Mathews* v. *Eldridge,* 424 U. S. 319, 347–349 (1976). However, I am constrained to recall that "administrative efficiency" has not uniformly been regarded as of "overriding importance." Indeed, claims of administrative efficiency have been swiftly dismissed at times as mere "bald assertion[s]." *Richardson* v. *Wright,* 405 U. S. 208, 223 (1972) (BRENNAN, J., dissenting). Numerous other opinions have held that individual interests, including the right to welfare payments, "clearly outweigh" government interests in promoting "administrative efficiency," *Goldberg* v. *Kelly,* 397 U. S. 254 (1970) (opinion of BRENNAN, J.). And, MR. JUSTICE MARSHALL in *Shapiro* v. *Thompson,* 394 U. S. 618, 634 (1969), stated that when "fundamental" rights are at stake, such as the "right to travel," government must demonstrate a *"compelling"* interest, not merely a "rational relationship between [the underlying statute] and [the] . . . admittedly permissible state objectives . . . ."

[24] The initial interest in preserving the materials for judicial purposes has diminished substantially. Since the Special Prosecutor has disclaimed any further interest in the materials for purposes of possible criminal investigations, the only conceivably remaining judicial need is to preserve the materials for possible use in civil litigation between *private parties.* The admittedly important interests in the enforcement of the criminal law, recognized in *United States* v. *Nixon,* are no longer pressed by the Government.

[25] If there were a particularized need, the statute suffers from greater overbreadth than others we have invalidated.

far more "generalized need" than that rejected in *United States* v. *Nixon* by a unanimous Court.

As to the interest in preserving historical materials, there is nothing whatever in our national experience to suggest that existing mechanisms, such as the 20-year-old Presidential Libraries Act, were insufficient to achieve that purpose.[26] In any event, the interest in preserving "historical materials" cannot justify seizing, without notice or hearing, private papers preliminary to a line-by-line examination by Government agents.

In contrast to Congress' purposes underlying the statute, this Act intrudes significantly on two areas of traditional privacy interests of Presidents. One embraces Presidential papers relating to his decisions, development of policies, appointments, and communications in his role as leader of a political party; the other encompasses purely private matters of family, property, investments, diaries, and intimate conversations. Both interests are of the highest order, with perhaps some primacy for family papers.[27] Cf. *Moore* v. *East Cleveland, supra,* at 499.

Title I thus touches directly on what MR. JUSTICE POWELL once referred to as the "intimate areas of an individual's personal affairs," *California Bankers Assn.* v. *Shultz,* 416 U. S.

---

[26] At the time Title I was passed, appellant had made tentative arrangements with the University of Southern California in Los Angeles for the establishment of a Presidential library, under the terms of the Presidential Libraries Act. App. 167–168. That has now ripened into a formal agreement so that in the event Title I is invalidated, appellant's historical materials will be housed in a facility on the USC campus under terms applicable to other Presidential libraries of past Presidents.

[27] The Court's refusal to afford constitutional protection to such commercial matters as bank records, *California Bankers Assn.* v. *Shultz,* 416 U. S. 21 (1974), or drug prescription records, *Whalen* v. *Roe,* 429 U. S. 589 (1977), only serves to emphasize the importance of truly private papers or communications, such as a personal diary or family correspondence. These private papers lie at the core of First and Fourth Amendment interests.

21, 78 (1974) (concurring opinion). The papers in both of these areas—family and political decisionmaking—are of the most private nature, enjoying the highest status under our law. MR. JUSTICE BRENNAN recently put it this way: "Personal letters constitute an integral aspect of a person's private enclave." *Fisher* v. *United States,* 425 U. S. 391, 427 (1976) (concurring in judgment). An individual's papers, he said, are "an extension of his person." *Id.,* at 420. MR. JUSTICE MARSHALL made the same point: "Diaries and personal letters that record only their author's personal thoughts lie at the heart of our sense of privacy." *Couch* v. *United States,* 409 U. S. 322, 350 (1973) (dissenting opinion). In discussing private papers, he referred even more emphatically to the "deeply held belief on the part of the Members of this Court throughout its history that there are certain documents *no person ought to be compelled to produce at the Government's request.*" *Fisher* v. *United States, supra,* at 431–432 (emphasis supplied) (concurring in judgment). This echoes Lord Camden's oft-quoted description of personal papers as a man's "dearest property." *Boyd* v. *United States,* 116 U. S. 616, 628 (1886).

One point emerges clearly: The papers here involve the most fundamental First and Fourth Amendment interests. Since the Act asserts *exclusive* Government custody over *all* papers of a former President, the Fourth Amendment's prohibition against unreasonable searches and seizures is surely implicated.[28] Indeed, where papers or books are the subject

[28] The fact that GSA initially secured possession of the Presidential papers through the agreement with the former President does not change the fact that the agency was commanded by Congress to take exclusive custody of *and retain* all Presidential historical materials. Moreover, everyone admits that the Act contemplates a careful screening process by Government agents. The fact that the governmental intrusion is noncriminal in nature does not, of course, render the Fourth Amendment's prohibitions inapplicable. See *South Dakota* v. *Opperman,* 428 U. S. 364 (1976).

of a government intrusion, our cases uniformly hold that the Fourth Amendment prohibition against a general search requires that warrants contain descriptions reflecting "the most scrupulous exactitude . . . ," *Stanford* v. *Texas,* 379 U. S. 476, 485 (1965). Those cases proscribe general language in a warrant—or a statute—of "indiscriminate sweep . . . ." *Id.,* at 486. Title I, commanding seizure followed by permanent control of all materials having "historical or commemorative value," evidences the "indiscriminate sweep" we have long denounced. This "broad broom" statute provides virtually no standard at all to guide the Government agents combing through the papers; the agents are left to roam at large through confidential materials, something to which no other President and no Member of Congress or of the Judicial Branch has been subjected.

The Court, while recognizing that Government agents will necessarily be reviewing the most private kinds of communications covering a period of five and one-half years, tells us that *Stanford* is inapposite. Several reasons are given. The Court suggests that, unlike the instant case, the seizure in *Stanford* included vast quantities of materials unrelated to any legitimate government objective; in addition, the *Stanford* intrusion constituted an invasion of the home in connection with a criminal investigation. That last consideration relied on by the Court can be disposed of quickly, for by its terms, just as in *Stanford,* Title I commands seizure and review of papers from appellant's *private residences* within and outside Washington, D. C., § 101 (a), for the purpose, among others, of criminal proceedings brought by the Special Prosecutor, § 102 (b), and to make the materials available more broadly "for use in judicial proceedings." § 104 (a)(2). Title I is not needed for this purpose, since a narrowly defined subpoena can accomplish those purposes under *United States* v. *Nixon.* Title I is in effect a "legislative warrant" reminiscent of the odious general warrants of the colonial era.

As to the Court's first consideration, its "quantity" test is fallacious. The intrusion in *Stanford* was unlawful not because the State had an interest in only part of many items in Stanford's home, but rather because the warrant failed to describe the objects of seizure with the "most scrupulous exactitude." *Stanford* is not a "numbers" test, the protection of which vanishes if unprotected materials outnumber protected materials; it is, rather, a test designed to ensure *that protected materials are not seized at all.* Title I on its face commands that protected materials be seized wherever found—including the private residences mentioned—reviewed, and returned only if the Government agents decide that certain protected materials lack historical significance. The Act plainly accomplishes exactly what *Stanford* expressly forbids.

In addition to Fourth Amendment considerations, highly important First Amendment interests pervade all Presidential papers, since they include expressions of privately held views about politics, diplomacy, or people of all walks of life, within and outside this country. Appellant's freedom of association is also implicated, since his recordings and papers will likely reveal much about his relationships with both individuals and organizations. In *NAACP* v. *Alabama,* 357 U. S. 449, 462 (1958), the Court said:

> "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."

Accordingly, in passing on a statute compelling disclosure of political contributions, the Court, in *Buckley* v. *Valeo,* imposed the strict standard of "exacting scrutiny" because of the significant impact on First Amendment rights.

The fact that the former President was an important national and world political figure obviously does not diminish the traditional privacy interest in his papers. Forced disclosure of private information, even to Government officials, is by no means sanctioned by this Court's decisions, except for

the most compelling reasons. Cf. *Whalen* v. *Roe,* 429 U. S. 589 (1977). I do not think, for example, that this Court would readily sustain, as a condition to holding public office, a requirement that a candidate reveal publicly membership in every organization whether religious, social, or political. After all, our decision in *NAACP* v. *Alabama, supra,* was presumably intended to protect from compelled disclosure members of the organization who were actively involved in public affairs or who held public office in Alabama.

The Court's reliance on *Whalen* v. *Roe, supra,* in rejecting appellant's privacy claim is surprising. That case dealt with the State's undoubted police power to regulate dispensing of dangerous drugs, the very use or possession of which the State could forbid. 429 U. S., at 603, and 597 n. 20. Hence, we had no difficulty whatever in reaching a unanimous holding that the public interest in regulating *dangerous drugs* outweighed any privacy interest in reporting to the State all prescriptions, those reports being made confidential by statute. No personal, private business, or political confidences were involved.

C

In short, a former President up to now has had essentially the same expectation of privacy with respect to his papers and records as every other person. This expectation is soundly based on two factors: first, under our constitutional traditions, Presidential papers have been, for more than 180 years, deemed by the Congress to belong to the President. Congress ratified this tradition by specific Acts: (a) congressional appropriations following authorization to purchase Presidential papers; (b) congressional enactment of a non-mandatory system of Presidential libraries; and (c) statutes permitting, until 1969, a charitable-contribution deduction for papers of Presidents donated to the United States or to nonprofit institutions.

Second, in the absence of any legislation to the contrary, there was no reason whatever for a President to take time from his official duties to ensure that there was no "commingling" of "public" and "private" papers. Indeed, the fact that the former President commingled Presidential and private family papers, absent any then-existing laws to the contrary, points strongly to the conclusion that he did in fact have an expectation of privacy with respect to both categories of papers.

On the basis of this Court's holdings, I cannot understand why the former President's privacy interests do not outweigh the generalized, undifferentiated goals sought to be achieved by Title I. Without a more carefully defined focus, these legislative goals do not represent "paramount Government interests," nor is this particular piece of legislation needed to achieve those goals, even if we assume, *arguendo,* that they are of a "compelling" or "overriding" nature. But even if other Members of the Court strike the balance differently, the Government has nonetheless failed to choose narrowly tailored means of carrying out its purposes so as not unnecessarily to invade important First and Fourth Amendment liberties. The Court demanded no less in *Buckley* v. *Valeo,* and nothing less will do here. Cf. *Hynes* v. *Mayor of Oradell,* 425 U. S. 610, 620 (1976).

The federal appellees point to two factors as mitigating the effects of this admitted intrusion: first, in their view, most of the President's papers and conversations relate to the business of Government, rather than to personal, family, or political matters; second, it is said that the intrusion is limited as much as possible, since the review will be carried out by specially trained Government agents.

Even accepting the Government's interest in identifying and preserving governmentally related papers in order to preserve them for historical purposes, that interest cannot justify a seizure and search of *all* the papers taken here.

Since compulsory review of personal and family papers and tape recordings is an admittedly improper invasion of privacy, no constitutional principle justifies an intrusion into indisputably protected areas in order to carry out the "generalized" statutory objectives.

Second, the intrusion cannot be saved by the credentials, however impeccable, of the Government agents. The initial problem with this justification is that no one knows whether these agents are, as the federal appellees contend, uniformly discreet. Despite the lip service paid by the District Court and appellees to the record of archivists generally, there is nothing before us to justify the conclusion that each of the more than 100 persons who apparently will have access to, and will monitor and examine, the materials is indeed reliably discreet.

The Act, furthermore, provides GSA with no meaningful standards to minimize the extent of intrusions upon appellant's privacy. We are thus faced with precisely the same standardless discretion vested in governmental officials which this Court has unhesitatingly struck down in other First Amendment areas. See, *e. g., Hynes* v. *Mayor of Oradell, supra.* In the absence of any meaningful statutory standards, which might help secure the privacy interests at stake, I question whether we can assume, as a matter of law, that Government agents will be able to formulate for themselves constitutionally valid standards of review in examining, segregating, and cataloging the papers of the former President.

Nor does the possibility that, had Title I not been passed, appellant would perhaps use Government specialists to help classify and catalog his papers eliminate the objections to this intrusion. Had appellant, like all his recent predecessors, been permitted to deposit his papers in a Presidential library, Government archivists would have been working directly under appellant's guidance and direction, not solely that of Congress or GSA. He, not Congress, would have established standards

for preservation, to ensure that his privacy would be protected. Similarly, he would have been able to participate personally in the reviewing process and could thus assure that any governmental review of purely personal papers was minimized or entirely eliminated. He, not Congress, would have controlled the selection of which experts, if any, would have access to his papers. Finally, and most important, the "intrusion" would have been consented to, eliminating any constitutional question. But the *possibility* of a consent intrusion cannot, under our law, justify a nonconsensual invasion. Actual consent is required, cf. *Schneckloth* v. *Bustamonte,* 412 U. S. 218 (1973), not the mere possibility of consent under drastically different circumstances.

Finally, even if the Government agents are completely discreet, they are still Government officials charged with reviewing highly private papers and tape recordings. Unless we are to say that a police seizure and examination of private papers is justified by the "impeccable" record of a discreet police officer, I have considerable difficulty understanding how a compulsory review of admittedly private papers, in which there is no conceivable governmental interest, by Government agents is constitutionally permissible.

III

Bill of Attainder

A

Under Art. I, § 9, cl. 3, as construed and applied by this Court since the time of Mr. Chief Justice Marshall, Title I violates the Bill of Attainder Clause. In contrast to Title II of Pub. L. 93–526, the Public Documents Act, which establishes a National Study Commission to study questions concerning the preservation of records of *all* federal officials, Title I commands the Administrator to seize all tape recordings "involv[ing] former President Richard M. Nixon" and all "Presidential historical materials of Richard M. Nixon . . . ."

§§ 101 (a)(1), (b)(1). By contrast with Title II, which is general legislation, Title I is special legislation singling out one individual as the target.

Although the prohibition against bills of attainder has been addressed only infrequently by this Court, it is now settled beyond dispute that a bill of attainder, within the meaning of Art. I, is by no means the same as a bill of attainder at common law. The definition departed from the common-law concept very early in our history, in a most fundamental way. At common law, the bill was a death sentence imposed by legislative Act. Anything less than death was not a bill of attainder, but was, rather, "a bill of pains and penalties." This restrictive definition was recognized tangentially in *Marbury* v. *Madison,* 1 Cranch 137, 179 (1803),[29] but the Court soon thereafter rejected conclusively any notion that only a legislative death sentence or even incarceration imposed on named individuals fell within the prohibition. Mr. Chief Justice Marshall firmly settled the matter in 1810, holding that legislative punishment in the form of a deprivation of property was prohibited by the Bill of Attainder Clause:

> "A bill of attainder may affect the life of an individual, *or may confiscate his property,* or may do both." *Fletcher* v. *Peck,* 6 Cranch 87, 138. (Emphasis supplied.)

The same point was made 17 years later in *Ogden* v. *Saunders,* 12 Wheat. 213, 286, where the Court stated:

> "By classing bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts together, the

---

[29] "The constitution declares that 'no bill of attainder or *ex post facto* law shall be passed.'

"If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?" *Marbury* v. *Madison,* 1 Cranch, at 179.

> general intent becomes very apparent; *it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property.*" (Emphasis supplied.)

More than 100 years ago this Court struck down statutes which had the effect of preventing defined categories of persons from practicing their professions. *Cummings* v. *Missouri,* 4 Wall. 277 (1867) (a priest); *Ex parte Garland,* 4 Wall. 333 (1867) (a lawyer). Those two cases established more broadly that "punishment" for purposes of bills of attainder is not limited to criminal sanctions; rather, "[t]he deprivation of *any rights, civil* or political, *previously enjoyed,* may be punishment . . . ." *Cummings, supra,* at 320.

Mr. Chief Justice Warren pointed out that the Constitution, in prohibiting bills of attainder, did not envision "a narrow, technical (and therefore soon to be outmoded) prohibition . . . ." *United States* v. *Brown,* 381 U. S. 437, 442 (1965). To the contrary, the evil was a *legislatively imposed* deprivation of existing rights, including property rights, directed at named individuals. Mr. Justice Black, in *United States* v. *Lovett,* 328 U. S. 303, 315–316 (1946), stated:

> "[The cases] stand for the proposition that legislative acts, *no matter what their form,* that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." (Emphasis supplied.)

The only "punishment" in *Lovett,* in fact, was the deprivation of Lovett's salary as a Government employee—an indirect punishment for his "bad" associations.

Under our cases, therefore, bills of attainder require two elements: first, a specific designation of persons or groups as subjects of the legislation, and, second, a *Garland-Cummings-Lovett-Brown*-type arbitrary deprivation, including depriva-

tion of property rights, without notice, trial, or other hearing.[30] No one disputes that Title I suffers from the first infirmity, since it applies only to one former President. The issue that remains is whether there has been a legislatively mandated deprivation of an existing right.

B

Since George Washington's Presidency, our constitutional tradition, without a single exception, has treated Presidential papers as the President's personal property. This view has been congressionally and judicially ratified, both as to the ownership of Presidential papers, *Folsom* v. *Marsh,* 9 F. Cas. 342 (No. 4,901) (CC Mass. 1841) (Story, J., sitting as Circuit Justice), and, by the practice of Justices as to ownership of their judicial papers.

Congress itself has consistently legislated on this assumption. I have noted earlier that appropriation legislation has been enacted on various occasions providing for Congress' *purchase* of Presidential papers. See Hearing before a Special Subcommittee of the House Committee on Government Operations on H. J. Res. 330, 84th Cong., 1st Sess., 28 (1955). Those hearings led Congress to establish a *nonmandatory* sys-

[30] Title I fails to provide any procedural due process safeguards, either before or after seizure of the Presidential materials. There is no provision whatever permitting appellant to be heard in the decisionmaking process by which GSA employees will determine, with no statutory standards to guide them, whether particular materials have "general historical value." No time restraints are placed upon GSA's decisionmaking process, even though this Court has consistently recognized that, when dealing with First Amendment interests, the timing of governmental decisionmaking is crucial. *E. g., Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961) Under those holdings, any statute which separates an individual, against his will, from First Amendment protected materials must be strictly limited within a time frame. Title I, in contrast, places no limits with respect to GSA's retention of custody over appellant's papers; three years have already elapsed since seizure of the papers in question.

tem of Presidential libraries, again explicitly recognizing that Presidential papers were the personal property of the Chief Executive. In the floor debate on that measure, Congressman John Moss, a supporter of the legislation, stated: "Finally, it should be remembered that Presidential papers belong to the President . . . ." 101 Cong. Rec. 9935 (1955). Indeed, in 1955 in testimony pertaining to this proposed legislation, the Archivist of the United States confirmed:

> "The papers of the Presidents have always been considered to be their personal property, both during their incumbency and afterward. This has the sanction of law and custom and has never been authoritatively challenged." Hearing on H. J. Res. 330, *supra,* at 32.

Similarly, the GSA Administrator testified:

> "As a matter of ordinary practice, the President has removed his papers from the White House at the end of his term. This has been in keeping with the tradition *and the fact that the papers are the personal property of the retiring Presidents.*" *Id.,* at 14. (Emphasis supplied.)

In keeping with this background, it was not surprising that the Attorney General stated in an opinion in September 1974:

> "To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times." 43 Op. Atty. Gen. No. 1, pp. 1–2 (1974).

I see no escape, therefore, from the conclusion that, on the basis of more than 180 years' history, the appellant has been deprived of a property right enjoyed by all other Presidents

after leaving office, namely, the control of his Presidential papers.

Even more starkly, Title I deprives only one former President of the right *vested by statute* in other former Presidents by the 1955 Act—the right to have a Presidential library at a facility of his own choosing for the deposit of such Presidential papers as he unilaterally selects. Title I did not purport to repeal the Presidential Libraries Act; that statute remains in effect, available to present and future Presidents, and has already been availed of by former President Ford. The operative effect of Title I, therefore, is to exclude, by name, one former President and deprive him of what his predecessors—and his successor—have already been allowed. This invokes what Mr. Justice Black said in *Lovett,* could not be constitutionally done:

> "Those who wrote our Constitution well knew the danger inherent in *special legislative acts* which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts." 328 U. S., at 317. (Emphasis supplied.)

But apart from Presidential papers generally, Title I on its face contemplates that even the former President's purely family and personal papers and tape recordings are likewise to be taken into custody for whatever period of time is required for review. Some items, such as the originals of tape recordings of the former President's conversations, will never be returned to him under the Act.

I need not, and do not, inquire into the motives of Congress in imposing this deprivation on only one named person. Our cases plainly hold that retribution and vindictiveness are not requisite elements of a bill of attainder. The Court

appears to overlook that Mr. Chief Justice Warren in *United States* v. *Brown, supra,* concluded that retributive motives on the part of Congress were irrelevant to bill-of-attainder analysis. To the contrary, he said flatly: "It would be archaic to limit the definition of punishment to 'retribution.'" Indeed, he expressly noted that bills of attainder had historically been enacted for regulatory or preventive purposes:

> "Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution. A number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble . . . and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event." 381 U. S., at 458–459.

Under the long line of our decisions, therefore, the Court has the heavy burden of demonstrating that legislation which singles out one named individual for deprivation—without any procedural safeguards—of what had for nearly 200 years been treated by all three branches of Government as private property, can survive the prohibition of the Bill of Attainder Clause. In deciding this case, the Court provides the basis for a future Congress to enact yet another Title I, directed at some future former President, or a Member of the House or the Senate because the individual has incurred public disfavor and that of the Congress. Cf. *Powell* v. *McCormack,* 395 U. S. 486 (1969). As in *United States* v. *Brown,* Title I, in contrast to Title II, does "not set forth a generally applicable rule," 381 U. S., at 450; it is beyond doubt special legislation doing precisely the evil against which the prohibitions of the "bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts . . ." were aimed. *Ogden* v. *Saunders,* 12 Wheat., at 286.

The concurring opinions make explicit what is implicit throughout the Court's opinion, *i. e.*, (a) that Title I would be unconstitutional under separation-of-powers principles if it applied to any other President; (b) that the Court's holding rests on appellant's being a "legitimate class of one," *ante,* at 472; and (c) that the Court's holding "will not be a precedent." *Ante,* at 486.

Nothing in our cases supports the analysis of MR. JUSTICE STEVENS, *ibid.* Under his view, appellant's resignation and subsequent acceptance of a pardon set him apart as a " 'legitimate class of one.' " The two events upon which he relies, however, are beside the point. Correct analysis under the Bill of Attainder Clause focuses solely upon the nature of the measure adopted by Congress, not upon the actions of the target of the legislation. Even if this approach were analytically sound, the two events singled out are relevant only to two possible theories: first, that appellant is culpably deserving of punishment by virtue of his resignation and pardon; or second, that appellant's actions were so unique as to justify legislation confiscating his Presidential materials but not those of any other President. The first point can be disposed of quickly, since the Bill of Attainder Clause was, of course, intended to prevent legislatively imposed deprivations of rights upon persons whom the Legislature thought to be culpably deserving of punishment.

The remaining question, then, is whether appellant's "uniqueness" permits individualized legislation of the sort passed here. It does not. The point is not that Congress is powerless to act as to exigencies arising during or in the immediate aftermath of a particular administration; rather, the point is that Congress cannot *punish* a particular individual on account of his "uniqueness." If Congress had declared forfeited appellant's retirement pay to which he otherwise would be entitled, instead of confiscating his Presidential materials, it would not avoid the bill-of-attainder prohibition to say that appellant was guilty of unprecedented actions

setting him apart from his predecessors in office. In short, appellant's uniqueness does not justify serious deprivations of existing rights, including the statutory right abrogated by Title I to establish a Presidential library.

The novel arguments advanced in the several concurring opinions serve to emphasize how clearly Title I violates the Bill of Attainder Clause; MR. JUSTICE STEVENS although finding no violation of the Clause, admirably states the case which, for me, demonstrates the unconstitutionality of Title I:

> "The statute before the Court does not apply to all Presidents or former Presidents. It singles out one, by name, for special treatment. Unlike all former Presidents in our history, he is denied custody of his own Presidential papers; he is subjected to the burden of prolonged litigation over the administration of the statute; and his most private papers and conversations are to be scrutinized by Government archivists. The statute implicitly condemns him as an unreliable custodian of his papers. Legislation which subjects a named individual to this humiliating treatment must raise serious questions under the Bill of Attainder Clause." *Ante,* at 484.

IV

The immediate consequences of the Court's holding may be discounted by some on the ground it is justified by the uniqueness of the circumstances—in short, that the end justifies the means—and that, after all, the Court's holding is really not to be regarded as precedent. Yet the reported decisions of this Court reflect other instances in which unique situations confronted the Judicial Branch—for example, the alleged treason of one of the Founding Fathers. *United States* v. *Burr,* 25 F. Cas. 187 (No. 14,694) (CC Va. 1807). Burr may or may not have been blameless; Father Cummings and Lawyer Garland, in common with hundreds of thousands of others, may have been technically guilty of "carrying on

rebellion" against the United States. But this Court did not weigh the culpability of Cummings, Garland, or of Lovett or Brown in according to each of them the full measure of the protection guaranteed by the literal language of the Constitution. For nearly 200 years this Court has not viewed either a "class" or a "class of one" as "legitimate" under the Bill of Attainder Clause.

It may be, as three Justices intimate in their concurring opinions, that today's holding will be confined to this particular "class of one"; if so, it may not do great harm to our constitutional jurisprudence but neither will it enhance the Court's credit in terms of adherence to *stare decisis*. Only with future analysis, in perspective, and free from the "hydraulic pressure" Holmes spoke of, will we be able to render judgment on whether the Court has today enforced the Constitution or eroded it.

MR. JUSTICE REHNQUIST, dissenting.

Appellant resigned the Office of the Presidency nearly three years ago, and if the issue here were limited to the right of Congress to dispose of his particular Presidential papers, this case would not be of major constitutional significance. Unfortunately, however, today's decision countenances the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions. This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisers. Believing as I do that the Act is a clear violation of the constitutional principle of separation of powers, I need not address the other issues considered by the Court.[1]

[1] While the entire substance of this dissent is devoted to the constitutional principle of separation of powers, and not to the other issues that

My conclusion that the Act violates the principle of separation of powers is based upon three fundamental propositions. First, candid and open discourse among the President, his

---

the Court addresses separately, it seems to me that the Court is too facile in separating appellant's "privacy" claims from his "separation of powers" claims, as if they were two separate and wholly unrelated attacks on the statute. The concept of "privacy" can be a coat of many colors, and quite differing kinds of rights to "privacy" have been recognized in the law. Property may be "private," in the sense that the Fifth Amendment prohibits the Government from seizing it without paying just compensation. A dictabelt tape or diary may be "private" in that sense, but may also be "private" in the sense that the Fourth Amendment would prohibit an unreasonable seizure of it even though in making such a seizure the Government agreed to pay for the fair value of the diary so as not to run afoul of the Eminent Domain Clause of the Fifth Amendment. Many states have recognized a common-law "right of privacy" first publicized in the famous Warren and Brandeis article, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). Privileges, such as the executive privilege embodied in the Constitution as a result of the separation of powers, *United States* v. *Nixon,* 418 U. S. 683 (1974), and the attorney-client privilege, recognized under case and statutory law in most jurisdictions, protect still a different form of privacy. The invocation of such privileges has the effect of protecting the privacy of a communication made confidentially to the President or by a client to an attorney; the purpose of the privilege, in each case, is to assure free communication on the part of the confidant and of the client, respectively.

The Court states, *ante,* at 459, that "it is logical to assume that the tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency." Whatever the merits of this argument may be against a claim based on other types of privacy, it makes crystal clear that the Act is a serious intrusion upon the type of "privacy" that is protected by the principle of executive privilege. The Court's complete separation of its discussion of the executive-privilege claim from the privacy claim thus enables it to take inconsistent positions in the different sections of its opinion.

The Court's position with respect to the appellant's individual privacy heightens my concern regarding the privacy interest served by executive privilege. In attempting to minimize the Act's impact upon appellant's privacy, the Court concludes that "purely private papers and recordings will be returned to appellant under § 104 (a) (7) of the Act." *Ibid.* How-

advisers, foreign heads of state and ambassadors, Members of Congress, and the others who deal with the White House on a sensitive basis is an absolute prerequisite to the effective discharge of the duties of that high office. Second, the effect of the Act, and of this Court's decision upholding its constitutionality, will undoubtedly restrain the necessary free flow of information to and from the present President and future Presidents. Third, any substantial intrusion upon the effective discharge of the duties of the President is sufficient to violate the principle of separation of powers, and our prior cases do not permit the sustaining of an Act such as this by "balancing" an intrusion of substantial magnitude against the interests assertedly fostered by the Act.

---

ever, this conclusion raises more questions than answers. Under § 104 (a) (7), the return of papers to the appellant is conditioned on their being "not otherwise of general historical significance." Given the expansive nature of this phrase, see Tr. of Oral Arg. 39, it is quite conceivable that virtually none of the papers will be returned, and the Court's representation is an empty gesture. See also § 104 (a) (6). What is meant by "*purely* private papers"? Is a personal letter to or from the President, but concerning the duties of the President considered "private," or is a document replete with personal communications, but containing some reference to the affairs of state, "purely private"? The dictabelts of the President's personal recollections, dictated in diary form at the end of each day, are assumedly private, and are to be returned. See Tr. of Oral Arg. 59. But the dictabelt dictation is also recorded on the voice-activated White House taping system, and those tapes will be retained and reviewed. Hence, appellant's privacy interest will not be served by the return of the dictabelts, and the retention of the tapes will seriously erode Presidential communications, as discussed *infra*, at 553–558. By approaching these issues in compartmentalized fashion the Court obscures the fallacy of its result.

I fully subscribe to most of what is said respecting the separation of powers in the dissent of THE CHIEF JUSTICE. Indeed, it is because I so thoroughly agree with his observation that the Court's holding today is a "grave repudiation of nearly 200 years of judicial precedent and historical practice" that I take this opportunity to write separately on the subject, thinking that its importance justifies such an opinion.

With respect to the second point, it is of course true that the Act is directed solely at the papers of former President Nixon.[2] Although the terms of the Act, therefore, have no direct application to the present occupant or future occupants of the Office, the effect upon candid communication to and from these future Presidents depends, in the long run, not upon the limited nature of the present Act, but upon the precedential effect of today's decision. Unless the authority of Congress to seize the papers of this appellant is limited only to him in some principled way, future Presidents and their advisers will be wary of a similar Act directed at their papers out of pure political hostility.

We are dealing with a privilege, albeit a qualified one, that both the Court and the Solicitor General concede may be asserted by an ex-President. It is a privilege which has been relied upon by Chief Executives since the time of George Washington. See, *e. g.*, the dissenting opinion of THE CHIEF JUSTICE, *ante*, at 509–510. Unfortunately, the Court's opinion upholding the constitutionality of this Act is obscure, to say the least, as to the circumstances that will justify Congress in seizing the papers of an ex-President.[3] A potpourri of reasons is advanced as to why the Act is not an unconstitutional

---

[2] I am not unmindful of the excesses of Watergate, and of the impetus it gave to this legislation. However, the Court's opinion does not set forth a principled distinction that would limit the constitutionality of an Act such as this to President Nixon's papers. Absent such a distinction:

"The emotional aspects of the case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in the particular case before us." *Brewer* v. *Williams,* 430 U. S. 387, 415 (1977) (STEVENS, J., concurring).

[3] Indeed, there is nothing in the Court's logic which would invalidate such an Act if it applied to an *incumbent* President *during* his term of office. It is of course not likely that an incumbent would sign such a measure, but a sufficiently determined Congress could pass it over his veto nonetheless.

infringement upon the principle of separation of powers,[4] but the weight to be attached to any of the factors is left wholly unclear.

The Court speaks of the need to establish procedures to preserve Presidential materials, to allow a successor President access to the papers of the prior President, to grant the American public historical access, and to rectify the present "hit-or-miss" approach by entrusting the materials to the expert handling of the archivists. *Ante,* at 452–453. These justifications are equally applicable to each and every future President, and other than one cryptic paragraph, *ante,* at 453–454, the Court's treatment contains no suggestion that Congress might not permissibly seize the papers of any outgoing future President. The unclear scope of today's opinion will cause future Presidents and their advisers to be uneasy over

[4] In my view, the Court's decision itself, by not offering any principled basis for distinguishing appellant's case from that of any future President, has a present and future impact on the functioning of the Office of the Presidency. Hence the validity of the reasons asserted by the Court for upholding this particular Act is a subject which I find it unnecessary to address in detail. I feel bound to observe, however, that the Court, in emphasizing, *e. g., ante,* at 443–444, the fact that the seized papers are to be lodged with the General Services Administration, an agency created by Congress but housed in the Executive Branch of the Government, relies upon a thin reed indeed.

Control and management of an agency such as the General Services Administration is shared between the incumbent President, by virtue of his authority to nominate its officials, and Congress, by virtue of its authority to enact substantive legislation defining the functions of the agency. But the physical placement of the seized Presidential papers with such an agency does not solve the separation-of-powers problem. The principle of separation of powers is infringed when, by Act of Congress, Presidential communications are impeded because the President no longer has exclusive control over the release of his confidential papers. The fact that this Act places physical custody in the hands of the General Services Administration, rather than a congressional committee, makes little difference so far as divestiture of Presidential control is concerned.

the confidentiality of their communications, thereby restraining those communications.

The position of my Brothers POWELL and BLACKMUN is that today's opinion will not result in an impediment to future Presidential communications since this case is "unique" [5]—appellant resigned in disgrace from the Presidency during events unique in the history of our Nation. MR. JUSTICE POWELL recognizes that this position is quite different from that of the Court. *Ante,* at 492–498. Unfortunately his concurring view that the authority of Congress is limited to the situation he describes does not itself change the expansive scope of the Court's opinion, and will serve as scant consolation to future Presidential advisers. For so long as the Court's opinion represents a threat to confidential communications, the concurrences of MR. JUSTICE POWELL and MR. JUSTICE BLACKMUN, I fear, are based on no more than wishful thinking.

Were the Court to advance a principled justification for affirming the judgment solely on the facts surrounding appellant's fall from office, the effect of its decision upon future Presidential communications would be far less serious. But the Court does not advance any such justification.

A

It would require far more of a discourse than could profitably be included in an opinion such as this to fully describe the pre-eminent position that the President of the United States occupies with respect to our Republic. Suffice it to say that the President is made the sole repository of the executive powers of the United States, and the powers entrusted to him as well as the duties imposed upon him

[5] My Brother STEVENS, *ante,* at 486–487, seeks to attribute a similar uniqueness to the precedential value of this case, but his observations are directed to appellant's bill-of-attainder claim, rather than to the separation-of-powers claim.

are awesome indeed.[6] Given the vast spectrum of the decisions that confront him—domestic affairs, relationships with foreign powers, direction of the military as Commander in

[6] Article II empowers him "by and with the Advice and Consent of the Senate" to make treaties, to appoint numerous other high officials of the Federal Government, to receive ambassadors and other public ministers, and to commission all the officers of the United States. That Article enjoins him to "take Care that the Laws be faithfully executed," and authorizes him to "give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." It is difficult to imagine a public office whose occupant would be more dependent upon the confidentiality of the advice which he received, and the confidentiality of the instructions which he gave, for the successful execution of his duties. This is particularly true in the area of foreign affairs and international relations; in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319 (1936), this Court stated:

"Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

" 'The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that respon-

Chief—it is by no means an overstatement to conclude that current, accurate, and absolutely candid information is essential to the proper performance of his office. Nor is it an overstatement to conclude that the President must be free to give frank and candid instructions to his subordinates. It cannot be denied that one of the principal determinants of the quality of the information furnished to the President will be the degree of trust placed in him by those who confide in him. The Court itself, *ante,* at 448–449, cites approvingly the following language of the Solicitor General:

> " 'Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submission of facts and opinions upon which effective discharge of his duties depends.' " See Brief for Federal Appellees 33.

The public papers of Dwight D. Eisenhower, who had the advantage of discharging executive responsibilities first as the Commander in Chief of the United States forces in Europe during the Second World War and then as President of the United States for two terms, attest to the critical importance of this trust in the President's discretion:

> "And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis." Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1955, p. 674 (1959).

The effect of a contrary course likewise impressed President Eisenhower:

> "But when it comes to the conversations that take place

---

sibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.' U. S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24."

> between any responsible official and his advisers or exchange of little, mere slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody; *and if they are, will wreck the Government.*" *Ibid.* (Emphasis added.)

There simply can be no doubt that it is of the utmost importance for sensitive communications to the President to be viewed as confidential, and generally unreachable without the President's consent.

B

In order to fully understand the impact of this Act upon the confidential communications in the White House, it must be understood that the Act will affect not merely former President Nixon, but the present President and future Presidents. As discussed above, while this Act itself addresses only the papers of former President Nixon, today's decision upholding its constitutionality renders uncertain the constitutionality of future congressional action directed at any ex-President. Thus Presidential confidants will assume, correctly, that any records of communications to the President could be subject to "appropriation" in much the same manner as the present Act seized the records of confidential communications to and from President Nixon. When advice is sought by future Presidents, no one will be unmindful of the fact that, as a result of the uncertainty engendered by today's decision, all confidential communications of any ex-President could be subject to seizure over his objection, as he leaves the inaugural stand on January 20.

And Presidential communications will undoubtedly be impeded by the recognition that there is a substantial probability of public disclosure of material seized under this Act, which, by today's decision, is a constitutional blueprint for future Acts. First, the Act on its face requires that 100-odd Government archivists study and review Presidential papers,

heretofore accessible only with the specific consent of the President. Second, the Act requires that public access is to be granted by future regulations consistent with "the need to provide public access to those materials which have general historical significance . . . ." § 104 (a)(6). Either of these provisions is sufficient to detract markedly from the candor of communications to and from the President.

In brushing aside the fact that the archivists are empowered to review the papers, the Court concludes that the archivists will be discreet. *Ante,* at 451–452. But there is no foundation for the Court's assumption that there will be no leaks. Any reviews that the archivists have made of Presidential papers in the past have been done only after authorization by the President, and after the President has had an opportunity to cull the most sensitive documents. It strikes me as extremely naive, and I daresay that this view will be shared by a large number of potential confidants of future Presidents, to suppose that each and every one of the archivists who might participate in a similar screening by virtue of a future Act would remain completely silent with respect to those portions of the Presidential papers which are extremely newsworthy. The Solicitor General, supporting the constitutionality of the Act, candidly conceded as much in oral argument:

> "Question: . . . I now ask you a question that may sound frivolous, but do you think if a hundred people know anything of great interest in the City of Washington, it will remain a secret?
>
> "[Laughter.]
>
> "Mr. McCree: MR. JUSTICE POWELL, I have heard that if two people have heard it, it will not." Tr. of Oral Arg. 46.

It borders on the absurd for the Court to cite our recent decision in *Whalen* v. *Roe,* 429 U. S. 589 (1977), as a precedent for the proposition that Government officials will invariably

honor provisions in a law dedicated to the preservation of privacy. It is quite doubtful, at least to my mind, that columnists or investigative reporters will be avidly searching for what doctor prescribed what drug for what patient in the State of New York, which was the information required to be furnished in *Whalen* v. *Roe*. But with respect to the advice received by a President, or the instructions given by him, on highly sensitive matters of great historical significance, the case is quite the opposite. Hence, at the minimum, today's decision upholding the constitutionality of this Act, mandating review by archivists, will engender the expectation that future confidential communications to the President may be subject to leaks or public disclosure without his consent.

In addition to this review by archivists, Presidential papers may now be seized and shown to the public if they are of "general historical significance." The Court attempts to avoid this problem with the wishful expectation that the regulations regarding public access, when promulgated, will be narrowly drawn. However, this assumes that a Presidential adviser will speak candidly based upon this same wishful assumption that the regulations, when ultimately issued and interpreted, will protect his confidences. But the current Act is over two and one-half years old and no binding regulations have yet been promulgated. And it is anyone's guess as to how long it will take before such ambiguous terms as "historical significance" are definitively interpreted, and as to whether some future Administrator as yet unknown might issue a broader definition. Thus, the public access required by this Act will at the very least engender substantial uncertainty regarding whether future confidential communications will, in fact, remain confidential.

The critical factor in all of this is not that confidential material might be disclosed, since the President himself might choose to "go public" with it. The critical factor is that the determination as to whether to disclose is wrested by the

Act from the President. When one speaks in confidence to a President, he necessarily relies upon the President's discretion not to disclose the sensitive. The President similarly relies on the discretion of a subordinate when instructing him. Thus it is no answer to suggest, as does the Court, *ante,* at 450–451, that the expectation of confidentiality has always been limited because Presidential papers have in the past been turned over to Presidential libraries or otherwise subsequently disclosed. In those cases, ultimate reliance was upon the discretion of the President to cull the sensitive ones before disclosure. But when, as is the case under this Act, the decision whether to disclose no longer resides in the President, communication will inevitably be restrained.

The Court, as does MR. JUSTICE POWELL, seeks to diminish the impact of this Act on the Office of the President by virtue of the fact that neither President Ford nor President Carter supports appellant's claim. *Ante,* at 441, 502 n. 5. It is quite true that President Ford signed the Act into law, and that the Solicitor General, representing President Carter, supports its constitutionality. While we must give due regard to the fact that these Presidents have not opposed the Act, we must also give due regard to the unusual political forces that have contributed to making this situation "unique." *Ante,* at 494 (POWELL, J., concurring). MR. JUSTICE POWELL refers to the stance of the current Executive as "dispositive," *ante,* at 498, and the Court places great emphasis upon it. I think this analysis is mistaken.

The current occupant of the Presidency cannot by signing into law a bill passed by Congress waive the claim of a successor President that the Act violates the principle of separation of powers. We so held in *Myers* v. *United States,* 272 U. S. 52 (1926). And only last Term we unanimously held in *Buckley* v. *Valeo,* 424 U. S. 1 (1976), that persons with no connection with the Executive Branch of the Government may attack the constitutionality of a law signed by the President on the

ground that it invaded authority reserved for the Executive Branch under the principle of separation of powers. This principle, perhaps the most fundamental in our constitutional framework, may not be signed away by the temporary incumbent of the office which it was designed to protect.

MR. JUSTICE POWELL's view that the incumbent President must join the challenge of the ex-President places Presidential communications in limbo, since advisers, at the time of the communication, cannot know who the successor will be or what his stance will be regarding seizure by Congress of his predecessor's papers. Since the advisers cannot be sure that the President to whom they are communicating can protect their confidences, communication will be inhibited. MR. JUSTICE POWELL's view, requiring an ex-President to depend upon his successor, blinks at political and historical reality. The tripartite system of Government established by the Constitution has on more than one occasion bred political hostility not merely between Congress and a lameduck President, but between the latter and his successor. To substantiate this view one need only recall the relationship at the time of the transfer to the reins of power from John Adams to Thomas Jefferson, from James Buchanan to Abraham Lincoln, from Herbert Hoover to Franklin Roosevelt, and from Harry Truman to Dwight Eisenhower. Thus while the Court's decision is an invitation for a hostile Congress to legislate against an unpopular lameduck President, MR. JUSTICE POWELL's position places the ultimate disposition of a challenge to such legislation in the hands of what history has shown may be a hostile incoming President. I cannot believe that the Constitution countenances this result. One may ascribe no such motives to Congress and the successor Presidents in this case, without nevertheless harboring a fear that they may play a part in some succeeding case.

The shadow that today's decision casts upon the daily operation of the Office of the President during his entire

four-year term sharply differentiates it from our previous separation-of-powers decisions, which have dealt with much more specific and limited intrusions. These cases have focused upon unique aspects of the operation of a particular branch of Government, rather than upon an intrusion, such as the present one, that permeates the entire decisionmaking process of the Office of the President. For example, in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952) (*Steel Seizure Cases*), this Court held that the President could not by Executive Order seize steel mills in order to prevent a work stoppage when Congress had provided other methods for dealing with such an eventuality. In *Myers* v. *United States, supra,* the Court struck down an 1876 statute which had attempted to restrict the President's power to remove postmasters without congressional approval. In *Buckley* v. *Valeo, supra,* the Court struck down Congress' attempt to vest the power to appoint members of the Federal Election Commission in persons other than the President.

To say that these cases dealt with discrete instances of governmental action is by no means to disparage their importance in the development of our constitutional law. But it does contrast them quite sharply with the issue involved in the present case. To uphold the Presidential Recordings and Materials Preservation Act is not simply to sustain or invalidate a particular instance of the exercise of governmental power by Congress or by the President; it has the much more far-reaching effect of significantly hampering the President, during his entire term of office, in his ability to gather the necessary information to perform the countless discrete acts which are the prerogative of his office under Art. II of the Constitution.

C

It thus appears to me indisputable that this Act is a significant intrusion into the operations of the Presidency. I do not think that this severe dampening of free communi-

cation to and from the President may be discounted by the Court's adoption of a novel "balancing" test for determining whether it is constitutional.[7] I agree with the Court that the three branches of Government need not be airtight, *ante,* at 443, and that the separate branches are not intended to operate

---

[7] As a matter of original inquiry, it might plausibly be claimed that the concerns expressed by the Framers of the Constitution during their debates, and similar expressions found in the Federalist Papers, by no means require the conclusion that the Judicial Branch is the ultimate arbiter of whether one branch has transgressed upon powers constitutionally reserved to another. It could have been plausibly maintained that the Framers thought that the Constitution itself had armed each branch with sufficient political weapons to fend off intrusions by another which would violate the principle of separation of powers, and that therefore there was neither warrant nor necessity for judicial invalidation of such intrusion. But that is not the way the law has developed in this Court.

Marbury v. *Madison,* 1 Cranch 137 (1803), not only established the authority of this Court to hold an Act of Congress unconstitutional, but the particular constitutional question which it decided was essentially a "separation of powers" issue: whether Congress was empowered under the Constitution to expand the original jurisdiction conferred upon this Court by Art. III of the Constitution.

Any argument that *Marbury* is limited to cases involving the powers of the Judicial Branch and that the Court had no power to intervene in any dispute relating to separation of powers between the other two branches has been rejected in *Myers* v. *United States,* 272 U. S. 52 (1926); *Humphrey's Executor* v. *United States,* 295 U. S. 602 (1935); and *Buckley* v. *Valeo,* 424 U. S. 1 (1976). In so doing, these cases are entirely consistent with the following language from *United States* v. *Nixon,* 418 U. S. 683 (1974):

"In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* v. *Madison,* 1 Cranch 137 (1803), that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' *Id.,* at 177." *Id.,* at 703.

with absolute independence, *United States* v. *Nixon,* 418 U. S. 683, 707 (1974). But I find no support in the Constitution or in our cases for the Court's pronouncement that the operations of the Office of the President may be severely impeded by Congress simply because Congress had a good reason for doing so.

Surely if ever there were a case for "balancing," and giving weight to the asserted "national interest" to sustain governmental action, it was in the *Steel Seizure Cases, supra.* There the challenged Presidential Executive Order recited, without contradiction by its challengers, that "American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea"; that "the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials"; and that a work stoppage in the steel industry "would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." 343 U. S., at 590–591 (App. to opinion). Although the "legislative" actions by the President could have been quickly overridden by an Act of Congress, *id.,* at 677 (Vinson, C. J., dissenting), this Court struck down the Executive Order as violative of the separation-of-powers principle with nary a mention of the national interest to be fostered by what could have been characterized as a relatively minimal and temporary intrusion upon the role of Congress. The analysis was simple and straightforward: Congress had exclusive authority to legislate; the President's Executive Order was an exercise of legislative power that impinged upon that authority of Congress, and was therefore unconstitutional. *Id.,* at 588–589. See also *Buckley* v. *Valeo.*[8]

[8] For the reasons set forth by THE CHIEF JUSTICE, *ante,* at 512, it is

I think that not only the Executive Branch of the Federal Government, but the Legislative and Judicial Branches as well, will come to regret this day when the Court has upheld an Act of Congress that trenches so significantly on the functioning of the Office of the President. I dissent.

---

clear that the circumstances in *United States* v. *Nixon,* involving a narrow request for specified documents in connection with a criminal prosecution, provide no support for the Court's use of a balancing test in a case such as this where the seizure is a broad and undifferentiated intrusion into the daily operations of the Office of the President.

ZACCHINI *v.* SCRIPPS-HOWARD BROADCASTING CO.

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 76–577. Argued April 25, 1977—Decided June 28, 1977

Petitioner's 15-second "human cannonball" act, in which he is shot from a cannon into a net some 200 feet away, was, without his consent, videotaped in its entirety at a county fair in Ohio by a reporter for respondent broadcasting company and shown on a television news program later the same day. Petitioner then brought a damages action in state court against respondent, alleging an "unlawful appropriation" of his "professional property." The trial court's summary judgment for respondent was reversed by the Ohio Court of Appeals on the ground that the complaint stated a cause of action. The Ohio Supreme Court, while recognizing that petitioner had a cause of action under state law on his "right to the publicity value of his performance," nevertheless, relying on *Time, Inc.* v. *Hill,* 385 U. S. 374, rendered judgment for respondent on the ground that it is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose. *Held:*

1. It appears from the Ohio Supreme Court's opinion syllabus (which is to be looked to for the rule of law in the case), as clarified by the opinion itself, that the judgment below did not rest on an adequate and independent state ground but rested solely on federal grounds in that the court considered the source of respondent's privilege to be the First and Fourteenth Amendments, and therefore this Court has jurisdiction to decide the federal issue. Pp. 566–568.

2. The First and Fourteenth Amendments do not immunize the news media when they broadcast a performer's entire act without his consent, and the Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film or broadcast a prize fight or a baseball game, where the promoters or participants had other plans for publicizing the event. *Time, Inc.* v. *Hill, supra,* distinguished. Pp. 569–579.

(a) The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance, since (1) if the public can see the act free on television it will be less willing

to pay to see it at the fair, and (2) the broadcast goes to the heart of petitioner's ability to earn a living as an entertainer. Pp. 575–576.

(b) The protection of petitioner's right of publicity provides an economic incentive for him to make the investment required to produce a performance of interest to the public. Pp. 576–577.

(c) While entertainment, as well as news, enjoys First Amendment protection, and entertainment itself can be important news, neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. P. 578.

(d) Although the State may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so. Pp. 578–579.

47 Ohio St. 2d 224, 351 N. E. 2d 454, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 579. STEVENS, J., filed a dissenting opinion, *post,* p. 582.

John G. Lancione argued the cause and filed a brief for petitioner.

Ezra K. Bryan argued the cause for respondent. With him on the brief were *Don H. Pace* and *Lawrence V. Lindberg.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, Hugo Zacchini, is an entertainer. He performs a "human cannonball" act in which he is shot from a cannon into a net some 200 feet away. Each performance occupies some 15 seconds. In August and September 1972, petitioner was engaged to perform his act on a regular basis at the Geauga County Fair in Burton, Ohio. He performed in a fenced area, surrounded by grandstands, at the fair grounds. Members of the public attending the fair were not charged a separate admission fee to observe his act.

On August 30, a freelance reporter for Scripps-Howard Broadcasting Co., the operator of a television broadcasting station and respondent in this case, attended the fair. He

carried a small movie camera. Petitioner noticed the reporter and asked him not to film the performance. The reporter did not do so on that day; but on the instructions of the producer of respondent's daily newscast, he returned the following day and videotaped the entire act. This film clip, approximately 15 seconds in length, was shown on the 11 o'clock news program that night, together with favorable commentary.[1]

Petitioner then brought this action for damages, alleging that he is "engaged in the entertainment business," that the act he performs is one "invented by his father and . . . performed only by his family for the last fifty years," that respondent "showed and commercialized the film of his act without his consent," and that such conduct was an "unlawful appropriation of plaintiff's professional property." App. 4–5. Respondent answered and moved for summary judgment, which was granted by the trial court.

The Court of Appeals of Ohio reversed. The majority held that petitioner's complaint stated a cause of action for conversion and for infringement of a common-law copyright, and one judge concurred in the judgment on the ground that the complaint stated a cause of action for appropriation of petitioner's "right of publicity" in the film of his act. All three judges agreed that the First Amendment did not privilege the press to show the entire performance on a news program without compensating petitioner for any financial injury he could prove at trial.

---

[1] The script of the commentary accompanying the film clip read as follows:

"This . . . now . . . is the story of a *true spectator* sport . . . the sport of human cannonballing . . . in fact, the great *Zacchini* is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it. . . ." (Emphasis in original.) App. 12.

Like the concurring judge in the Court of Appeals, the Supreme Court of Ohio rested petitioner's cause of action under state law on his "right to publicity value of his performance." 47 Ohio St. 2d 224, 351 N. E. 2d 454, 455 (1976). The opinion syllabus, to which we are to look for the rule of law used to decide the case,[2] declared first that one may not use for his own benefit the name or likeness of another, whether or not the use or benefit is a commercial one, and second that respondent would be liable for the appropriation, over petitioner's objection and in the absence of license or privilege, of petitioner's right to the publicity value of his performance. *Ibid.* The court nevertheless gave judgment for respondent because, in the words of the syllabus:

> "A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual." *Ibid.*

We granted certiorari, 429 U. S. 1037 (1977), to consider an issue unresolved by this Court: whether the First and Fourteenth Amendments immunized respondent from damages for its alleged infringement of petitioner's state-law "right of publicity." Pet. for Cert. 2. Insofar as the Ohio Supreme Court held that the First and Fourteenth Amendments of the

---

[2] *Beck* v. *Ohio,* 379 U. S. 89, 93 n. 2 (1964); *Perkins* v. *Benguet Consolidated Mining Co.,* 342 U. S. 437, 441–443 (1952); *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 554 (1940). See *Cassidy* v. *Glossip,* 12 Ohio St. 2d 17, 231 N. E. 2d 64 (1967); *Williamson Heater Co.* v. *Radich,* 128 Ohio St. 124, 190 N. E. 403 (1934); *Thackery* v. *Helfrich,* 123 Ohio St. 334, 336, 175 N. E. 449, 450 (1931); *State* v. *Hauser,* 101 Ohio St. 404, 408, 131 N. E. 66, 67 (1920); 14 Ohio Jur. 2d, Courts § 247 (1955).

United States Constitution required judgment for respondent, we reverse the judgment of that court.

I

If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Loew's Inc.*, 355 U. S. 597 (1958), for "[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945). We are confident, however, that the judgment below did not rest on an adequate and independent state ground and that we have jurisdiction to decide the federal issue presented in this case.

There is no doubt that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law. It is also clear that respondent's claim of constitutional privilege was sustained. The source of this privilege was not identified in the syllabus. It is clear enough from the opinion of the Ohio Supreme Court, which we are permitted to consult for understanding of the syllabus, *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 441–443 (1952),[3] that in adjudi-

[3] In *Perkins* the issue was whether the Ohio courts could exercise personal jurisdiction over a foreign corporation. The syllabus of the Ohio Supreme Court declared that it did not have personal jurisdiction, but it gave no indication of whether the Ohio court's decision rested on state grounds or on the Fourteenth Amendment. The only opinion filed with the syllabus reasoned, however, that the Due Process Clause of the Fourteenth Amendment prohibited the Ohio courts from exercising personal jurisdiction in that case. While recognizing the existence of the Ohio syllabus rule, this Court felt obliged in these circumstances to reach the

cating the crucial question of whether respondent had a privilege to film and televise petitioner's performance, the court placed principal reliance on *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967), a case involving First Amendment limitations on state tort actions. It construed the principle of that case, along with that of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), to be that "the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private," and concluded, therefore, that the press is also "privileged when an individual seeks to publicly exploit his talents while keeping the benefits private." 47 Ohio St. 2d, at 234, 351 N. E. 2d, at 461. The privilege thus exists in cases "where appropriation of a right of publicity is claimed." The court's opinion also referred to Draft 21 of the relevant portion of Restatement (Second) of Torts (1975), which was understood to make room for reasonable press appropriations by limiting the reach of the right of privacy rather than by creating a privileged invasion. The court preferred the notion of privilege over the Restatement's formulation, however, reasoning that "since the gravamen of the issue in this case is not whether the degree of intrusion is reasonable, but whether *First Amendment principles* require that the

---

merits of the constitutional issue, holding that the Due Process Clause did not preclude the exercise of jurisdiction. "[F]or us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so." 342 U. S., at 443.

The Ohio courts do not suggest that the opinion is not relevant to a determination of the Ohio Supreme Court's holding.

"The syllabus is the language of the court. The opinion is more particularly the language of the judge preparing the same, and yet *so much of the opinion as is reasonably necessary to sustain the judgment must of necessity be concurred in by the court.*" *Hart* v. *Andrews,* 103 Ohio St. 218, 221, 132 N. E. 846, 847 (1921) (emphasis added).

See also *Williamson Heater Co., supra; State* v. *Hauser, supra.*

right of privacy give way to the public right to be informed of matters of public interest and concern, the concept of privilege seems the more useful and appropriate one." 47 Ohio St. 2d, at 234 n. 5, 351 N. E. 2d, at 461 n. 5. (Emphasis added.)

Had the Ohio court rested its decision on both state and federal grounds, either of which would have been dispositive, we would have had no jurisdiction. *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935); *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164 (1917). But the opinion, like the syllabus, did not mention the Ohio Constitution, citing instead this Court's First Amendment cases as controlling. It appears to us that the decision rested solely on federal grounds. That the Ohio court might have, but did not, invoke state law does not foreclose jurisdiction here. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 197 n. 1 (1944); *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98 (1938).

Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law. *Perkins* v. *Benguet Consolidated Mining Co., supra.* If the Supreme Court of Ohio "held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide . . . these suits according to its own local law." *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950).

II

The Ohio Supreme Court held that respondent is constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity, absent an intent to injure or to appropriate for some nonprivileged purpose. If under this standard respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case. But petitioner is not contending that his appearance at the fair and his performance could not be reported by the press as newsworthy items. His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy. This, he claimed, was an appropriation of his professional property. The Ohio Supreme Court agreed that petitioner had "a right of publicity" that gave him "personal control over commercial display and exploitation of his personality and the exercise of his talents." [4] This right of "exclusive control over the publicity given to his performances" was said to be such a "valuable part of the benefit which may be attained by his talents and efforts" that it was entitled to legal protection. It was

---

[4] The court relied on *Housh* v. *Peth*, 165 Ohio St. 35, 133 N. E. 2d 340, 341 (1956), the syllabus of which held:

"An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

The court also indicated that the applicable principles of Ohio law were those set out in Restatement (Second) § 652C of Torts (Tent. Draft No. 13, 1967), and the comments thereto, portions of which were stated in the footnotes of the opinion. Also, referring to the right as the "right of publicity," the court quoted approvingly from *Haelan Laboratories, Inc.* v. *Topps Chewing Gum, Inc.*, 202 F. 2d 866, 868 (CA2 1953).

also observed, or at least expressly assumed, that petitioner had not abandoned his rights by performing under the circumstances present at the Geauga County Fair Grounds.

The Ohio Supreme Court nevertheless held that the challenged invasion was privileged, saying that the press "must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press requires." 47 Ohio St. 2d, at 235, 351 N. E. 2d, at 461. Under this view, respondent was thus constitutionally free to film and display petitioner's entire act.[5]

The Ohio Supreme Court relied heavily on *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967), but that case does not mandate a media privilege to televise a performer's entire act without his consent. Involved in *Time, Inc.* v. *Hill* was a claim under the New York "Right of Privacy" statute [6] that Life Magazine, in

---

[5] The court's explication was as follows:

"The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here." 47 Ohio St. 2d, at 235, 351 N. E. 2d, at 461.

[6] Section 51 of the New York Civil Rights Law (McKinney 1976) provides an action for injunction and damages for invasion of the "right of privacy" granted by § 50:

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

the course of reviewing a new play, had connected the play with a long-past incident involving petitioner and his family and had falsely described their experience and conduct at that time. The complaint sought damages for humiliation and suffering flowing from these nondefamatory falsehoods that allegedly invaded Hill's privacy. The Court held, however, that the opening of a new play linked to an actual incident was a matter of public interest and that Hill could not recover without showing that the Life report was knowingly false or was published with reckless disregard for the truth—the same rigorous standard that had been applied in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964).

Time, Inc. v. *Hill,* which was hotly contested and decided by a divided Court, involved an entirely different tort from the "right of publicity" recognized by the Ohio Supreme Court. As the opinion reveals in *Time, Inc.* v. *Hill,* the Court was steeped in the literature of privacy law and was aware of the developing distinctions and nuances in this branch of the law. The Court, for example, cited W. Prosser, Law of Torts 831–832 (3d ed. 1964), and the same author's well-known article, Privacy, 48 Calif. L. Rev. 383 (1960), both of which divided privacy into four distinct branches.[7] The Court was aware that it was adjudicating a "false light" privacy case involving a matter of public interest, not a case involving "intrusion," 385 U. S., at 384–385, n. 9, "appropriation" of a

[7] "The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone.'" Prosser, Privacy, 48 Calif. L. Rev., at 389. Thus, according to Prosser, some courts had recognized a cause of action for "intrusion" upon the plaintiff's seclusion or solitude; public disclosure of "private facts" about the plaintiff's personal life; publicity that places the plaintiff in a "false light" in the public eye; and "appropriation" of the plaintiff's name or likeness for commercial purposes. One may be liable for "appropriation" if he "pirate[s] the plaintiff's identity for some advantage of his own." *Id.,* at 403.

name or likeness for the purposes of trade, *id.*, at 381, or "private details" about a non-newsworthy person or event, *id.*, at 383 n. 7. It is also abundantly clear that *Time, Inc.* v. *Hill* did not involve a performer, a person with a name having commercial value, or any claim to a "right of publicity." This discrete kind of "appropriation" case was plainly identified in the literature cited by the Court [8] and had been adjudicated in the reported cases.[9]

---

[8] See, for example, W. Prosser, Law of Torts 842 (3d ed. 1964); Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962, 986–991 (1964); Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law & Contemp. Prob. 326, 331 (1966).

[9] *E. g., Ettore* v. *Philco Television Broadcasting Corp.*, 229 F. 2d 481 (CA3), cert. denied, 351 U. S. 926 (1956); *Sharkey* v. *National Broadcasting Co.*, 93 F. Supp. 986 (SDNY 1950); *Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (WD Pa. 1938); *Twentieth Century Sporting Club, Inc.* v. *Transradio Press Service*, 165 Misc. 71, 300 N. Y. S. 159 (1937); *Hogan* v. *A. S. Barnes & Co.*, 114 U. S. P. Q. 314 (Pa. Ct. C. P. 1957); *Myers* v. *U. S. Camera Publishing Corp.*, 9 Misc. 2d 765, 167 N. Y. S. 2d 771 (1957). The cases prior to 1961 are helpfully reviewed in Gordon, Right of Property in Name, Likeness, Personality and History, 55 Nw. U. L. Rev. 553 (1960).

Ettore v. *Philco Television Broadcasting Corp., supra,* involved a challenge to television exhibition of a film made of a prize fight that had occurred some time ago. Judge Biggs, writing for the Court of Appeals, said:

"There are, speaking very generally, two polar types of cases. One arises when some accidental occurrence rends the veil of obscurity surrounding an average person and makes him, arguably, newsworthy. The other type involves the appropriation of the performance or production of a professional performer or entrepreneur. Between the two extremes are many gradations, most involving strictly commercial exploitation of some aspect of an individual's personality, such as his name or picture." 229 F. 2d, at 486.

". . . The fact is that, if a performer performs for hire, a curtailment, without consideration, of his right to control his performance is a wrong to him. Such a wrong vitally affects his livelihood, precisely as a trade

The differences between these two torts are important. First, the State's interests in providing a cause of action in each instance are different. "The interest protected" in permitting recovery for placing the plaintiff in a false light "is clearly that of reputation, with the same overtones of mental distress as in defamation." Prosser, *supra,* 48 Calif. L. Rev., at 400. By contrast, the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.[10] As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation. Second, the two torts differ in the degree to which they intrude on dissemination of information to the public. In "false light" cases the only way to protect the interests involved is to attempt to minimize publication of the damaging matter, while in "right of publicity" cases the only question is who gets to do the publishing. An entertainer such as petitioner usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication. Indeed, in the present case petitioner did not seek to enjoin the broadcast of his act; he simply

---

libel, for example, affects the earnings of a corporation. If the artistry of the performance be used as a criterion, every judge perforce must turn himself into a literary, theatrical or sports critic." *Id.,* at 490.

[10] The Ohio Supreme Court expressed the view "that plaintiff's claim is one for invasion of the right of privacy by appropriation, and should be considered as such." 47 Ohio St. 2d, at 226, 351 N. E. 2d, at 456. It should be noted, however, that the case before us is more limited than the broad category of lawsuits that may arise under the heading of "appropriation." Petitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.

sought compensation for the broadcast in the form of damages.

Nor does it appear that our later cases, such as *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974); and *Time, Inc.* v. *Firestone*, 424 U. S. 448 (1976), require or furnish substantial support for the Ohio court's privilege ruling. These cases, like *New York Times*, emphasize the protection extended to the press by the First Amendment in defamation cases, particularly when suit is brought by a public official or a public figure. None of them involve an alleged appropriation by the press of a right of publicity existing under state law.

Moreover, *Time, Inc.* v. *Hill*, *New York Times*, *Metromedia*, *Gertz*, and *Firestone* all involved the reporting of events; in none of them was there an attempt to broadcast or publish an entire act for which the performer ordinarily gets paid. It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act.[11] Wherever the line in particular situations is to be drawn between media reports that are protected and

[11] W. Prosser, Law of Torts 806–807 (4th ed. 1971), generalizes on the cases:

"The New York courts were faced very early with the obvious fact that newspapers and magazines, to say nothing of radio, television and motion pictures, are by no means philanthropic institutions, but are operated for profit. As against the contention that everything published by these agencies must necessarily be 'for purposes of trade,' they were compelled to hold that there must be some closer and more direct connection, beyond the mere fact that the newspaper itself is sold; and that the presence of advertising matter in adjacent columns, or even the duplication of a news item for the purpose of advertising the publication itself, does not make any difference. Any other conclusion would in all probability have been an unconstitutional interference with the freedom of the press. Accordingly, it has been held that the mere incidental mention of the plaintiff's name in a book or a motion picture is not an invasion of his privacy; nor

those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, Copyrights Act, 17 U. S. C. App. § 101 *et seq.* (1976 ed.); cf. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911); *Manners* v. *Morosco*, 252 U. S. 317 (1920), or to film and broadcast a prize fight, *Ettore* v. *Philco Television Broadcasting Corp.*, 229 F. 2d 481 (CA3), cert. denied, 351 U. S. 926 (1956); or a baseball game, *Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (WD Pa. 1938), where the promoters or the participants had other plans for publicizing the event. There are ample reasons for reaching this conclusion.

The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. As the Ohio court recognized, this act is the product of petitioner's own talents and energy, the end result of much time, effort, and expense. Much of its economic value lies in the "right of exclusive control over the publicity given to his performance"; if the public can see the act free on television, it will be less willing to pay to see it at the fair.[12] The

---

is the publication of a photograph or a newsreel in which he incidentally appears." (Footnotes omitted.)

Cf. Restatement (Second) of Torts § 652C, Comment *d* (Tent. Draft No. 22, 1976).

[12] It is possible, of course, that respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live. In these circumstances, petitioner would not be able to prove damages and thus would not recover. But petitioner has alleged that the broadcast injured him to the extent of $25,000, App. 5, and we think the State should be allowed to authorize compensation of this injury if proved.

effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. "The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law & Contemp. Prob. 326, 331 (1966). Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus, in this case, Ohio has recognized what may be the strongest case for a "right of publicity"—involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.

Of course, Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court. As the Court stated in *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954):

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

These laws perhaps regard the "reward to the owner [as] a secondary consideration," *United States* v. *Paramount Pictures,* 334 U. S. 131, 158 (1948), but they were "intended definitely to grant valuable, enforceable rights" in order to afford greater encouragement to the production of works of benefit to the public. *Washingtonian Publishing Co.* v. *Pearson,* 306 U. S. 30, 36 (1939). The Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer's incentive in order to encourage the production of this type of work. Cf. *Goldstein* v. *California,* 412 U. S. 546 (1973); *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U. S. 470 (1974).[13]

---

[13] *Goldstein* involved a California statute outlawing "record piracy"—the unauthorized duplication of recordings of performances by major musical artists. Petitioners there launched a multifaceted constitutional attack on the statute, but they did not argue that the statute violated the First Amendment. In rejecting this broad-based constitutional attack, the Court concluded:

"The California statutory scheme evidences a legislative policy to prohibit 'tape piracy' and 'record piracy,' conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes of property. *No restraint has been placed on the use of an idea or concept;* rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording.

. . . . . .

"Until and unless Congress takes further action with respect to recordings . . . , the California statute may be enforced against acts of piracy such as those which occurred in the present case." 412 U. S., at 571. (Emphasis added.)

We note that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that "no restraint [has been] placed on the use of an idea or concept." *United States* v. *Bodin,* 375 F. Supp. 1265, 1267 (WD Okla. 1974). See also *Walt Disney Productions* v. *Air Pirates,* 345 F. Supp. 108, 115–116 (ND Cal. 1972) (citing Nimmer, Does Copyright Abridge The First Amendment Guaran-

There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. *Time, Inc.* v. *Hill.* But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state-law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). Respondent knew that petitioner objected to televising his act but nevertheless displayed the entire film.

We conclude that although the State of Ohio may as a

---

tees of Free Speech and Press?, 17 UCLA L. Rev. 1180 (1970), who argues that copyright law does not abridge the First Amendment because it does not restrain the communication of ideas or concepts); *Robert Stigwood Group Ltd.* v. *O'Reilly*, 346 F. Supp. 376 (Conn. 1972) (also relying on Nimmer, *supra*). Of course, this case does not involve a claim that respondent would be prevented by petitioner's "right of publicity" from staging or filming its own "human cannonball" act.

In *Kewanee* this Court upheld the constitutionality of Ohio's trade-secret law, although again no First Amendment claim was presented. Citing *Goldstein*, the Court stated:

"Just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries. States may hold diverse viewpoints in protecting intellectual property relating to invention as they do in protecting the intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress . . . ." 416 U. S., at 479.

Although recognizing that the trade-secret law resulted in preventing the public from gaining certain information, the Court emphasized that the law had "a decidedly beneficial effect on society," *id.*, at 485, and that without it, "organized scientific and technological research could become fragmented, and society, as a whole, would suffer." *Id.*, at 486.

matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.

Reversed.

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

Disclaiming any attempt to do more than decide the narrow case before us, the Court reverses the decision of the Supreme Court of Ohio based on repeated incantation of a single formula: "a performer's entire act." The holding today is summed up in one sentence:

> "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." *Ante,* at 574–575.

I doubt that this formula provides a standard clear enough even for resolution of this case.[1] In any event, I am not persuaded that the Court's opinion is appropriately sensitive

---

[1] Although the record is not explicit, it is unlikely that the "act" commenced abruptly with the explosion that launched petitioner on his way, ending with the landing in the net a few seconds later. One may assume that the actual firing was preceded by some fanfare, possibly stretching over several minutes, to heighten the audience's anticipation: introduction of the performer, description of the uniqueness and danger, last-minute checking of the apparatus, and entry into the cannon, all accompanied by suitably ominous commentary from the master of ceremonies. If this is found to be the case on remand, then respondent could not be said to have appropriated the "entire act" in its 15-second newsclip—and the Court's opinion then would afford no guidance for resolution of the case. Moreover, in future cases involving different performances, similar difficulties in determining just what constitutes the "entire act" are inevitable.

to the First Amendment values at stake, and I therefore dissent.

Although the Court would draw no distinction, *ante,* at 575, I do not view respondent's action as comparable to unauthorized commercial broadcasts of sporting events, theatrical performances, and the like where the broadcaster keeps the profits. There is no suggestion here that respondent made any such use of the film. Instead, it simply reported on what petitioner concedes to be a newsworthy event, in a way hardly surprising for a television station—by means of film coverage. The report was part of an ordinary daily news program, consuming a total of 15 seconds. It is a routine example of the press' fulfilling the informing function so vital to our system.

The Court's holding that the station's ordinary news report may give rise to substantial liability [2] has disturbing implications, for the decision could lead to a degree of media self-censorship. Cf. *Smith* v. *California,* 361 U. S. 147, 150–154 (1959). Hereafter, whenever a television news editor is unsure whether certain film footage received from a camera crew might be held to portray an "entire act," [3] he may

[2] At some points the Court seems to acknowledge that the reason for recognizing a cause of action asserting a "right of publicity" is to prevent unjust enrichment. See, *e. g., ante,* at 576. But the remainder of the opinion inconsistently accepts a measure of damages based not on the defendant's enhanced profits but on harm to the plaintiff regardless of any gain to the defendant. See, *e. g., ante,* at 575 n. 12. Indeed, in this case there is no suggestion that respondent television station gained financially by showing petitioner's flight (although it no doubt received its normal advertising revenue for the news program—revenue it would have received no matter which news items appeared). Nevertheless, in the unlikely event that petitioner can prove that his income was somehow reduced as a result of the broadcast, respondent will apparently have to compensate him for the difference.

[3] Such doubts are especially likely to arise when the editor receives film footage of an event at a local fair, a circus, a sports competition of limited

decline coverage—even of clearly newsworthy events—or confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of news reportage that the First Amendment is meant to foster. See generally *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241, 257–258 (1974); *Time, Inc.* v. *Hill,* 385 U. S. 374, 389 (1967); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270–272, 279 (1964).

In my view the First Amendment commands a different analytical starting point from the one selected by the Court. Rather than begin with a quantitative analysis of the performer's behavior—is this or is this not his entire act?—we should direct initial attention to the actions of the news media: what use did the station make of the film footage? When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a "right of publicity" or "appropriation" suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.[4]

I emphasize that this is a "reappropriation" suit, rather than one of the other varieties of "right of privacy" tort suits identified by Dean Prosser in his classic article. Prosser, Privacy, 48 Calif. L. Rev. 383 (1960). In those other causes

---

duration (*e. g.,* the winning effort in a ski-jump competition), or a dramatic production made up of short skits, to offer only a few examples.

[4] This case requires no detailed specification of the standards for identifying a subterfuge, since there is no claim here that respondent's news use was anything but bona fide. Cf. 47 Ohio St. 2d 224, 351 N. E. 2d 454, 455 (the standards suggested by the Supreme Court of Ohio, quoted *ante,* at 565). I would point out, however, that selling time during a news broadcast to advertisers in the customary fashion does not make for "commercial exploitation" in the sense intended here. See W. Prosser, Law of Torts 806–807 (4th ed. 1971). Cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266 (1964).

of action the competing interests are considerably different. The plaintiff generally seeks to avoid any sort of public exposure, and the existence of constitutional privilege is therefore less likely to turn on whether the publication occurred in a news broadcast or in some other fashion. In a suit like the one before us, however, the plaintiff does not complain about the fact of exposure to the public, but rather about its timing or manner. He welcomes some publicity, but seeks to retain control over means and manner as a way to maximize for himself the monetary benefits that flow from such publication. But having made the matter public—having chosen, in essence, to make it newsworthy—he cannot, consistent with the First Amendment, complain of routine news reportage. Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339–348, 351–352 (1974) (clarifying the different liability standards appropriate in defamation suits, depending on whether or not the plaintiff is a public figure).

Since the film clip here was undeniably treated as news and since there is no claim that the use was subterfuge, respondent's actions were constitutionally privileged. I would affirm.

MR. JUSTICE STEVENS, dissenting.

The Ohio Supreme Court held that respondent's telecast of the "human cannonball" was a privileged invasion of petitioner's common-law "right of publicity" because respondent's actual intent was neither (a) to appropriate the benefit of the publicity for a private use, nor (b) to injure petitioner.*

*Paragraph 3 of the court's syllabus, 47 Ohio St. 2d 224, 351 N. E. 2d 454, 455, reads as follows:

"A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to

As I read the state court's explanation of the limits on the concept of privilege, they define the substantive reach of a common-law tort rather than anything I recognize as a limit on a federal constitutional right. The decision was unquestionably influenced by the Ohio court's proper sensitivity to First Amendment principles, and to this Court's cases construing the First Amendment; indeed, I must confess that the opinion can be read as resting entirely on federal constitutional grounds. Nevertheless, the basis of the state court's action is sufficiently doubtful that I would remand the case to that court for clarification of its holding before deciding the federal constitutional issue.

---

appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual."

In its opinion, the court described the "proper standard" in language which I read as defining the boundaries of a common-law tort:

"The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here." *Id.*, at 235, 351 N. E. 2d, at 461.

COKER *v.* GEORGIA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 75–5444. Argued March 28, 1977—Decided June 29, 1977

While serving various sentences for murder, rape, kidnaping, and aggravated assault, petitioner escaped from a Georgia prison and, in the course of committing an armed robbery and other offenses, raped an adult woman. He was convicted of rape, armed robbery, and the other offenses and sentenced to death on the rape charge, when the jury found two of the aggravating circumstances present for imposing such a sentence, *viz.*, that the rape was committed (1) by a person with prior capital-felony convictions and (2) in the course of committing another capital felony, armed robbery. The Georgia Supreme Court affirmed both the conviction and sentence. *Held:* The judgment upholding the death sentence is reversed and the case is remanded. Pp. 591–600; 600; 600-601; 601.

234 Ga. 555, 216 S. E. 2d 782, reversed and remanded.

MR. JUSTICE WHITE, joined by MR JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, concluded that the sentence of death for the crime of rape is grossly disproportionate and excessive punishment and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment. Pp. 591–600.

(a) The Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed, and a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. Pp. 591–592.

(b) That death is a disproportionate penalty for rape is strongly indicated by the objective evidence of present public judgment, as represented by the attitude of state legislatures and sentencing juries, concerning the acceptability of such a penalty, it appearing that Georgia is currently the only State authorizing the death sentence for rape of an adult woman, that it is authorized for rape in only two other States but only when the victim is a child, and that in the vast majority (9 out of 10) of rape convictions in Georgia since 1973, juries have not imposed the death sentence. Pp. 593–597.

(c) Although rape deserves serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not unjustifiably take human life. Pp. 597–598.

(d) The conclusion that the death sentence imposed on petitioner is disproportionate punishment for rape is not affected by the fact that the jury found the aggravating circumstances of prior capital-felony convictions and occurrence of the rape while committing armed robbery, a felony for which the death sentence is also authorized, since the prior convictions do not change the fact that the rape did not involve the taking of life, and since the jury did not deem the robbery itself deserving of the death penalty, even though accompanied by the aggravating circumstances of prior capital-felony convictions. Pp. 598–599.

(e) That under Georgia law a deliberate killer cannot be sentenced to death, absent aggravating circumstances, argues strongly against the notion that, with or without such circumstances, a rapist who does not take the life of his victim should be punished more severely than the deliberate killer. P. 600.

MR. JUSTICE BRENNAN concluded that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. P. 600.

MR. JUSTICE MARSHALL concluded that the death penalty is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Pp. 600–601.

MR. JUSTICE POWELL concluded that death is disproportionate punishment for the crime of raping an adult woman where, as here, the crime was not committed with excessive brutality and the victim did not sustain serious or lasting injury. P. 601.

WHITE, J., announced the Court's judgment and delivered an opinion, in which STEWART, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., *post,* p. 600, and MARSHALL, J., *post,* p. 600, filed statements concurring in the judgment. POWELL, J., filed an opinion concurring in the judgment in part and dissenting in part, *post,* p. 601. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post,* p. 604.

David E. Kendall argued the cause for petitioner. With him on the briefs were *E. Kontz Bennett, Jr., Jack Greenberg, James M. Nabrit III, Peggy C. Davis,* and *Anthony G. Amsterdam.*

B. Dean Grindle, Jr., Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, *Richard L. Chambers*, First Assistant Attorney General, *John C. Walden*, Senior Assistant Attorney General, *Harrison Kohler*, Assistant Attorney General, and *Dewey Hayes*.*

MR. JUSTICE WHITE announced the judgment of the Court and filed an opinion in which MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, joined.

Georgia Code Ann. § 26–2001 (1972) provides that "[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years." [1] Punishment is determined by a jury in a separate sentencing proceeding in which at least one of the statutory aggravating circumstances must be found before the death penalty may be imposed.[2] Petitioner Coker was convicted of rape and sentenced to death. Both the conviction and the sentence were affirmed by the Georgia Supreme Court. Coker was granted a writ of certiorari, 429 U. S. 815, limited to the single claim, rejected by the Georgia court, that the punishment of death for rape violates the Eighth Amendment, which proscribes "cruel and unusual punishments" and which must be observed by the States as well as the Federal Government. *Robinson* v. *California*, 370 U. S. 660 (1962).

**Ruth Bader Ginsburg, Melvin L. Wulf, Marjorie Mazen Smith*, and *Nancy Stearns* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

[1] The section defines rape as having "carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ."

[2] See n. 3, *infra*.

I

While serving various sentences for murder, rape, kidnaping, and aggravated assault, petitioner escaped from the Ware Correctional Institution near Waycross, Ga., on September 2, 1974. At approximately 11 o'clock that night, petitioner entered the house of Allen and Elnita Carver through an unlocked kitchen door. Threatening the couple with a "board," he tied up Mr. Carver in the bathroom, obtained a knife from the kitchen, and took Mr. Carver's money and the keys to the family car. Brandishing the knife and saying "you know what's going to happen to you if you try anything, don't you," Coker then raped Mrs. Carver. Soon thereafter, petitioner drove away in the Carver car, taking Mrs. Carver with him. Mr. Carver, freeing himself, notified the police; and not long thereafter petitioner was apprehended. Mrs. Carver was unharmed.

Petitioner was charged with escape, armed robbery, motor vehicle theft, kidnaping, and rape. Counsel was appointed to represent him. Having been found competent to stand trial, he was tried. The jury returned a verdict of guilty, rejecting his general plea of insanity. A sentencing hearing was then conducted in accordance with the procedures dealt with at length in *Gregg* v. *Georgia,* 428 U. S. 153 (1976), where this Court sustained the death penalty for murder when imposed pursuant to the statutory procedures.[3] The jury was

---

[3] Ga. Code § 26–3102 (1977):

"*Capital offenses; jury verdict and sentence*

"Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless

instructed that it could consider as aggravating circumstances whether the rape had been committed by a person with a prior record of conviction for a capital felony and whether the rape

---

the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code § 27–2302 (1977):

"Recommendation to mercy

"In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge."

Ga. Code § 27–2534.1 (1977):

"Mitigating and aggravating circumstances; death penalty

"(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or

had been committed in the course of committing another capital felony, namely, the armed robbery of Allen Carver. The court also instructed, pursuant to statute, that even if

---

another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27–2534.1 (b) is so found, the death penalty shall not be imposed."

Ga. Code § 27–2537 (1977):

"*Review of death sentences*

"(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a

aggravating circumstances were present, the death penalty need not be imposed if the jury found they were outweighed by mitigating circumstances, that is, circumstances not constituting justification or excuse for the offense in question,

---

notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27–2534.1 (b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"(1) Affirm the sentence of death; or

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it

"but which, in fairness and mercy, may be considered as extenuating or reducing the degree" of moral culpability or punishment. App. 300. The jury's verdict on the rape count was death by electrocution. Both aggravating circumstances on which the court instructed were found to be present by the jury.

II

Furman v. *Georgia,* 408 U. S. 238 (1972), and the Court's decisions last Term in *Gregg* v. *Georgia,* 428 U. S. 153 (1976); *Proffitt* v. *Florida,* 428 U. S. 242 (1976); *Jurek* v. *Texas,* 428 U. S. 262 (1976); *Woodson* v. *North Carolina,* 428 U. S. 280 (1976); and *Roberts* v. *Louisiana,* 428 U. S. 325 (1976), make unnecessary the recanvassing of certain critical aspects of the controversy about the constitutionality of capital punishment. It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed. It is also established that imposing capital punishment, at least for murder, in accordance with the procedures provided under the Georgia statutes saves the sentence from the infirmities which led the Court to invalidate the prior Georgia capital punishment statute in *Furman* v. *Georgia, supra.*

In sustaining the imposition of the death penalty in *Gregg,*

---

desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

however, the Court firmly embraced the holdings and dicta from prior cases, *Furman* v. *Georgia, supra; Robinson* v. *California,* 370 U. S. 660 (1962); *Trop* v. *Dulles,* 356 U. S. 86 (1958); and *Weems* v. *United States,* 217 U. S. 349 (1910), to the effect that the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Under *Gregg,* a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted. In *Gregg,* after giving due regard to such sources, the Court's judgment was that the death penalty for deliberate murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. But the Court reserved the question of the constitutionality of the death penalty when imposed for other crimes. 428 U. S., at 187 n. 35.

III

That question, with respect to rape of an adult woman, is now before us. We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.[4]

[4] Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth

A

As advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman. At no time in the last 50 years have a majority of the States authorized death as a punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female.[5] By 1971 just prior to the decision in *Furman* v. *Georgia,* that number had declined, but not substantially, to 16 States plus the Federal Government.[6] *Furman* then invalidated most of the capital punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws.

With their death penalty statutes for the most part invalidated, the States were faced with the choice of enacting modified capital punishment laws in an attempt to satisfy the requirements of *Furman* or of being satisfied with life imprisonment as the ultimate punishment for *any* offense. Thirty-

---

Amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so. We observe that in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system.

[5] See Bye, Recent History and Present Status of Capital Punishment in the United States, 17 J. Crim. L. & C. 234, 241–242 (1926).

[6] Ala. Code, Tit. 14, § 395 (1958); Ark. Stat. Ann. § 41–3403 (1964); Fla. Stat. Ann. § 794.01 (1965); Ga. Code § 26–2001 (1977); Ky. Rev. Stat. Ann. §§ 435.080–435.090 (1962); La. Rev. Stat. Ann. § 14:42 (1950); Md. Ann. Code, Art. 27, § 461 (1957); Miss. Code Ann. § 2358 (1957); Mo. Rev. Stat. § 559.260 (1969); Nev. Rev. Stat. § 200.360 (1963) (rape with substantial bodily harm); N. C. Gen. Stat. § 14–21 (1969); Okla. Stat. Ann., Tit. 21, § 1115 (1958); S. C. Code Ann. §§ 16–72, 16–80 (1962); Tenn. Code Ann. § 39–3702 (1955); Tex. Penal Code § 1189 (1961); Va. Code Ann. § 18.1–44 (1960); 18 U. S. C. § 2031.

five States immediately reinstituted the death penalty for at least limited kinds of crime. *Gregg* v. *Georgia,* 428 U. S., at 179 n. 23. This public judgment as to the acceptability of capital punishment, evidenced by the immediate, post-*Furman* legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in *Gregg* v. *Georgia, supra,* at 179–182.

But if the "most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman,*" *Gregg* v. *Georgia, supra,* at 179–180, it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In reviving death penalty laws to satisfy *Furman*'s mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes—Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* and *Roberts.* When Louisiana and North Carolina, responding to those decisions, again revised their capital punishment laws, they re-enacted the death penalty for murder but not for rape; none of the seven other legislatures that to our knowledge have amended or replaced their death penalty statutes since July 2, 1976, including four States (in addition to Louisiana and North Carolina) that had authorized the death sentence for rape prior to 1972 and had reacted to *Furman* with mandatory statutes, included rape among the crimes for which death was an authorized punishment.[7]

[7] 1976 Okla. Sess. Laws, c. 1, p. 627; 1976 La. Acts, Nos. 657, 694; 1976 Ky. Acts, c. 15 (Ex. Sess.); 1977 Wyo. Sess. Laws, c. 122. Recent legislative action has taken place in North Carolina, Virginia, Maryland, California, and New Jersey. The legislation has been signed into law in

Georgia argues that 11 of the 16 States that authorized death for rape in 1972 attempted to comply with *Furman* by enacting arguably mandatory death penalty legislation and that it is very likely that, aside from Louisiana and North Carolina, these States simply chose to eliminate rape as a capital offense rather than to *require* death for *each* and *every* instance of rape.[8] The argument is not without force; but 4 of the 16 States did not take the mandatory course and also did *not* continue rape of an adult woman as a capital offense. Further, as we have indicated, the legislatures of 6 of the 11 arguably mandatory States have revised their death penalty laws since *Woodson* and *Roberts* without enacting a new death penalty for rape. And this is to say nothing of 19 other States that enacted nonmandatory, post-*Furman* statutes and chose not to sentence rapists to death.

It should be noted that Florida, Mississippi, and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult.[9] The Tennessee statute has since been invalidated because the death sentence was mandatory. *Collins* v. *State*, 550 S. W. 2d 643 (Tenn. 1977). The upshot is that Georgia is the sole jurisdic-

---

North Carolina and Virginia, N. C. Sess. Laws (May 19, 1977); 1977 Va. Acts, c. 492 (Mar. 29, 1977), and has been vetoed in Maryland and California, Washington Post, May 27, 1977, p. A1, col. 1; N. Y. Times, May 28, 1977, p. 8, col. 6. The Governor of New Jersey apparently has not yet acted on the legislation in that State.

[8] The legislation that respondent places in this category is as follows: Ky. Rev. Stat. § 507.020 (1975); La. Rev. Stat. Ann. § 14:30 (1974); Md. Code Ann., Art. 27, § 413 (b) (Supp. 1976); Miss. Code Ann. §§ 97–3–19, 97–3–21, 97–25–55, 99–17–20 (Supp. 1975); Mo. Rev. Stat. §§ 559.005, 559.009 (Supp. 1975); Nev. Rev. Stat. § 200.030 (1975); N. C. Gen. Stat. §§ 14–17, 14–21 (Supp. 1975); Okla. Stat. Ann., Tit. 21, §§ 701.1–701.3 (Supp. 1975); S. C. Code Ann. § 16–52 (Supp. 1975); Tenn. Code Ann. §§ 39–2402, 39–2406, 39–3702 (1975); Va. Code Ann. §§ 18.2–10, 18.2–31 (1975). Brief for Respondent 19 n. 38.

[9] Fla. Stat. Ann. § 794.011 (2) (1976); Miss. Code Ann. § 97–3–65 (Supp. 1976); Tenn. Code Ann. § 39–3702 (1974).

tion in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.

The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.[10]

B

It was also observed in *Gregg* that "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," 428 U. S., at 181, and that it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried. Of course, the jury's judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed. As far as execution for rape is concerned, this is now true only in Georgia and in Florida; and in the latter State, capital punishment is authorized only for the rape of children.

According to the factual submissions in this Court, out of all rape convictions in Georgia since 1973—and that total number has not been tendered—63 cases had been reviewed by the Georgia Supreme Court as of the time of oral argument; and of these, 6 involved a death sentence, 1 of which was set aside, leaving 5 convicted rapists now under sentence

---

[10] In *Trop* v. *Dulles*, 356 U. S. 86, 102 (1958), the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue. United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968).

of death in the State of Georgia. Georgia juries have thus sentenced rapists to death six times since 1973. This obviously is not a negligible number; and the State argues that as a practical matter juries simply reserve the extreme sanction for extreme cases of rape and that recent experience surely does not prove that jurors consider the death penalty to be a disproportionate punishment for every conceivable instance of rape, no matter how aggravated. Nevertheless, it is true that in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence.

IV

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." [11] It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accom-

[11] U. S. Dept. of Justice, Law Enforcement Assistance Administration Report, Rape and Its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies 1 (1975), quoting Bard & Ellison, Crisis Intervention and Investigation of Forcible Rape, The Police Chief (May 1974), reproduced as Appendix I–B to the Report.

panied by physical injury to the female and can also inflict mental and psychological damage.[12] Because it undermines the community's sense of security, there is public injury as well.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person.[13] The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg* v. *Georgia,* 428 U. S., at 187, is an excessive penalty for the rapist who, as such, does not take human life.

This does not end the matter; for under Georgia law, death may not be imposed for any capital offense, including rape, unless the jury or judge finds one of the statutory aggravating circumstances and then elects to impose that sentence. Ga. Code § 26–3102 (1977); *Gregg* v. *Georgia, supra,* at 165–166. For the rapist to be executed in Georgia, it must therefore be found not only that he committed rape but also that one or more of the following aggravating circumstances were present: (1) that the rape was committed by a person with a prior record of conviction for a capital felony; (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or (3) the rape "was outrageously or wantonly vile, horrible or

---

[12] See Note, The Victim In a Forcible Rape Case; A Feminist View , 11 Am. Crim. L. Rev. 335, 338 (1973); Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Calif. L. Rev. 919, 922–923 (1973).

[13] See n. 1, *supra,* for the Georgia definition of rape.

inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim." [14] Here, the first two of these aggravating circumstances were alleged and found by the jury.

Neither of these circumstances, nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape. Coker had prior convictions for capital felonies—rape, murder, and kidnaping—but these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.

It is also true that the present rape occurred while Coker was committing armed robbery, a felony for which the Georgia statutes authorize the death penalty.[15] But Coker was tried for the robbery offense as well as for rape and received a separate life sentence for this crime; the jury did not deem the robbery itself deserving of the death penalty, even though accompanied by the aggravating circumstance, which was stipulated, that Coker had been convicted of a prior capital crime.[16]

---

[14] There are other aggravating circumstances provided in the statute, see n. 3, *supra,* but they are not applicable to rape.

[15] In *Gregg* v. *Georgia,* the Georgia Supreme Court refused to sustain a death sentence for armed robbery because, for one reason, death had been so seldom imposed for this crime in other cases that such a sentence was excessive and could not be sustained under the statute. As it did in this case, however, the Georgia Supreme Court apparently continues to recognize armed robbery as a capital offense for the purpose of applying the aggravating-circumstances provisions of the Georgia Code.

[16] Where the accompanying capital crime is murder, it is most likely that the defendant would be tried for murder, rather than rape; and it is perhaps academic to deal with the death sentence for rape in such a circumstance. It is likewise unnecessary to consider the rape-felony murder—a rape accompanied by the death of the victim which was unlawfully but nonmaliciously caused by the defendant.

Where the third aggravating circumstance mentioned in the text is

We note finally that in Georgia a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. He also commits that crime when in the commission of a felony he causes the death of another human being, irrespective of malice. But even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim. The judgment of the Georgia Supreme Court upholding the death sentence is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE BRENNAN, concurring in the judgment.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976) (dissenting opinion), I concur in the judgment of the Court setting aside the death sentence imposed under the Georgia rape statute.

MR. JUSTICE MARSHALL, concurring in the judgment.

In *Gregg* v. *Georgia,* 428 U. S. 153, 231 (1976) (dissenting opinion), I stated: "In *Furman* v. *Georgia,* 408 U. S. 238, 314 (1972) (concurring opinion), I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view."

---

present—that the rape is particularly vile or involves torture or aggravated battery—it would seem that the defendant could very likely be convicted, tried, and appropriately punished for this additional conduct.

I then explained in some detail my reasons for reaffirming my position. I continue to adhere to those views in concurring in the judgment of the Court in this case.

MR. JUSTICE POWELL, concurring in the judgment in part and dissenting in part.

I concur in the judgment of the Court on the facts of this case, and also in the plurality's reasoning supporting the view that ordinarily death is disproportionate punishment for the crime of raping an adult woman. Although rape invariably is a reprehensible crime, there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury. The plurality, however, does not limit its holding to the case before us or to similar cases. Rather, in an opinion that ranges well beyond what is necessary, it holds that capital punishment *always*—regardless of the circumstances—is a disproportionate penalty for the crime of rape.

The Georgia statute, sustained in *Gregg* v. *Georgia,* 428 U. S. 153 (1976), specifies aggravating circumstances that may be considered by the jury when appropriate. With respect to the crime of rape, only three such circumstances are specified: (i) the offense was committed by a person with a prior record of conviction for a capital felony; (ii) the offense was committed while the offender was engaged in another capital felony or in aggravated battery; and (iii) the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Ante,* at 588–589, n. 3. Only the third circumstance describes in general the offense of aggravated rape, often identified as a separate and more heinous offense than rape. See, *e. g.,* ALI, Model Penal Code § 207.4, Comment, p. 246 (Tent. Draft No. 4, 1955); ALI, Model Penal Code § 213.1 (Prop. Off. Draft, 1962); Nev. Rev. Stat. § 200.363 (1975). That third circumstance was not sub-

mitted to the jury in this case, as the evidence would not have supported such a finding. It is therefore quite unnecessary for the plurality to write in terms so sweeping as to foreclose each of the 50 state legislatures from creating a narrowly defined substantive crime of aggravated rape punishable by death.[1]

In accord with our decisions last Term, the plurality opinion states:

> "[T]he death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amend-

[1] It is not this Court's function to formulate the relevant criteria that might distinguish aggravated rape from the more usual case, but perhaps a workable test would embrace the factors identified by Georgia: the cruelty or viciousness of the offender, the circumstances and manner in which the offense was committed, and the consequences suffered by the victim. See also *Ralph* v. *Warden*, 438 F. 2d 786 (CA4 1970), cert. denied, 408 U. S. 942 (1972); 438 F. 2d, at 794 (opinion of Haynsworth, C. J.). The legislative task of defining, with appropriate specificity, the elements of the offense of aggravated rape would not be easy, see *Furman* v. *Georgia*, 408 U. S. 238, 460 (1972) (POWELL, J., dissenting), but certainly this Court should not assume that the task is impossible.

The dissent of THE CHIEF JUSTICE, relying on selected excerpts from my opinion in *Furman*, seeks to buttress the view that for sentencing purposes meaningful distinctions cannot be drawn between rapes regardless of the circumstances and effect upon the victim. *Post*, at 607–608, n. 2. The dissent emphasizes the difficulties of proof. But the jury system is designed and operates successfully to resolve precisely this type of factual issue. The law of negligence, for example, is replete with issues requiring the jury to determine degrees of culpability and the extent or permanency of physical and psychological injury.

I am complimented by the frequency with which THE CHIEF JUSTICE, in his dissent, cites and quotes from my opinion in *Furman*. That opinion, however, did not prevail, and—as with most of the writing in *Furman*—it now must be read in light of *Gregg* and *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), which have established the controlling general principles. But contrary to implications in THE CHIEF JUSTICE's dissent, my opinion in *Furman* did emphasize that the proportionality test as to rape should be applied on a case-by-case basis, noting that in some cases the death sentence would be "grossly excessive." 408 U. S., at 461. I remain

ment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed." *Ante,* at 591.

Thus, capital punishment may be imposed on those sentenced in accordance with the procedures identified in *Gregg* and *Woodson* v. *North Carolina,* 428 U. S. 280 (1976), at least when the offender is convicted of murder, the crime involved in all five of last Term's capital cases.

Today, in a case that does not require such an expansive pronouncement, the plurality draws a bright line between murder and all rapes—regardless of the degree of brutality of the rape or the effect upon the victim. I dissent because I am not persuaded that such a bright line is appropriate. As noted in *Snider* v. *Peyton,* 356 F. 2d 626, 627 (CA4 1966), "[t]here is extreme variation in the degree of culpability of rapists." The deliberate viciousness of the rapist may be greater than that of the murderer. Rape is never an act committed accidentally. Rarely can it be said to be unpremeditated. There also is wide variation in the effect on the victim. The plurality opinion says that "[l]ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Ante,* at 598. But there is indeed "extreme variation" in the crime of rape. Some victims are so grievously injured physically or psychologically that life *is* beyond repair.

Thus, it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape. Final resolution of the question must await careful inquiry into objective indicators of society's "evolving standards of decency," particularly legislative enactments and the responses of juries in capital cases.[2] See *Gregg* v. *Georgia, supra,* at 173–182

---

in disagreement with the simplistic all-or-nothing views of the plurality opinion and the dissenting opinion of THE CHIEF JUSTICE.

[2] These objective indicators are highly relevant, but the ultimate deci-

(joint opinion of STEWART, POWELL, and STEVENS, JJ.); *Woodson* v. *North Carolina, supra,* at 294–295 (plurality opinion); *Furman* v. *Georgia,* 408 U. S. 238, 436–443 (1972) (POWELL, J., dissenting). The plurality properly examines these indicia, which do support the conclusion that society finds the death penalty unacceptable for the crime of rape in the absence of excessive brutality or severe injury. But it has not been shown that society finds the penalty disproportionate for all rapes. In a proper case a more discriminating inquiry than the plurality undertakes well might discover that both juries and legislatures have reserved the ultimate penalty for the case of an outrageous rape resulting in serious, lasting harm to the victim. I would not prejudge the issue. To this extent, I respectfully dissent.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

In a case such as this, confusion often arises as to the Court's proper role in reaching a decision. Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a State to do under its reserved powers. In striking down the death penalty imposed upon the petitioner in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature. I accept that the Eighth Amendment's concept of disproportionality bars the death penalty for minor crimes. But rape is not a minor crime; hence the Cruel and Unusual Punishments Clause does not give the Members of this Court license to engraft their conceptions of proper public policy onto the considered legislative judgments of the States. Since I cannot agree that Georgia lacked the consti-

---

sion as to the appropriateness of the death penalty under the Eighth Amendment—as the plurality notes, *ante,* at 597—must be decided on the basis of our own judgment in light of the precedents of this Court.

tutional power to impose the penalty of death for rape, I dissent from the Court's judgment.

(1)

On December 5, 1971, the petitioner, Ehrlich Anthony Coker, raped and then stabbed to death a young woman. Less than eight months later Coker kidnaped and raped a second young woman. After twice raping this 16-year-old victim, he stripped her, severely beat her with a club, and dragged her into a wooded area where he left her for dead. He was apprehended and pleaded guilty to offenses stemming from these incidents. He was sentenced by three separate courts to three life terms, two 20-year terms, and one 8-year term of imprisonment.[1] Each judgment specified that the sentences it imposed were to run consecutively rather than concurrently. Approximately 1½ years later, on September 2, 1974, petitioner escaped from the state prison where he was serving these sentences. He promptly raped another 16-year-old woman in the presence of her husband, abducted her from her home, and threatened her with death and serious bodily harm. It is this crime for which the sentence now under review was imposed.

The Court today holds that the State of Georgia may not impose the death penalty on Coker. In so doing, it prevents the State from imposing any effective punishment upon Coker for his latest rape. The Court's holding, moreover, bars Georgia from guaranteeing its citizens that they

[1] On March 12, 1973, the Superior Court of Richmond County, Ga., sentenced Coker to 20 years' imprisonment for the kidnaping of petitioner's second victim, and to life imprisonment for one act of rape upon her. On May 28, 1973, the Superior Court of Taliaferro County, Ga., sentenced Coker to eight years' imprisonment for aggravated assault upon the same victim, and to life imprisonment for the second rape upon her. On April 6, 1973, the Superior Court of Clayton County, Ga., sentenced Coker to 20 years' imprisonment for the rape of petitioner's first victim, and to life imprisonment for her murder. App. 307–312.

will suffer no further attacks by this habitual rapist. In fact, given the lengthy sentences Coker must serve for the crimes he has already committed, the Court's holding assures that petitioner—as well as others in his position—will henceforth feel no compunction whatsoever about committing further rapes as frequently as he may be able to escape from confinement and indeed even within the walls of the prison itself. To what extent we have left States "elbow-room" to protect innocent persons from depraved human beings like Coker remains in doubt.

(2)

My first disagreement with the Court's holding is its unnecessary breadth. The narrow issue here presented is whether the State of Georgia may constitutionally execute this petitioner for the particular rape which he has committed, in light of all the facts and circumstances shown by this record. The plurality opinion goes to great lengths to consider societal mores and attitudes toward the generic crime of rape and the punishment for it; however, the opinion gives little attention to the special circumstances which bear directly on whether imposition of the death penalty is an appropriate societal response to Coker's criminal acts: (a) On account of his prior offenses, Coker is already serving such lengthy prison sentences that imposition of additional periods of imprisonment would have no incremental punitive effect; (b) by his life pattern Coker has shown that he presents a particular danger to the safety, welfare, and chastity of women, and on his record the likelihood is therefore great that he will repeat his crime at the first opportunity; (c) petitioner escaped from prison, only a year and a half after he commenced serving his latest sentences; he has nothing to lose by further escape attempts; and (d) should he again succeed in escaping from prison, it is reasonably predictable that he will repeat his pattern of attacks on

women—and with impunity since the threat of added prison sentences will be no deterrent.

Unlike the plurality, I would narrow the inquiry in this case to the question actually presented: Does the Eighth Amendment's ban against cruel and unusual punishment prohibit the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime and who has not hesitated to escape confinement at the first available opportunity? Whatever one's view may be as to the State's constitutional power to impose the death penalty upon a rapist who stands before a court convicted for the first time, this case reveals a chronic rapist whose continuing danger to the community is abundantly clear.

MR. JUSTICE POWELL would hold the death sentence inappropriate in *this* case because "there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury." *Ante*, at 601.[2] Apart from the reality that rape is inherently one

[2] The position today adopted by Mr. JUSTICE POWELL constitutes a disquieting shift from the view he embraced several Terms ago in *Furman* v. *Georgia*, 408 U. S. 238, 460–461 (1972) (dissenting opinion), where he stated:

"While I reject each of [petitioners'] attempts to establish specific categories of cases in which the death penalty may be deemed excessive, I view them as groping toward what is for me the appropriate application of the Eighth Amendment. While in my view *the disproportionality test may not be used either to strike down the death penalty for rape altogether or to install the Court as a tribunal for sentencing review, that test may find its application in the peculiar circumstances of specific cases. Its utilization should be limited to the rare case in which the death penalty is rendered for a crime technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category.*" (Emphasis added.)

While MR. JUSTICE POWELL purports to dissent from the broadest sweep of the Court's holding, I cannot see that his view differs materially from that of the plurality. He suggests two situations where it might be proper to execute rapists: (1) where the "offense [is] committed

of the most egregiously brutal acts one human being can inflict upon another, there is nothing in the Eighth Amendment that so narrowly limits the factors which may be considered by a state legislature in determining whether a particular punishment is grossly excessive. Surely recidivism, especially the repeated commission of heinous crimes, is a factor which may properly be weighed as an aggravating circumstance, permitting the imposition of a punishment more severe than for one isolated offense. For example, as a matter of national policy, Congress has expressed its will that a person who has committed two felonies will suffer enhanced punishment for a third one, 18 U. S. C. § 3575 (e)(1); Congress has also declared that a second conviction for assault on a mail carrier may be punished more seriously than a first such conviction, 18 U. S. C. § 2114. Many States

---

with excessive brutality"; and (2) where "the victim sustained serious or lasting injury." The second part of this test was rejected by MR. JUSTICE POWELL himself in *Furman*, and with good reason: "[T]he emotional impact [upon the rape victim] may be impossible to gauge at any particular point in time. The extent and duration of psychological trauma may not be known or ascertainable prior to the date of trial." *Id.*, at 460. Can any Member of the Court state with confidence that a 16-year-old woman who is raped in the presence of her husband three weeks after giving birth to a baby "sustained [no] serious or lasting injury"? This bifurcation of rape into categories of harmful and nonharmful eludes my comprehension.

The difficulty with the first part of MR. JUSTICE POWELL's test is that rape is inherently an aggravated offense; in MR. JUSTICE POWELL's own words, "the threat of both [physical and psychological] injury is always present." *Id.*, at 459. Therefore the "excessive brutality" requirement must refer to something more, I assume, than the force normally associated with physically coercing or overpowering the will of another. Rather, what must be meant is that the rapist has engaged in torture or has committeed an aggravated battery upon the victim. See *ante*, at 601–602, and n. 1. However, torture and aggravated battery are offenses separate from rape, and ordinarily are punished separately. The clear negative inference of MR. JUSTICE POWELL's analysis therefore appears to be that where rape alone is committed, *i. e.*, rape unaccompanied by any other criminal conduct, the death penalty may never be imposed.

provide an increased penalty for habitual criminality. See, *e. g.,* Wis. Stat. Ann. § 939.62 (1958); see also Annot., 58 A. L. R. 20 (1929); 82 A. L. R. 345 (1933); 79 A. L. R. 2d 826 (1961).[3] As a factual matter, the plurality opinion is correct in stating that Coker's "prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life," *ante,* at 599; however, it cannot be disputed that the existence of these prior convictions makes Coker a substantially more serious menace to society than a first-time offender:[4]

> "There is a widely held view that those who present the strongest case for severe measures of incapacitation are not murderers as a group (their offenses often are situational) *but rather those who have repeatedly engaged in violent, combative behavior.* A well-demonstrated

---

[3] This Court has consistently upheld the constitutional validity of such punishment-enhancing statutes. See, *e. g., Spencer* v. *Texas,* 385 U. S. 554, 559–560 (1967):

"No claim is made here that recidivist statutes are . . . unconstitutional, nor could there be under our cases. Such statutes and other enhanced-sentence laws, and procedures designed to implement their underlying policies, have been enacted in all the States, and by the Federal Government as well. . . . Such statutes . . . have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, *cruel and unusual punishment,* due process, equal protection, and privileges and immunities." (Footnote and citations omitted; emphasis added.)

Accord, *Oyler* v. *Boles,* 368 U. S. 448, 451 (1962).

[4] This special danger is demonstrated by the very record in this case. After tying and gagging the victim's husband, and raping the victim, petitioner sought to make his getaway in their automobile. Leaving the victim's husband tied and gagged in his bathroom, Coker took the victim with him. As he started to leave, he brandished the kitchen knife he was carrying and warned the husband that "if he would get pulled over or the police was following him in any way that he would kill—he would kill my wife. *He said he didn't have nothing to lose—that he was in prison for the rest of his life, anyway . . .*" Testimony of the victim's husband, App. 121 (emphasis added).

propensity for life-endangering behavior is thought to provide a more solid basis for infliction of the most severe measures of incapacitation than does the fortuity of a single homicidal incident." Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1080 (1964). (Emphasis added.)

In my view, the Eighth Amendment does not prevent the State from taking an individual's "well-demonstrated propensity for life-endangering behavior" into account in devising punitive measures which will prevent inflicting further harm upon innocent victims. See *Gregg* v. *Georgia,* 428 U. S. 153, 183 n. 28 (1976). Only one year ago MR. JUSTICE WHITE succinctly noted: "[D]eath finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not." *Roberts* v. *Louisiana,* 428 U. S. 325, 354 (1976) (dissenting opinion); see also *Furman* v. *Georgia,* 408 U. S., at 311 (WHITE, J., concurring).

In sum, once the Court has held that "the punishment of death does not invariably violate the Constitution," *Gregg* v. *Georgia, supra,* at 169, it seriously impinges upon the State's legislative judgment to hold that it may not impose such sentence upon an individual who has shown total and repeated disregard for the welfare, safety, personal integrity, and human worth of others, and who seemingly cannot be deterred from continuing such conduct.[5] I therefore would

[5] Professor Packer addressed this:

"What are we to do with those whom we cannot reform, and, in particular, those who by our failure are thought to remain menaces to life? Current penal theories admit, indeed insist upon, the need for permanent incapacitation in such cases. Once this need is recognized, the death penalty as a means of incapacitation for the violent psychopath can hardly be objected to on grounds that will survive rational scrutiny, *if the use of the death penalty in any situation is to be permitted.* And its use in rape cases as a class, while inept, is no more so than its use for any other specific offense involving danger to life and limb." Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1081 (1964). (Emphasis added.)

hold that the death sentence here imposed is within the power reserved to the State and leave for another day the question of whether such sanction would be proper under other circumstances. The dangers which inhere whenever the Court casts its constitutional decisons in terms sweeping beyond the facts of the case presented, are magnified in the context of the Eighth Amendment. In *Furman* v. *Georgia, supra,* at 431, MR. JUSTICE POWELL, in dissent, stated:

> "[W]here, as here, the language of the applicable [constitutional] provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. *It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency.*" (Emphasis added.)

Since the Court now invalidates the death penalty as a sanction for all rapes of adults at all times under all circumstances,[6] I reluctantly turn to what I see as the broader issues raised by this holding.

(3)

The plurality, *ante,* at 597–598, acknowledges the gross nature of the crime of rape. A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim's life and health is likely

---

[6] I find a disturbing confusion as to this issue in the plurality opinion. The issue is whether Georgia can, under any circumstances and for any kind of rape—"mild" or "gross"—impose the death penalty. Yet the plurality opinion opens its discussion, apparently directed at demonstrating that this was not an "aggravated" rape, saying that following the rape and kidnaping, "Mrs. Carver was unharmed." *Ante,* at 587. If the Court is holding that no rape can ever be punished by death, why is it relevant whether Mrs. Carver was "unharmed"?

to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians, and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack—it is destructive of the human personality. The remainder of the victim's life may be gravely affected, and this in turn may have a serious detrimental effect upon her husband and any children she may have. I therefore wholly agree with MR. JUSTICE WHITE's conclusion as far as it goes—that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" *Ante,* at 597. Victims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery. To speak blandly, as the plurality does, of rape victims who are "unharmed," or to classify the human outrage of rape, as does MR. JUSTICE POWELL, in terms of "excessively brutal," *ante,* at 601, versus "moderately brutal," takes too little account of the profound suffering the crime imposes upon the victims and their loved ones.

Despite its strong condemnation of rape, the Court reaches the inexplicable conclusion that "the death penalty . . . is an excessive penalty" for the perpetrator of this heinous offense.[7] This, the Court holds, is true even though in Georgia the death penalty may be imposed only where the rape is coupled with one or more aggravating circumstances. The process by which this conclusion is reached is as startling as it is disquieting. It represents a clear departure from precedent by making this Court "under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility in diverse areas of the

[7] While only three Justices have joined MR. JUSTICE WHITE in this portion of his opinion, see separate opinion of MR. JUSTICE POWELL, *ante,* p. 601, I take this to be the view of the Court in light of MR. JUSTICE BRENNAN's and MR. JUSTICE MARSHALL's statements joining the judgment.

criminal law, throughout the country." *Powell* v. *Texas,* 392 U. S. 514, 533 (1968) (opinion of MARSHALL, J.).[8] This seriously strains and distorts our federal system, removing much of the flexibility from which it has drawn strength for two centuries.

The analysis of the plurality opinion is divided into two parts: (a) an "objective" determination that most American jurisdictions do not presently make rape a capital offense, and (b) a subjective judgment that death is an excessive punishment for rape because the crime does not, in and of itself, cause the death of the victim. I take issue with each of these points.

(a)

The plurality opinion bases its analysis, in part, on the fact that "Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman." *Ante,* at 595–596. Surely, however, this statistic cannot be deemed determinative, or even particularly relevant. As the opinion concedes, *ante,* at 594, two other States—Louisiana and North Carolina—have enacted death penalty statutes for adult rape since this Court's 1972 decision in *Furman* v. *Georgia,* 408 U. S. 238. If the Court is to rely on some "public opinion" process, does this not suggest the beginning of a "trend"?

---

[8] Only last Term in *Gregg* v. *Georgia,* 428 U. S. 153 (1976), MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS warned that "the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts," and noted that "we may not act as judges as we might as legislators," *id.,* at 174–175. Accord, *Roberts* v. *Louisiana,* 428 U. S. 325, 355–356 (1976) (WHITE, J., dissenting). MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS further noted that "[t]he deference we owe to decisions of the state legislatures under our federal system, [*Furman* v. *Georgia,* 408 U. S.,] at 465–470 (REHNQUIST, J., dissenting), is enhanced where the specification of punishments is concerned, *for 'these are peculiarly questions of legislative policy.' Gore* v. *United States,* 357 U. S. 386, 393 (1958)." 428 U. S., at 176. (Emphasis added.)

More to the point, however, it is myopic to base sweeping constitutional principles upon the narrow experience of the past five years. Considerable uncertainty was introduced into this area of the law by this Court's *Furman* decision. A large number of States found their death penalty statutes invalidated; legislatures were left in serious doubt by the expressions vacillating between discretionary and mandatory death penalties, as to whether this Court would sustain *any* statute imposing death as a criminal sanction.[9] Failure of more States to enact statutes imposing death for rape of an adult woman may thus reflect hasty legislative compromise occasioned by time pressures following *Furman,* a desire to wait on the experience of those States which did enact such statutes, or simply an accurate forecast of today's holding.

In any case, when considered in light of the experience since the turn of this century, where more than one-third of American jurisdictions have consistently provided the death penalty for rape, the plurality's focus on the experience of the immediate past must be viewed as truly disingenuous. Having in mind the swift changes in positions of some Members of this Court in the short span of five years, can it rationally be considered a relevant indicator of what our society deems "cruel and unusual" to look solely to what legislatures have *refrained* from doing under conditions of great uncertainty arising from our less than lucid holdings on the Eighth Amendment? Far more representative of societal mores of the 20th century is the accepted

---

[9] I take no satisfaction in my predictive caveat in *Furman:*

"Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress." 408 U. S., at 403 (dissenting opinion).

practice in a substantial number of jurisdictions preceding the *Furman* decision. "[The] problem . . . is the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago." *Furman* v. *Georgia, supra,* at 410 (BLACKMUN, J., dissenting). Cf. *Rudolph* v. *Alabama,* 375 U. S. 889 (1963).

However, even were one to give the most charitable acceptance to the plurality's statistical analysis, it still does not, to my mind, support its conclusion. The most that can be claimed is that for the past year Georgia has been the only State whose adult rape death penalty statute has not otherwise been invalidated; two other state legislatures had enacted rape death penalty statutes in the last five years, but these were invalidated for reasons unrelated to rape under the Court's decisions last Term. *Woodson* v. *North Carolina,* 428 U. S. 280 (1976); *Roberts* v. *Louisiana,* 428 U. S. 325 (1976). Even if these figures could be read as indicating that no other States view the death penalty as an appropriate punishment for the rape of an adult woman, it would not necessarily follow that Georgia's imposition of such sanction violates the Eighth Amendment.

The Court has repeatedly pointed to the reserve strength of our federal system which allows state legislatures, within broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results. See, *e. g., Whalen* v. *Roe,* 429 U. S. 589, 597–598, and n. 22 (1977); *Johnson* v. *Louisiana,* 406 U. S. 356, 376 (1972) (opinion of POWELL, J.); *California* v. *Green,* 399 U. S. 149, 184–185 (1970) (Harlan, J., concurring); *Fay* v. *New York,* 332 U. S. 261, 296 (1947). Various provisions of the Constitution, including the Eighth Amendment and the Due Process Clause, of course place substantive limitations on the type of experimentation a State may undertake. However, as the plurality admits, the crime of rape is second perhaps only to murder in its gravity. It follows then that Georgia did not approach

such substantive constraints by enacting the statute here in question. See also *infra,* at 619–622.

Statutory provisions in criminal justice applied in one part of the country can be carefully watched by other state legislatures, so that the experience of one State becomes available to all. Although human lives are in the balance, it must be remembered that failure to allow flexibility may also jeopardize human lives—those of the victims of undeterred criminal conduct. See *infra,* at 620. Our concern for the accused ought not foreclose legislative judgments showing a modicum of consideration for the potential victims.

Three state legislatures have, in the past five years, determined that the taking of human life and the devastating consequences of rape will be minimized if rapists may, in a limited class of cases, be executed for their offenses.[10] That these States are presently a minority does not, in my view, make their judgment less worthy of deference. Our concern for human life must not be confined to the guilty; a state legislature is not to be thought insensitive to human values because it acts firmly to protect the lives and related values of the innocent. In this area, the choices for legislatures are at best painful and difficult and deserve a high degree of deference. Only last Term MR. JUSTICE WHITE observed:

> "It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment *with which the judiciary should be most reluc-*

[10] The statute here in question does not provide the death penalty for any and all rapes. Rather, the jury must find that at least one statutorily defined aggravated circumstance is present. Ga. Code §§ 26–3102, 27–2534.1 (b) (1), (2), and (7) (1977).

tant to interfere." Roberts v. *Louisiana, supra,* at 355 (dissenting opinion). (Emphasis added.)

The question of whether the death penalty is an appropriate punishment for rape is surely an open one. It is arguable that many prospective rapists would be deterred by the possibility that they could suffer death for their offense; it is also arguable that the death penalty would have only minimal deterrent effect.[11] It may well be that rape victims would become more willing to report the crime and aid in the apprehension of the criminals if they knew that community disapproval of rapists was sufficiently strong to inflict the extreme penalty; or perhaps they would be reluctant to cooperate in the prosecution of rapists if they knew that a conviction might result in the imposition of the death penalty. Quite possibly, the occasional, well-publicized execution of egregious rapists may cause citizens to feel greater security in their daily lives; [12] or, on the contrary, it may be that members of a civilized community will suffer the pangs of a heavy conscience because such punishment will be perceived as excessive.[13] We cannot know which among

[11] "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. *Furman* v. *Georgia,* [408 U. S.,] at 403–405 (BURGER, C. J., dissenting)." *Gregg* v. *Georgia,* 428 U. S., at 186 (joint opinion of STEWART, POWELL, and STEVENS, JJ.).

[12] "There are many cases in which the sordid, heinous nature of a particular [rape], demeaning, humiliating, and often physically or psychologically traumatic, will call for public condemnation." *Furman* v. *Georgia,* 408 U. S., at 459 (POWELL, J., dissenting).

[13] Obviously I have no special competence to make these judgments, but by the same token no other Member of the Court is competent to make a contrary judgment. This is why our system has, until now, left these difficult policy choices to the state legislatures, which may be no wiser, but surely are more attuned to the mores of their communities, than are we.

this range of possibilities is correct, but today's holding forecloses the very exploration we have said federalism was intended to foster. It is difficult to believe that Georgia would long remain alone in punishing rape by death if the next decade demonstrated a drastic reduction in its incidence of rape, an increased cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the rule of law on the part of the populace.

In order for Georgia's legislative program to develop it must be given time to take effect so that data may be evaluated for comparison with the experience of States which have not enacted death penalty statutes. Today, the Court repudiates the State's solemn judgment on how best to deal with the crime of rape before anyone can know whether the death penalty is an effective deterrent for one of the most horrible of all crimes. And this is done a few short years after MR. JUSTICE POWELL's excellent statement:

> "In a period in our country's history when the frequency of [rape] is increasing alarmingly, it is indeed a grave event for the Court to take from the States whatever deterrent and retributive weight the death penalty retains." *Furman* v. *Georgia,* 408 U. S., at 459 (dissenting opinion) (footnote omitted).

To deprive States of this authority as the Court does, on the basis that "[t]he current judgment with respect to the death penalty for rape . . . weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman," *ante,* at 596, is impermissibly rash. The current judgment of some Members of this Court has undergone significant change in the short time since *Furman.*[14] Social change on great issues generally reveals itself in small increments, and the "current judgment" of many States could

[14] Indeed as recently as 1971—a year before *Furman*—a majority of this Court appeared to have no doubt about the constitutionality of the death penalty. See *McGautha* v. *California,* 402 U. S. 183 (1971).

well be altered on the basis of Georgia's experience, were we to allow its statute to stand.[15]

(b)

The subjective judgment that the death penalty is simply disproportionate to the crime of rape is even more disturbing than the "objective" analysis discussed *supra*. The plurality's conclusion on this point is based upon the bare fact that murder necessarily results in the physical death of the victim, while rape does not. *Ante*, at 598–599, 600. However, no Member of the Court explains why this distinction has relevance, much less constitutional significance. It is, after all, not irrational—nor constitutionally impermissible—for a legislature to make the penalty more severe than the criminal act it punishes[16] in the hope it would deter wrongdoing:

> "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." *Gregg* v. *Georgia*, 428 U. S., at 175.

Accord, *Furman* v. *Georgia*, *supra*, at 451 (POWELL, J., dissenting).

It begs the question to state, as does the plurality opinion:

> "Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Ante*, at 598.

---

[15] To paraphrase MR. JUSTICE POWELL, "[w]hat [the Court is] saying, in effect, is that the evolutionary process has come suddenly to an end; that the ultimate wisdom as to the appropriateness of capital punishment [for adult rape] under all circumstances, and for all future generations, has somehow been revealed." *Furman* v. *Georgia*, *supra*, at 430–431 (dissenting opinion).

[16] For example, hardly any thief would be deterred from stealing if the only punishment upon being caught were return of the money stolen.

Until now, the issue under the Eighth Amendment has not been the state of any particular victim after the crime, but rather whether the punishment imposed is grossly disproportionate to the evil committed by the perpetrator. See *Gregg* v. *Georgia, supra,* at 173, *Furman* v. *Georgia, supra,* at 458 (POWELL, J., dissenting). As a matter of constitutional principle, that test cannot have the primitive simplicity of "life for life, eye for eye, tooth for tooth." Rather States must be permitted to engage in a more sophisticated weighing of values in dealing with criminal activity which consistently poses serious danger of death or grave bodily harm. If innocent life and limb are to be preserved I see no constitutional barrier in punishing by death all who engage in such activity, regardless of whether the risk comes to fruition in any particular instance. See Packer, 77 Harv. L. Rev., at 1077–1079.

Only one year ago the Court held it constitutionally permissible to impose the death penalty for the crime of murder, provided that certain procedural safeguards are followed. Compare *Gregg* v. *Georgia, supra; Proffitt* v. *Florida,* 428 U. S. 242 (1976), and *Jurek* v. *Texas,* 428 U. S. 262 (1976), with *Roberts* v. *Louisiana,* 428 U. S. 325 (1976), and *Woodson* v. *North Carolina,* 428 U. S. 280 (1976). Today, the plurality readily admits that "[s]hort of homicide, [rape] is the 'ultimate violation of self.' " *Ante,* at 597. Moreover, as stated by MR. JUSTICE POWELL:

> "The threat of serious injury is implicit in the definition of rape; the victim is either forced into submission by physical violence or by the threat of violence." *Furman* v. *Georgia, supra,* at 460 (dissenting opinion).

Rape thus is not a crime "light years" removed from murder in the degree of its heinousness; it certainly poses a serious potential danger to the life and safety of innocent victims—apart from the devastating psychic consequences. It would

seem to follow therefore that, affording the States proper leeway under the broad standard of the Eighth Amendment,[17] if murder is properly punishable by death, rape should be also, if that is the considered judgment of the legislators.

The Court's conclusion to the contrary is very disturbing indeed. The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim. This casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, *e. g.,* treason, airplane hijacking, and kidnaping. In that respect, today's holding does even more harm than is initially apparent. We cannot avoid taking judicial notice that crimes such as airplane hijacking, kidnaping, and mass terrorist activity constitute a serious and increasing danger to the safety of the public. It would be unfortunate indeed if the effect of today's holding were to inhibit States and the Federal Government from experimenting with various remedies—including possibly imposition of the penalty of death—to prevent and deter such crimes.

---

[17] MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS in *Gregg* v. *Georgia* noted: "[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure [of the Eighth Amendment], we presume its validity. . . . [*A*] *heavy burden rests on those who would attack the judgment of the representatives of the people.*" 428 U. S., at 175 (emphasis added). Accord, *Furman* v. *Georgia, supra,* at 451 (POWELL, J., dissenting).

The reason for this special deference to state legislative enactments was described:

"This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.' *Furman* v. *Georgia,* [408 U. S.,] at 383 (BURGER, C. J., dissenting)." 428 U. S., at 175–176.

Some sound observations, made only a few years ago, deserve repetition:

> "Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible." *Furman* v. *Georgia,* 408 U. S., at 411 (BLACKMUN, J., dissenting).

Whatever our individual views as to the wisdom of capital punishment, I cannot agree that it is constitutionally impermissible for a state legislature to make the "solemn judgment" to impose such penalty for the crime of rape. Accordingly, I would leave to the States the task of legislating in this area of the law.

VENDO CO. *v.* LEKTRO-VEND CORP. ET AL.

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

No. 76–156. Argued January 19, 1977—Decided June 29, 1977

Petitioner vending machine manufacturer acquired most of the assets of another vending machine manufacturing company controlled by respondent Stoner and his family. As part of the acquisition agreement the latter company undertook to refrain from owning or managing any business engaged in the manufacture or sale of vending machines, and respondent Stoner, who was employed by petitioner as a consultant under a 5-year contract, agreed not to compete with petitioner in the manufacture of such machines during the term of his contract and for five years thereafter. Subsequently, petitioner sued respondents (Stoner, the company which he and his family controlled, and another corporation with which he had a relationship) in an Illinois state court for breach of the noncompetition covenants. Shortly thereafter, respondents sued petitioner in Federal District Court, alleging that it had violated §§ 1 and 2 of the Sherman Act in that the covenant against competition was an unreasonable restraint of trade. After protracted litigation in the state-court action, the Illinois Supreme Court affirmed a judgment in petitioner's favor in an amount exceeding $7 million. Then in the antitrust action, which, in the meantime, had lain "dormant," the District Court granted respondents' motion for a preliminary injunction against collection of the Illinois judgment, holding that § 16 of the Clayton Act (which authorizes any person to seek injunctive relief against violations of the antitrust laws) constituted an "expressly authorized" exception to the Anti-Injunction Act, 28 U. S. C. § 2283 (which prohibits a federal court from enjoining state-court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"), and further found that an injunction was necessary to protect the court's jurisdiction within the meaning of that exception in § 2283 by preserving a case or controversy, since the state collection efforts would eliminate the two corporate respondents (which would then be controlled by petitioner) as plaintiffs in the federal suit. The Court of Appeals affirmed, also finding that § 16 of the Clayton Act was an express

exception to § 2283, but not reaching the issue of whether an injunction was necessary to protect the District Court's jurisdiction. *Held:* The judgment is reversed, and the case is remanded. Pp. 630–643; 643–645.

545 F. 2d 1050, reversed and remanded.

MR. JUSTICE REHNQUIST, joined by MR. JUSTICE STEWART and MR. JUSTICE POWELL, concluded that the District Court's preliminary injunction violated the Anti-Injunction Act. Pp. 630–643.

(a) Having been enacted long after the Anti-Injunction Act, § 16 of the Clayton Act, on its face, is far from an express exception to the Anti-Injunction Act, and may be fairly read as virtually incorporating the prohibitions of that Act. Pp. 631–632.

(b) The test as to whether an Act of Congress qualifies as an "expressly authorized" exception to the Anti-Injunction Act is whether the "Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Mitchum* v. *Foster,* 407 U. S. 225, 238. Here, while the private action conferred by § 16 of the Clayton Act meets the first part of the test in that such an action may be brought only in a federal court, it does not meet the second part of the test, since, as is demonstrated by § 16's legislative history suggesting that § 16 was merely intended to extend to private citizens the right to enjoin antitrust violations, § 16 is not an "Act of Congress [which] could be given its intended scope only by the stay of a state court proceeding." *Mitchum, supra,* distinguished. Pp. 632–635.

(c) To hold that § 16 could be given its "intended scope" only by allowing an injunction against a pending state-court action would completely eviscerate the Anti-Injunction Act, because this would mean that virtually *all* federal statutes authorizing injunctive relief would be exceptions to that Act. While § 16 embodies an important congressional policy favoring private enforcement of the antitrust laws, the importance of the policy to be "protected" by an injunction under § 16 does not control for purposes of the Anti-Injunction Act, since the prohibitions of that Act exist separate and apart from the traditional principles of equity and comity that determine whether or not the state proceeding can be enjoined. Pp. 635–639.

(d) For an Act countenancing a federal injunction to come within the "expressly authorized" exception to the Anti-Injunction Act, it must necessarily interact with, or focus upon, a state judicial proceeding, and § 16 of the Clayton Act is not such an Act. Pp. 640–641.

(e) The District Court's finding that the injunction was "necessary in aid of its jurisdiction" within the meaning of that exception to the Anti-Injunction Act is supported neither by precedent nor by the factual premises upon which such finding was based. Although such exception may be fairly read as incorporating cases where the federal court has obtained jurisdiction over a *res* prior to the state-court action, here both the federal and state actions are *in personam* actions, which traditionally may proceed concurrently, without interference from either court, and an injunction to "preserve" a case or controversy does not fit within the "necessary in aid of its jurisdiction" exception. It does not appear that even if the two corporate respondents ceased to litigate the federal action, respondent Stoner would lose his standing to vindicate his rights, or that the two corporate defendants would necessarily be removed from the action. Pp. 641–643.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, concluded that, although § 16 of the Clayton Act may be an "expressly authorized" exception to the Anti-Injunction Act in limited circumstances where the state proceedings are part of a "pattern of baseless, repetitive claims" being used as an anticompetitive device, all the traditional prerequisites for equitable relief are satisfied, and the only way to give the antitrust laws their intended scope is by staying the state proceedings, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, the District Court failed properly to apply the *California Motor Transport* rule because it did not and could not find the state litigation to be part of a "pattern of baseless, repetitive claims" being used in and of itself as an anticompetitive device, and that therefore § 16 did not itself authorize the District Court's injunction. Pp. 643–645.

REHNQUIST, J., announced the Court's judgment and delivered an opinion, in which STEWART and POWELL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, in which BURGER, C. J., joined, *post*, p. 643. STEVENS, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, *post*, p. 645.

Earl E. Pollock argued the cause for petitioner. With him on the briefs was *Lambert M. Ochsenschlager.*

Barnabas F. Sears argued the cause for respondents. With him on the brief were *James E. S. Baker* and *Thomas L. Brejcha, Jr.*

MR. JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion in which MR. JUSTICE STEWART and MR. JUSTICE POWELL join.

I

After nine years of litigation in the Illinois state courts, the Supreme Court of Illinois affirmed a judgment in favor of petitioner and against respondents in the amount of $7,363,500. Shortly afterwards the United States District Court for the Northern District of Illinois enjoined, at the behest of respondents, state proceedings to collect the judgment. 403 F. Supp. 527 (1975). The order of the United States District Court was affirmed by the Court of Appeals for the Seventh Circuit, 545 F. 2d 1050 (1976), and we granted certiorari to consider the important question of the relationship between state and federal courts which such an injunction raises. 429 U. S. 815 (1976).

II

The Illinois state-court litigation arose out of commercial dealings between petitioner and respondents. In 1959 petitioner Vendo Co., a vending machine manufacturer located in Kansas City, Mo., acquired most of the assets of Stoner Manufacturing, which was thereupon reorganized as respondent Stoner Investments, Inc. Respondent Harry H. Stoner and members of his family owned all of the stock of Stoner Manufacturing, and that of Stoner Investments. Stoner Manufacturing had engaged in the manufacture of vending machines which dispensed candy, and as a part of the acquisition agreement it undertook to refrain from owning or managing any business engaged in the manufacture or sale of vending machines. Pursuant to an employment contract, respondent Harry Stoner was employed by petitioner as a consultant for five years at a salary of $50,000, and he agreed that during the term of his contract and for five years thereafter he would not

compete with petitioner in the business of manufacturing vending machines.

In 1965, petitioner sued respondents [1] in state court for breach of these noncompetition covenants. Shortly thereafter, respondents sued petitioner in the United States District Court for the Northern District of Illinois, complaining that petitioner had violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. Respondents alleged that the covenants against competition were unreasonable restraints of trade because they were not reasonably limited as to time and place, and that the purpose of petitioner's state-court lawsuit was to "unlawfully harass" respondents and to "eliminate the competition" of respondents. App. 22, 25.

Respondents set up this federal antitrust claim as an affirmative defense to petitioner's state-court suit. *Id.*, at 31–32. However, prior to any ruling by the state courts on the merits of this defense, respondents voluntarily withdrew it. *Id.*, at 82.

The state-court litigation ran its protracted course,[2] includ-

---

[1] In addition to respondents Stoner and Stoner Manufacturing, petitioner also sued respondent Lektro-Vend Corp. Lektro-Vend had developed a radically new vending machine, and it was Stoner's relationship with Lektro-Vend that formed the basis of the lawsuit.

[2] The Court of Appeals' summary of the state-court litigation is illustrative:

"The suit was filed in Kane County, Illinois on August 10, 1965; the complaint charged breach of noncompetition covenants; an amended complaint also charged theft of trade secrets. After a bench trial the court on December 16, 1966 found for Vendo. Judgments against Stoner for $250,000 and against both defendants for $1,100,000 were granted. Stoner and Stoner Investments were enjoined from further acts of competition.

"An appeal was taken to the Appellate Court of Illinois. That court entered its decision on January 30, 1969, . . . 105 Ill. App. 2d 261, 245 N. E. 2d 263. The court held that no trade secrets were involved, the noncompetition covenants were valid and enforceable, and the covenants had been breached by the defendants. The grant of injunctive relief was affirmed. The court also held that though the trial court erred in striking

ing two trials, two appeals to the State Appellate Court, and an appeal to the Supreme Court of Illinois. In September 1974, the latter court affirmed a judgment in favor of petitioner and against respondents in an amount exceeding $7 million. *Vendo Co.* v. *Stoner,* 58 Ill. 2d 289, 321 N. E. 2d 1. The Supreme Court of Illinois predicated its judgment on its holding that Stoner had breached a fiduciary duty owed to petitioner, rather than upon any breach of the noncompetitive covenants.[3] This Court denied respondents' petition for a writ of certiorari. 420 U. S. 975 (1975).

During the entire nine-year course of the state-court litigation, respondents' antitrust suit in the District Court was, in the words of the Court of Appeals, allowed to lie "dormant." 545 F. 2d, at 1055. But the day after a Circuit Justice of this

---

the affirmative defense based on the federal antitrust laws, it was correct in denying the defense based on the Illinois antitrust laws. The cause was remanded for a determination of damages and further proceedings.

"Upon remand the defendant withdrew its affirmative defense asserted under the federal antitrust laws. The trial court, after hearing evidence, entered judgments against Stoner and Stoner Investments which totaled $7,363,500.

"Upon a second appeal to the Illinois Appellate Court, the court decided, on September 12, 1973, 13 Ill. App. 3d 291, 300 N. E. 2d 632, that the trial court erred in the measurement of damages. The case was remanded for assessment of damages in accordance with the Appellate Court's original opinion.

"Upon appeal to the Illinois Supreme Court on September 27, 1974, . . . 58 Ill. 2d 289, 321 N. E. 2d 1, the appellate court was reversed and the trial court's judgments were affirmed. The Supreme Court in deciding the case constructed a different theory of recovery—the breach of a fiduciary obligation on the part of Stoner—than had been asserted by Vendo." 545 F. 2d 1050, 1055 n. 4 (CA7 1976).

[3] "Quite apart from any liability which may be predicated upon a breach of the covenants against competition contained in the sales agreement and the employment contract, it is clear that Stoner violated his fiduciary duties to plaintiff during the period when he was a director and an officer of plaintiff." 58 Ill. 2d, at 303, 321 N. E. 2d, at 9.

Court had denied a stay of execution pending petition for certiorari to the Supreme Court of Illinois, respondents moved in the District Court for a preliminary injunction against collection of the Illinois judgment. The District Court in due course granted this motion.

That court found that it "appear[ed] that the [noncompetition] covenants . . . were overly broad," 403 F. Supp., at 533, and that there was "persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately." *Id.*, at 534–535. Recognizing that there is a "paucity of authority" on the issue, *id.*, at 536, the District Court held that the injunctive-relief provision of the Clayton Act, 15 U. S. C. § 26, constitutes an express exception to 28 U. S. C. § 2283, the "Anti-Injunction Act." The court further found that collection efforts would eliminate two of the three plaintiffs and thus that the injunction was necessary to protect the jurisdiction of the court, within the meaning of that exception to § 2283.

The Court of Appeals affirmed, finding that § 16 of the Clayton Act was an express exception to § 2283. The court did not reach the issue of whether an injunction was necessary to protect the jurisdiction of the District Court.

In this Court, petitioner renews its contention that principles of equity, comity, and federalism, as well as the Anti-Injunction Act, barred the issuance of the injunction by the District Court. Petitioner also asserts in its brief on the merits that the United States District Court was required to give full faith and credit to the judgment entered by the Illinois courts.[4] Because we agree with petitioner that the District Court's order violated the Anti-Injunction Act, we reach none of its other contentions.

---

[4] This issue was not presented to this Court in the petition for certiorari, and the Court of Appeals did not discuss it in its opinion.

III

The Anti-Injunction Act, 28 U. S. C. § 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The origins and development of the present Act, and of the statutes which preceded it, have been amply described in our prior opinions and need not be restated here. The most recent of these opinions are *Mitchum* v. *Foster,* 407 U. S. 225 (1972), and *Atlantic Coast Line R. Co.* v. *Locomotive Engineers,* 398 U. S. 281 (1970). Suffice it to say that the Act is an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act. The Act's purpose is to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.,* 309 U. S. 4, 9 (1940). Respondents' principal contention is that, as the Court of Appeals held, § 16 of the Clayton Act, which authorizes a private action to redress violations of the antitrust laws, comes within the "expressly authorized" exception to § 2283.

We test this proposition mindful of our admonition that

> "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line R. Co., supra,* at 297.

This cautious approach is mandated by the "explicit wording of § 2283" and the "fundamental principle of a dual system of

courts." *Ibid.* We have no occasion to construe the section more broadly:

> "[It is] clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 514 (1955).

Our inquiry, of course, begins with the language of § 16 of the Clayton Act, which is the statute claimed to "expressly authorize" the injunction issued here. It provides, in pertinent part:

> "[A]ny person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ." 38 Stat. 737, 15 U. S. C. § 26.

On its face, the language merely authorizes private injunctive relief for antitrust violations. Not only does the statute not mention § 2283 or the enjoining of state-court proceedings, but the granting of injunctive relief under § 16 is by the terms of that section limited to "the same conditions and principles" employed by courts of equity, and by "the rules governing such proceedings." In 1793 the predecessor to § 2283 was enacted specifically to limit the general equity powers of a federal court. *Smith* v. *Apple*, 264 U. S. 274, 279 (1924); *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 130 n. 2 (1941). When § 16 was enacted in 1914 the bar of the Anti-Injunction Act had long constrained the equitable power of federal courts to issue injunctions. Thus, on its face, § 16 is far from an express exception to the Anti-Injunction Act, and may be fairly read as virtually incorporating the prohibitions

of the Anti-Injunction Act with restrictive language not found, for example, in 42 U. S. C. § 1983. See discussion of *Mitchum* v. *Foster, infra.*

Respondents rely, as did the Court of Appeals and the District Court, on the following language from *Mitchum:*

> ". . . [I]t is clear that, in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. *The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.*" 407 U. S., at 237–238. (Emphasis added, footnote omitted.)

But we think it is clear that neither this language from *Mitchum* nor *Mitchum*'s *ratio decidendi* supports the result contended for by respondents.

The private action for damages conferred by the Clayton Act is a "uniquely federal right or remedy," in that actions based upon it may be brought only in the federal courts. See *General Investment Co.* v. *Lake Shore & Mich. So. R. Co.,* 260 U. S. 261, 287 (1922). It thus meets the first part of the test laid down in the language quoted from *Mitchum.*

But that authorization for private actions does not meet the second part of the *Mitchum* test; it is not an "Act of Congress . . . [which] could be given its intended scope only by the stay of a state court proceeding," 407 U. S., at 238. Crucial to our determination in *Mitchum* that 42 U. S. C.

§ 1983 fulfilled this requirement—but wholly lacking here—was our recognition that one of the clear congressional concerns underlying the enactment of § 1983 was the possibility that state courts, as well as other branches of state government, might be used as instruments to deny citizens their rights under the Federal Constitution. This determination was based on our review of the legislative history of § 1983; similar review of the legislative history underlying § 16 demonstrates that that section does not meet this aspect of the *Mitchum* test.

Section 1983 on its face, of course, contains no reference to § 2283, nor does it expressly authorize injunctions against state-court proceedings. But, as *Mitchum* recognized, such language need not invariably be present in order for a statute to come within the "expressly authorized" exception if there exists sufficient evidence in the legislative history demonstrating that Congress recognized and intended the statute to authorize injunction of state-court proceedings. In Part IV of our opinion in *Mitchum* we examined *in extenso* the purpose and legislative history underlying § 1983, originally § 1 of the Civil Rights Act of 1871. We recounted in detail that statute's history which made it abundantly clear that by its enactment Congress demonstrated its direct and explicit concern to make the federal courts available to protect civil rights against unconstitutional actions of state courts.

We summarized our conclusion in these words:

> "This legislative history makes 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." 407 U. S., at 242.

Thus, in *Mitchum*, absence of express language authorization for enjoining state-court proceedings in § 1983 actions was cured by the presence of relevant legislative history. In this case, however, neither the respondents nor the courts below have called to our attention any similar legislative history in connection with the enactment of § 16 of the Clayton Act. It is not suggested that Congress was concerned with the possibility that state-court proceedings would be used to violate the Sherman or Clayton Acts. Indeed, it seems safe to say that of the many and varied anticompetitive schemes which § 16 was intended to combat, Congress in no way focused upon a scheme using litigation in the state courts. The relevant legislative history of § 16 simply suggests that in enacting § 16 Congress was interested in extending the right to enjoin antitrust violations to private citizens.[5]

[5] Prior to the enactment of § 16, private injunctive relief was not authorized for antitrust violations. *Paine Lumber Co.* v. *Neal*, 244 U. S. 459 (1917). As far as the legislative history indicates, the sole purpose of § 16 (§ 14 in the original drafts) was to extend to private parties the right to sue for injunctive relief. The following passage, taken in its entirety from H. R. Rep. No. 627, 63d Cong., 2d Sess., 21 (1914), demonstrates what Congress had in mind in enacting § 16:

"Section 14 authorizes a person, firm, or corporation or association to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings. Under section 7 of the act of July 2, 1890, a person injured in his business and property by corporations or combinations acting in violation of the Sherman antitrust law, may recover loss and damage for such wrongful act. There is, however, no provision in the existing law authorizing a person, firm, corporation, or association to enjoin threatened loss or damage to his business or property by the commission of such unlawful acts, and the purpose of this section is to remedy such defect in the law. This provision is in keeping with the recommendation made by the President in his message to Congress on the subject of trusts and monopolies."

See also S. Rep. No. 698, 63d Cong., 2d Sess., 17–18 (1914).

The critical aspects of the legislative history recounted in *Mitchum* which led us to conclude that § 1983 was within the "expressly authorized" exception to § 2283 are wholly absent from the relevant history of § 16 of the Clayton Act. This void is not filled by other evidence of congressional authorization.

Section 16 undoubtedly embodies congressional policy favoring private enforcement of the antitrust laws, and undoubtedly there exists a strong national interest in antitrust enforcement.[6] However, contrary to certain language in the opinion

---

[6] In *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972), this Court held that harassing and sham state-court proceedings of a repetitive nature could be part of an anticompetitive scheme or conspiracy. In *Otter Tail Power Co.* v. *United States,* 410 U. S. 366 (1973), one of the allegations was that the federal-court defendant had instituted and supported state-court litigation for anticompetitive purposes in violation of the antitrust laws. The District Court had enjoined the defendant from "[i]nstituting, supporting or engaging in litigation, directly or indirectly, against cities and towns, and officials thereof, which have voted to establish municipal power systems . . . ." Jurisdictional Statement, O. T. 1972, No. 71–991, p. A–115. This Court vacated and remanded to the District Court for consideration, in light of the intervening decision of *California Motor Transport,* of whether the state-court litigation came within the "mere sham" exception announced in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961). Those cases together may be cited for the proposition that repetitive, sham litigation in state courts may constitute an antitrust violation and that an injunction may lie to enjoin future state-court litigation. However, neither of those cases involved the injunction of a pending state-court proceeding, and thus the bar of § 2283 was not brought into play.

Nothing that we say today cuts back in any way on the holdings of these two cases; what we must here decide is whether such a lawsuit may be enjoined by a federal court *after* it has been commenced, notwithstanding the bar of the Anti-Injunction Act. While we conclude that it may not, nothing in our opinion today prevents a federal court in the proper exercise of its jurisdiction from enjoining the commencement of additional state-court proceedings if it concludes from the course and outcome of the first one that such proceedings would constitute a violation of the anti-

of the District Court, 403 F. Supp., at 536, the importance of the federal policy to be "protected" by the injunction is not the focus of the inquiry. Presumptively, all federal policies enacted into law by Congress are important, and there will undoubtedly arise particular situations in which a particular policy would be fostered by the granting of an injunction against a pending state-court action. If we were to accept respondents' contention that § 16 could be given its "intended scope" only by allowing such injunctions, then § 2283 would be completely eviscerated since the ultimate logic of this position can mean no less than that virtually *all* federal statutes [7] authorizing injunctive relief are exceptions to § 2283. Cer-

trust laws. With respect to this future litigation, the injunction will prevent even the commencement of a second such action, and the principles of federalism do not require the bar of § 2283. This distinction is totally consistent with the realization that the true bona fides of the initial state-court litigation is often not apparent:

"One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused." *California Motor Transport, supra,* at 513.

Any "disadvantage" to which the federal plaintiff is put in the initial proceeding is diminished by his ability to set up the federal antitrust claim as an affirmative defense, reviewable by this Court under 28 U. S. C. § 1257 (3), and his ability to sue for treble damages resulting from the vexatious prosecution of that state-court litigation.

[7] Petitioner has catalogued the following federal statutes, and suggests that each would be so affected:

"E. g., 7 U. S. C. § 216 (§ 315 of the Packers and Stockyards Act of 1921); 7 U. S. C. § 2050a (Farm Labor Contractor Registration Act); 7 U. S. C. § 2305 (a) (§ 6 of the Agricultural Fair Practices Act of 1967); 12 U. S. C. § 1731b (i) (§ 513 of the National Housing Act); 12 U. S. C. § 1976 (Bank Holding Company Act); 15 U. S. C. § 78aa (Securities Exchange Act of 1934); 15 U. S. C. § 298 (relating to the false stamping of gold and silver); 15 U. S. C. § 433 (providing for suits by farmer's cooperative associations against discrimination by boards of trade); 15 U. S. C. §§ 1114 (2), 1116, 1121 (providing for injunctive relief against trademark infringement); 15 U. S. C. § 2073 (Consumer Product Safety Act); 15 U. S. C. § 2102 (Hobby Protection Act); 17 U. S. C. § 112 (providing for

tainly all federal injunctive statutes are enacted to provide for the suspension of activities antithetical to the federal policies underlying the injunctive statute or related statutes. If the injunction would issue under the general rules of equity practice—requiring, *inter alia,* a showing of irreparable injury—but for the bar of § 2283, then clearly § 2283 in some sense may be viewed as frustrating or restricting federal policy since the activity inconsistent with the federal policy may not be enjoined because of § 2283's bar.[8] Thus, were we to accede

---

injunctions against violation of any right secured by the copyright laws); 26 U. S. C. § 9011 (b) (Presidential Election Campaign Fund Act); 29 U. S. C. § 412 (Labor-Management Reporting and Disclosure Act); 42 U. S. C. § 2000e–5 (Title VII (Equal Employment Opportunities) of the Civil Rights Act of 1964); 42 U. S. C. §§ 6305, 6395 (e) (Energy Policy and Conservation Act); 45 U. S. C. § 547 (Title III of the Rail Passenger Service Act of 1970); 49 U. S. C. §§ 1 (20), 322 (b)(2), 916, 1017 (b) (Interstate Commerce Act); 49 U. S. C. § 1487 (a) (Federal Aviation Act). See also 16 U. S. C. § 1540 (g) (Endangered Species Act of 1973); 33 U. S. C. § 1365 (Federal Water Pollution Control Act); 33 U. S. C. § 1415 (g) (Marine Protection, Research, and Sanctuaries Act of 1972); 33 U. S. C. § 1515 (Deepwater Ports Act of 1974); 42 U. S. C. § 300j–8 (Safe Drinking Water Act); 42 U. S. C. § 1857h–2 (Clean Air Act); 42 U. S. C. § 4911 (Noise Control Act of 1972)." Reply Brief for Petitioner 10–11, n. 7.

[8] MR. JUSTICE STEVENS in his dissent, see *post,* at 649–654, would conclude that since certain types of state-court litigation may violate the antitrust laws, an injunction of such litigation while pending is "expressly authorized" under the provisions of the Anti-Injunction Act. But this conclusion does not at all follow from the premise that judicial decisions have construed the prohibition of the antitrust laws to include sham and frivolous state-court proceedings—a premise with which we do not at all disagree, see n. 6, *supra.* The conclusion is supportable only as a matter of policy preference, and not of statutory construction. Under MR. JUSTICE STEVENS' view, all a federal court need do is find a violation of the federal statute, then by the very force of that finding "express authorization" for the statute would be presumed. But this approach flies in the face of our past decisions. For example, in *Mitchum* v. *Foster,* 407 U. S. 225, 227 (1972), the petitioner had alleged that the state courts "were depriving him of rights protected by the First and Fourteenth

to respondent's interpretation of the "intended scope" language, an exception to § 2283 would always be found to be "necessary" to give the injunctive Act its full intended scope, and § 2283 would place no additional limitation on the right

---

Amendments." Under MR. JUSTICE STEVENS' syllogistic formulation, since the state-court action is a violation of § 1983, the express authorization would be readily found on the face of the statute. However, the Court in *Mitchum* found no such *ipso facto* shortcut to the explicit prohibition of § 2283, but resorted to careful analysis of the legislative history in order to find evidence of congressional authorization. In short, MR. JUSTICE STEVENS' approach, which removes the bar of § 2283 from all federal injunctive statutes, is totally inconsistent with this Court's longstanding recognition that "[l]egislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 516 (1955).

In reaching this conclusion, MR. JUSTICE STEVENS argues that the Anti-Injunction Act should be "considered wholly inapplicable to later enacted federal statutes that are enforceable exclusively in federal litigation." *Post,* at 659. But this view is inconsistent with the approach adopted by the Court in *Clothing Workers, supra.* In that case, an employer had sought an injunction against a union in state court. This Court found that the action before the state court was "outside state authority," 348 U. S., at 514, and that jurisdiction was vested solely in the National Labor Relations Board. But the Court found that the exclusive federal jurisdiction was not sufficient to render § 2283 inapplicable. See also *Atlantic Coast Line R. Co.* v. *Locomotive Engineers,* 398 U. S. 281 (1970).

We think MR. JUSTICE STEVENS' view tends to confuse the jurisdiction granted to federal courts by § 16 of the Clayton Act with the separate question of whether a court having such jurisdiction has also been "expressly authorize[d]" to enjoin state-court proceedings. *Post,* at 650–654. But the question of whether an injunction against state-court proceedings has been "expressly authorized" under § 2283 never arises unless the federal court asked to issue the injunction has subject-matter jurisdiction of the case in which the injunction is sought. Here the District Court is entirely free to proceed with the litigation on the merits of respondents' antitrust claim against petitioner, and to grant damages and such other relief as may be appropriate if it determines the issues in favor of respondents. All that we conclude is that it may not include as a part of that relief an injunction against an already pending state-court proceeding.

to enjoin state proceedings. The Anti-Injunction Act, a fixture in federal law since 1793, would then be a virtual dead letter whenever the plaintiff seeks an injunction under a federal injunctive statute. Whether or not the state proceeding could be enjoined would rest solely upon the traditional principles of equity and comity. However, as we emphasized in *Mitchum,* 407 U. S., at 243, the prohibitions of § 2283 exist separate and apart from these traditional principles, and we cannot read the "intended scope" language as rendering this specific and longstanding statutory provision inoperative simply because important federal policies are fostered by the statute under which the injunction is sought. Congress itself has found that these policies, in the ordinary case, must give way to the policies underlying § 2283. Given the clear prohibition of § 2283, the courts will not sit to balance and weigh the importance of various federal policies in seeking to determine which are sufficiently important to override historical concepts of federalism underlying § 2283; by the statutory scheme it has enacted, Congress has clearly reserved this judgment unto itself.[9]

---

[9] Much of MR. JUSTICE STEVENS' dissenting opinion is an able brief for the conceded importance of the Sherman and Clayton Acts. But however persuasive it might be in inducing Congress to lift the bar of § 2283 with respect to injunctions issued under § 16, we do not believe it is persuasive in determining whether, under the present state of the law, Congress has in fact "expressly authorized" the injunction issued by the District Court here. For example, MR. JUSTICE STEVENS laments that state-court proceedings may now become the vehicles by which an antitrust violator may put one independent businessman after another out of business. See *post,* at 652–654, 657. Federal courts are able to enjoin future repetitive litigation, see discussion of *California Motor Transport* and *Otter Tail Power, supra,* n. 6. But even if one were to agree with this broad speculation, the solution is simple and straightforward. If Congress determines that the use of state-court proceedings to foster anticompetitive schemes is of sufficient gravity, it may simply conclude that the need for greater antitrust enforcement outweighs the need to prevent

Our conclusion that the "importance," or the potential restriction in scope, of the federal injunction statute does not control for § 2283 purposes is consistent with the analysis of those very few statutes which we have in the past held to be exceptions to the Anti-Injunction Act. See *Mitchum, supra,* at 234–235, and nn. 12–16. The original version of the Anti-Injunction Act itself was amended in 1874 to allow federal courts to enjoin state-court proceedings which interfere with the administration of a federal bankruptcy proceeding. Rev. Stat. § 720. The Interpleader Act of 1926, 28 U. S. C. § 2361, the Frazier-Lemke Act, 11 U. S. C. § 203 (1940 ed.), and the Federal Habeas Corpus Act, 28 U. S. C. § 2251, while not directly referring to § 2283, have nonetheless explicitly authorized injunctive relief against state-court proceedings. The Act of 1851 limiting liability of shipowners, 46 U. S. C. § 185, provided that, after deposit of certain funds in the court by the shipowner, "all claims and proceedings against the owner with respect to the matter in question shall cease." The statutory procedures for removal of a case from state court to federal court provide that the removal acts as a stay of the state-court proceedings. 28 U. S. C. § 1446 (e).

By limiting the statutory exceptions of § 2283 and its predecessors to these few instances, we have clearly recognized that the Act countenancing the federal injunction must neces-

---

friction in our federal system and amend § 16 to expressly authorize an injunction of state-court proceedings.

No desire for more vigorous antitrust enforcement should cause us to lose sight of our role as judges in interpreting the explicit command of a congressional statute; for notwithstanding the rhetoric of the dissenting opinion, the conclusion that §16 is an "expressly authorized" exception to § 2283 is no more than an *ipse dixit.* The "explicit wording of § 2283," *Atlantic Coast Line R. Co., supra,* at 297, is lost on the dissent; the dissent's approach is the clearest form of judicial improvisation which the Court counseled against in *Clothing Workers* v. *Richman Bros. Co., supra,* at 514.

sarily interact with, or focus upon, a state judicial proceeding.[10] Section 16 of the Clayton Act, which does not by its very essence contemplate or envision any necessary interaction with state judicial proceedings, is clearly not such an Act.

IV

Although the Court of Appeals did not reach the issue, the District Court found that, in addition to being "expressly authorized," the injunction was "necessary in aid of its jurisdiction," a separate exception to § 2283. The rationale of the District Court was as follows:

> "The Court also holds that § 2283 authorizes an injunction here because further collection efforts would eliminate two plaintiffs, Stoner Investments and Lektro-Vend Corp., as parties under the case or controversy provisions of Article III since they would necessarily be controlled by Vendo. Vendo's offer to place the Stoner Investment and Lektro-Vend stock under control of the Court does not meet this problem because as a matter of substance Vendo would control both plaintiff and defendant, requiring dismissal under Article III. Thus the injunction is also necessary to protect the jurisdiction of the Court." 403 F. Supp., at 536–537.

In *Toucey* v. *New York Life Ins. Co.*, 314 U. S., at 134–135, we acknowledged the existence of a historical exception to the Anti-Injunction Act in cases where the federal court has obtained jurisdiction over the *res,* prior to the state-court action. Although the "necessary in aid of" exception to § 2283 may be fairly read as incorporating this historical *in rem* exception, see C. Wright, Federal Courts § 47, p. 204 (3d ed. 1976), the federal and state actions here are simply *in per-*

[10] A possible exception is *Porter* v. *Dicken,* 328 U. S. 252 (1946), regarding § 205 (a) of the Emergency Price Control Act of 1942. This Act, enacted in response to wartime exigencies, expired in 1947.

sonam. The traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance. We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court; as we stated in *Kline* v. *Burke Construction Co.*, 260 U. S. 226 (1922):

> "[A]n action brought to enforce [a personal liability] *does not tend to impair or defeat the jurisdiction* of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* . . . ." *Id.*, at 230 (emphasis added).

No case of this Court has ever held that an injunction to "preserve" a case or controversy fits within the "necessary in aid of its jurisdiction" exception; neither have the parties directed us to any other federal-court decisions so holding.

The District Court's legal conclusion is not only unsupported by precedent, but the factual premises upon which it rests are not persuasive. First, even if the two corporate plaintiffs would cease to litigate the case after execution of the state-court judgment, there is no indication that Harry Stoner himself would lose his standing to vindicate his rights, or that the case could not go forward. Nor does it appear that the two corporate plaintiffs would necessarily be removed from the lawsuit. As far as the record indicates, there are currently minority shareholders in those corporations whose ownership interests would not be affected by petitioner's acquisition of majority stock control of the corporations. Under the applicable rules for shareholder derivative actions,

see Fed. Rule Civ. Proc. 23.1, the shareholders could presumably pursue the corporate rights of action, which would inure to their benefit, even if the corporations themselves chose not to do so. Finally, petitioner offered to enter a consent decree which assuredly would eliminate any possibility of petitioner's acquiring control of the corporations. See App. 209–210, 258. The injunction in this case was therefore, even under the District Courts' legal theory, not *necessary* in aid of that court's jurisdiction.

Our conclusion that neither of the bases relied upon by the District Court constitutes an exception to § 2283 is more than consistent with the recognition that any doubt must be resolved *against* the finding of an exception to § 2283, *Atlantic Coast Line R. Co.,* 398 U. S., at 297; a holding that there is an exception present in this case would demonstrably involve "judicial improvisation." *Clothing Workers,* 348 U. S., at 514.

Reversed and remanded.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in the result.

Although I agree that the decision of the Court of Appeals should be reversed, I do so for reasons that differ significantly from those expressed by the plurality. According to the plurality's analysis, § 16 of the Clayton Act, 15 U. S. C. § 26, is not an expressly authorized exception to the Anti-Injunction Act, 28 U. S. C. § 2283, because it is not "an 'Act of Congress . . . [which] could be given its intended scope only by the stay of a state-court proceeding,' [*Mitchum* v. *Foster,* 407 U. S. 225, 238 (1972)]." *Ante,* at 632. I do not agree that this is invariably the case; since I am of the opinion, however, that the state-court proceeding in this case should not have been enjoined by the federal court, I concur in the result.

In my opinion, application of the *Mitchum* test for deciding whether a statute is an "expressly authorized" exception to the Anti-Injunction Act shows that § 16 is such an exception

under narrowly limited circumstances. Nevertheless, consistently with the decision in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972),* I would hold that no injunction may issue against currently pending state-court proceedings unless those proceedings are themselves part of a "pattern of baseless, repetitive claims" that are being used as an anticompetitive device, all the traditional prerequisites for equitable relief are satisfied, and the only way to give the antitrust laws their intended scope is by staying the state proceedings. Cf. *California Motor Transport Co.* v. *Trucking*

*I cannot agree with MR. JUSTICE STEVENS, *post,* at 661–662, that the examples given in the quoted portion of *California Motor Transport Co.* v. *Trucking Unlimited* necessarily involve the use of the adjudicatory process in the same way that the state courts were being used in this case. For example, there is no reason to believe that the Court's reference to the use of a patent obtained by fraud to exclude a competitor contemplated only one lawsuit. The case cited in connection with that reference, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U. S. 172 (1965), held only that the enforcement of a patent procured by fraud on the Patent Office could state a claim under § 2 of the Sherman Act, where the monopolistic acts alleged included use of the fraudulent patent through a course of action involving both threats of suit and prosecution of an infringement suit.

MR. JUSTICE STEVENS' quotation from *California Motor Transport* stops just short of the language that I consider critical to the instant case. The Court's opinion continues:

"Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw." 404 U. S., at 513.

Since I believe that federal courts should be hesitant indeed to enjoin ongoing state-court proceedings, I am of the opinion that a pattern of baseless, repetitive claims or some equivalent showing of grave abuse of the state courts must exist before an injunction would be proper. No such finding was made by the District Court in this case.

Unlimited, 404 U. S., at 513. See also *Otter Tail Power Co.* v. *United States,* 410 U. S. 366, 380 (1973).

In my view, the District Court failed properly to apply the *California Motor Transport* rule. The court believed that it was enough that Vendo's activities in the single state-court proceeding involved in this case were not genuine attempts to use the state adjudicative process legitimately. In reaching this conclusion, the court looked to Vendo's purpose in conducting the state litigation and to several negative consequences that the litigation had for respondents. The court, however, did not find a "pattern of baseless, repetitive claims," nor could it have done so under the circumstances. Only one state-court proceeding was involved in this case, and it resulted in the considered affirmance by the Illinois Supreme Court of a judgment for more than $7 million. In my opinion, therefore, it cannot be said on this record that Vendo was using the state-court proceeding as an anticompetitive device in and of itself. Thus, I believe that § 16 itself did not authorize the injunction below, and on this ground I would reverse.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

Quite properly, the plurality does not question the merits of the preliminary injunction entered by the United States District Court for the Northern District of Illinois staying proceedings in the Illinois courts. It was predicated on appropriate findings of fact,[1] it was entered by a District Judge whose

[1] Specific findings of likelihood of ultimate success on the merits, likelihood of irreparable harm, a balance of the equities in favor of respondent-movants, and of protection of the public interest by issuance of the injunction are recited and substantiated in the District Court opinion. 403 F. Supp. 527, 532–538 (1975). The Court of Appeals affirmed, specifically rejecting petitioner's attack on the finding of a likelihood of ultimate success on the merits. 545 F. 2d 1050, 1058–1059 (CA7 1976).

understanding of the federal antitrust laws was unique,[2] and its entry was affirmed unanimously by the Court of Appeals.

Judge McLaren found substantial evidence that petitioner intended to monopolize the relevant market; that one of the overt acts performed in furtherance thereof was the use of litigation as a method of harassing and eliminating competition; that two of the corporate plaintiffs in the case, respondents here, would be eliminated by collection of the Illinois judgment; and that the state litigation had already severely hampered, and collection of the judgment would prevent, the marketing of a promising, newly developed machine which would compete with petitioner's products. 403 F. Supp. 527, 534–535, 538 (1975).[3] The Court of Appeals implicitly endorsed these findings when it noted that "[h]ere Vendo seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged to be the very object of antitrust violations." 545 F. 2d 1050, 1057 (CA7 1976).

The question which is therefore presented is whether the

---

[2] The late Richard W. McLaren served as Assistant Attorney General in charge of the Antitrust Division of the Department of Justice from 1969 until his appointment to the bench in 1972. In private practice he had acted as Chairman of the Antitrust Section of the American Bar Association.

[3] It is well settled, and the District Court so held, that when the precise conduct proscribed by the antitrust laws is sought to be furthered by litigation, the antitrust laws forbid a court from giving judgment if to do so "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Kelly* v. *Kosuga*, 358 U. S. 516, 520. See 403 F. Supp., at 535, citing *Continental Wall Paper Co.* v. *Louis Voight & Sons*, 212 U. S. 227, 261. See *Response of Carolina* v. *Leasco Response, Inc.*, 498 F. 2d 314, 317–320 (CA5 1974), cert. denied, 419 U. S. 1050; *Milsen Co.* v. *Southland Corp.*, 454 F. 2d 363 (CA7 1971); *Helfenbein* v. *International Industries, Inc.*, 438 F. 2d 1068, 1071 (CA8 1971); *Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 307 F. 2d 207 (CA3 1962); *Tampa Electric Co.* v. *Nashville Coal Co.*, 276 F. 2d 766 (CA6 1960); *United States* v. *Bayer Co.*, 135 F. Supp. 65 (SDNY 1955).

anti-injunction statute [4] deprives the federal courts of power to stay state-court litigation which is being prosecuted in direct violation of the Sherman Act. I cannot believe that any of the members of Congress who unanimously enacted that basic charter of economic freedom [5] in 1890 would have answered that question the way the plurality does today.

I

The plurality relies on the present form of a provision of the Judiciary Act of 1793.[6] In the ensuing century, there were changes in our economy which persuaded the Congress that the state courts could not adequately deal with contracts in restraint of trade that affected commerce in more than one

---

[4] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283.

[5] "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 4.

"The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce." *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 359–360.

[6] Act of Mar. 2, 1793, § 5, 1 Stat. 335: "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . . ." For convenience, the plurality has referred to this clause as the "Anti-Injunction Act"; that, however, is not the proper name of the statute.

jurisdiction.[7] The Sherman Act was enacted virtually unanimously in 1890 to protect the national economy from the pernicious effects of regulation by private cartel and to vest the fed-

---

[7] In his first speech in support of his bill, Senator Sherman stated:

"The power of the State courts has been repeatedly exercised to set aside such combinations as I shall hereafter show, but these courts are limited in their jurisdiction to the State, and, in our complex system of government, are admitted to be unable to deal with the great evil that now threatens us.

". . . The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests.

. . . . . .

". . . The committee therefore deemed it proper by express legislation to confer on the circuit courts of the United States original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, with authority to issue all remedial process or writs proper and necessary to enforce its provisions . . . ." 21 Cong. Rec. 2456 (1890).

Later the same day he said:

"[Congress] may 'regulate commerce;' can it not protect commerce, nullify contracts that restrain commerce, turn it from its natural courses, increase the price of articles, and therefore diminish the amount of commerce?

. . . . . .

"[The power of the 'combinations'] for mischief will be greatly crippled by this bill. Their present plan of organization was adopted only to evade the jurisdiction of State courts.

. . . . . .

"Suppose one of these combinations should unite all, or nearly all, the domestic producers of an article of prime necessity with a view to prevent competition and to keep the price up to the foreign cost and duty added, would not this be in restraint of trade and commerce and affect injuriously the operation of our revenue laws? Can Congress prescribe no remedy except to repeal its taxes? Surely it may authorize the executive authorities to appeal to the courts of the United States for such a remedy, as courts habitually apply in the States for the forfeiture of charters thus abused and the punishment of officers

eral courts with jurisdiction adequate to "exert such remedies as would fully accomplish the purposes intended." [8]

Between 1890 and 1914, although private litigants could

---

who practice such wrongs to the public. It may also give to our citizens the right to sue for such damages as they have suffered." *Id.*, at 2462.

Senator Sherman, 3 days later, discussing the rise of the "combinations" during the preceding 20 years, stated:

". . . The State courts have attempted to wrestle with this difficulty. I produced decisions of the supreme courts of several of the States.

"Take the State of New York, where the sugar trust was composed of seventeen corporations. What remedy had the people of New York in the suit that they had against that combination? None whatever, except as against one corporation out of the seventeen. No proceeding could be instituted in the State of New York by which all those corporations could be brought in one suit under the common jurisdiction of the United States. No remedy could be extended by the courts, although they were eager and earnest in search of a remedy.

. . . . . .

". . . When a man is injured by an unlawful combination why should he not have the power to sue in the courts of the United States? It would not answer to send him to a State court. It would not answer at all to send him to a court of limited jurisdiction. Then, besides, it is a court of the United States that alone has jurisdiction over all parts of the United States. The United States can send its writs into every part of a State and make parties in different States submit to its process. The States can not do that." *Id.*, at 2568–2569.

Similarly, in the House debate Congressman Culberson, floor sponsor of the bill, had this to say during his introductory remarks:

"If Congress will legislate within its sphere and to the limit to which it may go, and if the legislatures of the several States will do their duty and supplement that legislation, the trusts and combinations which are devouring the substance of the people of the country may be effectually suppressed. The States are powerless unless Congress will take charge of the trade between the States and make unlawful traffic that operates in restraint of trade and which promotes and encourages monopoly." *Id.*, at 4091.

See Letwin, Congress and the Sherman Antitrust Law: 1887–1890, 23 U. Chi. L. Rev. 221 (1956).

[8] "[F]ounded upon broad conceptions of public policy, the prohibi-

recover treble damages, only the United States could invoke the jurisdiction of the federal courts to prevent and restrain violations of the Sherman Act.[9] When Congress authorized the federal courts to grant injunctive relief in private antitrust litigation, it conferred the same broad powers that the courts possess in cases brought by the Government.[10] Section

---

tions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions. . . . [T]he statute in express terms vested the Circuit Court[s] of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and to exert such remedies as would fully accomplish the purposes intended." *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174.

See *Northern Securities Co.* v. *United States*, 193 U. S. 197, 343–347, 349–350 (opinion of Harlan, J.).

[9] Section 4 of the Sherman Act authorized equitable relief in actions brought by United States Attorneys; § 7 authorized any person injured in his business or property by reason of a violation of the antitrust laws to recover treble damages. 26 Stat. 209–210. In both sections, as is true of § 16 of the Clayton Act, the scope of the court's jurisdiction is limited only by the need to establish a violation of the Act.

[10] Although the kind of relief which is appropriate in private litigation may sometimes be different from that which the Government may obtain, cf. *United States* v. *Borden Co.*, 347 U. S. 514, 518–520, there is no difference in the scope of the jurisdictional grant to the federal court in the two kinds of cases:

"[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. *E. g., United States* v. *Borden Co.*, 347 U. S. 514, 518 (1954). Section 16 should be construed and applied with this purpose in mind . . . . Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.' [*Hecht Co.* v. *Bowles*, 321 U. S. 321, 330.]" *Zenith Corp.* v. *Hazeltine*, 395 U. S. 100, 130–131.

16 of the Clayton Act expressly authorizes injunctions against "a violation of the antitrust laws." [11]

The scope of the jurisdictional grant is just as broad as the definition of a violation of the antitrust laws. That definition was deliberately phrased in general language to be sure that "every conceivable act which could possibly come within

---

[11] Section 16 provides:

"[A]ny person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ." 38 Stat. 737, 15 U. S. C. § 26.

The legislative history of § 16 is thin. In addition to the nearly identical House and Senate Reports, *ante,* at 634 n. 5, the following comments from the House debate provide some idea of the congressional intent. Congressman McGillicuddy, a member of the Commerce Committee, described the perceived need:

"Under the present law any person injured in his business or property by acts in violation of the Sherman antitrust law may recover his damage. . . . There is no provision under the present law, however, to prevent threatened loss or damage even though it be irreparable. The practical effect of this is that a man would have to sit by and see his business ruined before he could take advantage of his remedy. In what condition is such a man to take up a long and costly lawsuit to defend his rights?

"The proposed bill solves this problem for the person, firm, or corporation threatened with loss or damage to property by providing injunctive relief against the threatened act that will cause such loss or damage. Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy." 51 Cong. Rec. 9261 (1914).

During consideration of the Conference Report Congressman Floyd described the scope of the § 16 remedy:

"[S]o that if a man is injured by a discriminatory contract, by a tying contract, by the unlawful acquisition of stock of competing corporations, or by reason of someone acting unlawfully as a director in two banks or other corporations, he can go into any court and enjoin or restrain the party from committing such unlawful acts." *Id.,* at 16319.

the spirit or purpose of the prohibition" would be covered by the statute, regardless of whether or not the particular form of restraint was actually foreseen by Congress.[12] In the decades following the formulation of the Rule of Reason in 1911, this Court has made it perfectly clear that the prosecution of litigation in a state court may itself constitute a form of violation of the federal statute.

Thus, the attempt to enforce a patent obtained by fraud,[13] or a patent known to be invalid for other reasons,[14] may constitute an independent violation of the Sherman Act; and such litigation may be brought in a state court.[15] The prosecution of frivolous claims and objections before regulatory bodies, including state agencies, may violate the antitrust laws.[16] The enforcement of restrictive provisions in a license to use a patent or a trademark [17] may violate the Sherman Act; such enforcement may, of course, be sought in the state courts. Similarly, the provisions of a lease,[18] or a fair trade

---

[12] "[T]he generic designation of the first and second sections of the [Sherman Act], when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held [in *Standard Oil Co.* v. *United States*, 221 U. S. 1,] that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 181.

[13] *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172.

[14] *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402.

[15] *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 260.

[16] *Otter Tail Power Co.* v. *United States*, 410 U. S. 366; 417 U. S. 901 (summary affirmance after remand); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508.

[17] *Timken Co.* v. *United States*, 341 U. S. 593; *Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 307 F. 2d 207 (CA3 1962); *Gray Line, Inc.* v. *Gray Line Sightseeing Cos.*, 246 F. Supp. 495 (ND Cal. 1965).

[18] *International Salt Co.* v. *United States*, 332 U. S. 392; *United*

agreement,[19] may become the focus of enforcement litigation which has a purpose or effect of frustrating rights guaranteed by the antitrust laws, either in a state or federal court.[20] Indeed, the enforcement of a covenant not to compete—the classic example of a contract in restraint of trade—typically takes place in a state court.[21]

These examples are sufficient to demonstrate that "litigation in state courts may constitute an antitrust violation . . . ." *ante,* at 635 n. 6. Since the judicial construction of a statute is as much a part of the law as the words written by the legislature, the illegal use of state-court litigation as a method of monopolizing or restraining trade is as plainly a violation of the antitrust laws as if Congress had specifically described each of the foregoing cases as an independent

---

Shoe Machinery Corp. v. *United States,* 258 U. S. 451; *Phillips* v. *Crown Central Petroleum Corp.,* 376 F. Supp. 1250 (Md. 1973).

[19] *Janel Sales Corp.* v. *Lanvin Parfums, Inc.,* 396 F. 2d 398 (CA2 1968), cert. denied, 393 U. S. 938; *Katz Drug Co.* v. *W. A. Sheaffer Pen Co.,* 6 F. Supp. 212 (WD Mo. 1933).

[20] In litigation between a franchisee and a franchisor the former may challenge the validity of various contract provisions under federal law, while the latter may rely heavily on state contract law as a basis for controlling the franchisee's conduct. State proceedings to obtain possession of disputed premises or equipment are powerful weapons in such litigation, even when the federal court has the power to maintain the status quo. See *Chmieleski* v. *City Products Corp.,* 71 F. R. D. 118, 141–142, 158 (WD Mo. 1976).

[21] The potential consequences of the plurality's view may perhaps best be illustrated by reference to a common-law decision that could not possibly survive scrutiny under the Sherman Act. In *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.,* [1894] A. C. 535, the House of Lords held that a 25-year, worldwide covenant not to compete in the arms business was an enforceable bargain. One of the parties to such a contract was therefore entitled to enjoin a breach of the agreement by another party. If such common-law relief should be granted by a state court in a comparable situation, and if the plurality's interpretation of the statute were accepted, a federal court would be powerless to interfere with state proceedings to enforce such a judgment.

violation. The language in § 16 of the Clayton Act which expressly authorizes injunctions against violations of the antitrust laws is therefore applicable to this species of violation as well as to other kinds of violations.

Since § 16 of the Clayton Act is an Act of Congress which expressly authorizes an injunction against a state-court proceeding which violates the antitrust laws, the plain language of the anti-injunction statute excepts this kind of injunction from its coverage.[22]

II

There is nothing in this Court's precedents which is even arguably inconsistent with this rather obvious reading of the statutory language.[23] On at least three occasions the Court

---

[22] The text of the statute is quoted in n. 4, *supra*.

[23] Rather surprisingly the plurality seems to regard *Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, as supporting its position. That case involved a construction of the portion of the Taft-Hartley Act that conferred jurisdiction on the National Labor Relations Board to obtain injunctive relief in certain situations. The Court rejected the argument that the statute implicitly authorized similar relief for private parties:

"Congress explicitly gave such jurisdiction to the district courts only on behalf of the Board on a petition by it or 'the officer or regional attorney to whom the matter may be referred.' § 10 (j), (l), 61 Stat. 149, 29 U. S. C. § 160 (j), (l). To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify. To find exclusive authority for relief vested in the Board and not in private parties accords with other aspects of the Act." *Id.*, at 517.

Since the statute did not expressly authorize the requested relief, it was obviously not within the "expressly authorized" exception to § 2283. The fact that the Court simply read the relevant statutes literally in that case supports my view that we should use the same approach here.

In *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, on which the plurality also relies, the union did not even argue that injunctive relief was expressly authorized by federal statute. It unsuccessfully contended "that the federal injunction was proper either 'to protect

has held that general grants of federal jurisdiction which make no mention of either state-court proceedings, or of the anti-injunction statute, are within the "expressly authorized" exception. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 599–601; [24] *Porter* v. *Dicken*, 328 U. S. 252; [25] *Mitchum* v. *Foster*, 407 U. S. 225.

---

or effectuate' the District Court's denial of an injunction in 1967, or as 'necessary in aid of' the District Court's jurisdiction." *Id.*, at 284. That case is wholly inapposite to the issue presented today.

The fact that these two cases provide the plurality with its strongest support emphasizes the dramatic character of its refusal to accept the plain meaning of the words Congress has written.

[24] "But the power of the District Courts to issue an injunction to stay proceedings in a State court is questioned, since, by the Judiciary Act of 1793, 1 Stat. 335, it was declared that no writ of injunction shall be granted [by the United States courts] 'to stay proceedings in any court of a State.' But the act of 1851 was a subsequent statute, and by the 4th section of this act—after providing for proceedings to be had under it for the benefit of ship owners, and after declaring that it shall be deemed a sufficient compliance with its requirements on their part if they shall transfer their interest in ship and freight for the benefit of the claimants to a trustee to be appointed by the court—it is expressly declared, that 'from and after [such] transfer all claims and proceedings against the owners shall cease.' Surely this injunction applies as well to 'claims and proceedings' in State courts as to those in the federal courts . . . ." 109 U. S., at 599–600.

[25] The relevant portions of §§ 205 (a) and (c) of the Emergency Price Control Act of 1942, 56 Stat. 33, simply provided:

"SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

. . . . .

"(c) The district courts shall have jurisdiction of criminal proceedings

In *Mitchum* the Court made it clear that a statute may come within the "expressly authorized" exception to § 2283 even though it does not mention the anti-injunction statute or contain any reference to state-court proceedings, provided that it creates a uniquely federal right or remedy that could be frustrated if the federal court were not empowered to enjoin the state proceeding.[26] The Court then formulated and applied this test: "The test . . . is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." 407 U. S., at 238.

Section 16 of the Clayton Act created a federal remedy which can only be given its intended scope if it includes the power to stay state-court proceedings in appropriate

---

for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act."

[26] "In the first place, it is evident that, in order to qualify under the 'expressly authorized' exception of the anti-injunction statute, a federal law need not contain an express reference to that statute. As the Court has said, 'no prescribed formula is required; an authorization need not expressly refer to § 2283.' *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 516. Indeed, none of the previously recognized statutory exceptions contains any such reference. Secondly, a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception. Three of the six previously recognized statutory exceptions contain no such authorization. Thirdly, it is clear that, in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." 407 U. S., at 237–238 (footnotes omitted).

cases. As one of the sponsors of the statute explained, under "this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy." [27] But if the plurality's interpretation of the legislation were correct, a private litigant might indeed be "ruined in his business before he has his remedy" against state-court litigation seeking enforcement of an invalid patent, a covenant not to compete, or an executory merger agreement, to take only a few obvious examples of antitrust violations that might be consummated by state-court litigation.

The plurality assumes that Congress intended to distinguish between illegal state proceedings which are already pending and those which have not yet been filed at the time of a federal court's determination that a violation of the antitrust laws has been consummated; the federal court may enjoin the latter, but is powerless to restrain the former. See *ante*, at 635–636, n. 6. Nothing in the history of the anti-injunction statute suggests any such logic-chopping distinction.[28] Indeed, it is squarely at odds with Senator Sherman's own explanation of the intended scope of the statutory power "to issue all remedial process or writs proper and necessary to enforce its provisions . . . ." [29] It would demean the legislative

[27] See n. 11, *supra*.

[28] Thus, the 1851 Act to limit the liability of shipowners, 9 Stat. 635, applied equally to "preventing or arresting the prosecution of separate suits," see *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 596. The Interpleader Act, 28 U. S. C. § 2361, in terms, applies equally to the "instituting or prosecuting" of other litigation. In terms of the interest in federalism, since the injunction against litigation typically runs against the parties rather than the court, there is little difference between denying a citizen access to the state forum and denying him the right to prosecute an existing case to its conclusion. In either situation, a federal injunction must rest on a determination that an important federal policy outweighs the interest in allowing a state court to resolve a particular controversy. But when the federal policy does justify that conclusion, the timing of the state-court action should rarely be controlling.

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

process to construe the eloquent rhetoric which accompanied the enactment of the antitrust laws as implicitly denying federal courts the power to restrain illegal state-court litigation simply because it was filed before the federal case was concluded.[30] A faithful application of the rationale of *Mitchum* v. *Foster* requires a like result in this case.

III

The plurality expresses the fear that if the Clayton Act is given its intended scope, the anti-injunction statute "would be completely eviscerated" since there are 26 other federal statutes which may also be within the "expressly authorized" exception. *Ante,* at 636–637, n. 7. That fear, stated in its strongest terms, is that in the 184 years since the anti-injunction statute was originally enacted, there are 26 occasions on which Congress has qualified its prohibition to some extent. There are at least three reasons why this argument should not cause panic.

First, the early history of the anti-injunction statute indicates that it was primarily intended to prevent the federal courts from exercising a sort of appellate review function in litigation in which the state and federal courts had equal competence. The statute imposed a limitation on the general equity powers of the federal courts which existed in 1793, and which have been exercised subsequently in diversity

[30] It is true that when the Sherman Act was passed, Congress did not expressly address "the possibility that state-court proceedings would be used to violate the Sherman or Clayton Acts." *Ante,* at 634. As the statute has been construed, however, it is now well settled that state courts can be used as the very instruments by which litigants, and the public, may be deprived of rights protected by the antitrust laws. When the state courts are so used and the antitrust laws thereby violated, the state litigation is as plainly a matter of federal legislative concern as if it had been expressly identified in the debates preceding the enactment of the 1890 statute.

and other private litigation. But the anti-injunction statute has seldom, if ever, been construed to interfere with a federal court's power to implement federal policy pursuant to an express statutory grant of federal jurisdiction.[31] Although there is no need to resolve the question in this case, I must confess that I am not now persuaded that the concept of federalism is necessarily inconsistent with the view that the 1793 Act should be considered wholly inapplicable to later enacted federal statutes that are enforceable exclusively in federal litigation.[32] If a fair reading of the jurisdictional grant in any such statute does authorize an injunction against state-court litigation frustrating the federal policy, nothing in our prior cases would foreclose the conclusion that it is within the "expressly authorized" exception to § 2283.

Second, in any event, the question whether the Packers and Stockyards Act of 1921, for example, gives the federal court the power to enjoin state litigation has little, if any, relevance to the issues presented by this case. Whatever the answer to that question may be,[33] that 56-year-old statute will not exacerbate federal-state relations and jeopardize the vitality of "our federalism." Indeed, even if all the statutes identified by the plurality are within the "expressly authorized" exception to § 2283, it is extremely doubtful that they would generate as much, or as significant, litigation as either

---

[31] As already noted, *supra,* at 654–655, n. 23, there was no such express grant of jurisdiction to private litigants in either *Clothing Workers* v. *Richman Bros. Co.,* 348 U. S. 511, or *Atlantic Coast Line R. Co.* v. *Locomotive Engineers,* 398 U. S. 281.

[32] Indeed, Mr. Justice Black's opinion for the Court in *Porter* v. *Dicken,* 328 U. S. 252, seems to proceed on the assumption that the anti-injunction statute is inapplicable when the federal statute may be enforced in either a state or a federal court.

[33] Cases in which § 2283 has been held to bar injunctive relief against state proceedings have seldom involved attempts to enforce federal statutes. Indeed, some courts have held that any federal statute expressly authorizing equitable relief is within the exception from § 2283.

the Civil Rights Act of 1871 or the antitrust laws.[34] The answer to the important question presented by this case should not depend on speculation about potential consequences for other statutes of relatively less importance to the economy and the Nation.

Third, concern about the Court's ability either to enlarge or to contain the exceptions to the anti-injunction statute, *ante*, at 635–639, is disingenuous at best. As originally enacted in 1793, the statute contained no express exception at all. Those few that were recognized in the ensuing century and a half were the product of judicial interpretation of the statute's prohibition in concrete situations. The codification of the Judicial Code in 1948 restated the exceptions in statutory language, but was not intended to modify the Court's power to accommodate the terms of the statute to overriding expressions of national policy embodied in statutes like the Ku Klux Klan Act of 1871 or the Sherman Act of 1890.[35]

IV

Since the votes of THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN are decisive, a separate comment on MR. JUSTICE BLACKMUN's opinion concurring in the result is required.

His agreement with the proposition that an injunction properly entered pursuant to § 16 of the Clayton Act is within the "expressly authorized" exception to the anti-injunction statute establishes that proposition as the law for the future.

---

[34] It is worthy of note that only 5 of the cited statutes predate the addition of the words "except as expressly authorized by Act of Congress" to the anti-injunction statute in 1948 (fully 16 were enacted in the last 10 years).

[35] The Reviser's Note to § 2283, which is taken from the House Report, H. R. Rep. No. 308, 80th Cong., 1st Sess., A181–A182 (1947), states that, with the exception of the addition of the words "to protect or effectuate its judgments," which were intended to overrule *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, "the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision."

His view that § 16 did not authorize the preliminary injunction entered by Judge McLaren is dispositive of this litigation but, for reasons which may be briefly summarized, is not a view that finds any support in the law.

Unlike the plurality, which would draw a distinction between ongoing litigation and future litigation, *ante,* at 635–636, n. 6, MR. JUSTICE BLACKMUN differentiates between a violation committed by a multiplicity of lawsuits and a violation involving only one lawsuit. The very case on which he relies rejects that distinction. In *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 512–513, the Court stated:

> "Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in *Walker Process Equipment* v. *Food Machinery & Chemical Corp.,* 382 U. S. 172, 175–177. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U. S. 690, 707; *Harman* v. *Valley National Bank,* 339 F. 2d 564 (CA9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act. *Rangen, Inc.* v. *Sterling Nelson & Sons,* 351 F. 2d 851 (CA9 1965).
>
> "There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations."

Each of the examples given in this excerpt from the *California Motor Transport* opinion involves a single use of the adjudicatory process to violate the antitrust laws.

Manifestly, when Mr. Justice Douglas wrote for the Court in that case and described "a pattern of baseless, repetitive claims," *id.*, at 513, as an illustration of an antitrust violation, he did not thereby circumscribe the category to that one example. Nothing in his opinion even remotely implies that there would be any less reason to enjoin the "[u]se of a patent obtained by fraud to exclude a competitor from the market," *id.*, at 512, for example, than to enjoin the particular violation before the Court in that case.

In this case we are reviewing the affirmance by the Court of Appeals of an order granting a preliminary injunction. Affirmance was required unless the exercise of the District Court's discretion was clearly erroneous. And when both the District Court and the Court of Appeals are in agreement, the scope of review in this Court is even more narrow, *Faulkner* v. *Gibbs,* 338 U. S. 267, 268; *United States* v. *Dickinson,* 331 U. S. 745, 751; *Allen* v. *Trust Co.,* 326 U. S. 630, 636. Without the most careful review of the record, and the findings and conclusions of the District Court, it is most inappropriate for this Court to reverse on the basis of a contrary view of the facts of the particular case.

The mere fact that the Illinois courts concluded that petitioner's state-law claim was meritorious does not disprove the existence of a serious federal antitrust violation. For if it did, invalid patents, price-fixing agreements, and other illegal covenants in restraint of trade would be enforceable in state courts no matter how blatant the violation of federal law.

V

Apart from the anti-injunction statute, petitioner has argued that principles of equity, comity, and federalism create a bar to injunctive relief in this case. Brief for Petitioner 36–39. This argument is supported by three facts: The Illinois litigation was pending for a period of nine years; the Illinois Supreme Court concluded that respondents were guilty of

a breach of fiduciary duty; and respondents withdrew their antitrust defense from the state action.

Unfortunately, in recent years long periods of delay have been a characteristic of litigation in the Illinois courts. That is not a reason for a federal court to show any special deference to state courts; quite the contrary, it merely emphasizes the seriousness of any decision by a federal court to abstain, on grounds of federalism, from the prompt decision of a federal question.

The Illinois Supreme Court's conclusion that respondents had violated a fiduciary obligation and that petitioner was entitled to a large damages recovery rested on that court's appraisal of the legality of a covenant in restraint of trade.[36] The fact that the covenant not to compete is valid as a matter of state law is irrelevant to the federal antitrust issue. If, for example, instead of a contract totally excluding respondents from the relevant market, the parties had agreed on a lesser restraint which merely required respondents to sell at prices fixed by petitioner, the Illinois court might also have concluded that respondents were bound by the contract even though the federal courts would have found it plainly violative of the Sherman Act. The Illinois decision on the merits merely highlights the fact that state and federal courts apply significantly different standards in evaluating contracts in restraint of trade.[37]

---

[36] "In some situations there could be, of course, a violation of a covenant not to compete without the breach of a fiduciary duty, as would be the case if Stoner had not been an officer and director of plaintiff. In the present case, however, the acts of defendants in misappropriating the Lektro-Vend [machine] and their use of it to compete against plaintiff are intertwined, the latter being, so to speak, the means by which the former was brought to bear against plaintiff." *Vendo Co.* v. *Stoner,* 58 Ill. 2d 289, 306–307, 321 N. E. 2d 1, 11 (1974).

[37] Indeed, a state court's conclusion that the breach of a covenant not to compete constitutes the violation of a fiduciary obligation as a matter of state law is not inconsistent with a federal-court determination that the litigation enforcing that covenant was "conducted in bad faith" as that

That fact provides the explanation for respondents' decision to withdraw their federal antitrust defense from the Illinois litigation and to present it to the federal courts. Congress has granted the federal courts exclusive jurisdiction over the prosecution of private antitrust litigation.[38] Since the state courts do not have the power to award complete relief for an antitrust violation, since state judges are unfamiliar with the complexities of this area of the law, and since state procedures are sometimes unsatisfactory for cases of nationwide scope, no adverse inference should be drawn from a state-court defendant's election to reserve his federal antitrust claim for decision by a federal court.

Indeed, since these respondents made that election, and since Congress has withheld jurisdiction of antitrust claims from the state courts, the plurality properly ignores the argument that principles of federalism require abstention in this case. For a ruling requiring the federal court to abstain from

---

concept is used in cases like *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 611. While the District Court did not specifically address the question involved in *Huffman* and *Younger* v. *Harris*, 401 U. S. 37, it had the following to say in addressing the extent of the Sherman Act violation:

"There is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately. Its theft of trade secret claim was clearly non-meritorious, and litigation of this claim might well be interpreted—considering the record as a whole—as an attempt to further harass the Stoner interests and limit the amount of aid Stoner could lend Lektro-Vend. The attempt to enforce the covenants not to compete . . . appears to have been to lengthen the period for which the noncompetition covenants would run. The purpose of this portion of the state litigation seems purely anticompetitive." 403 F. Supp., at 534–535.

The Court of Appeals implicitly affirmed, *supra*, at 646. Thus while every state proceeding which clashes with the antitrust laws would not necessarily be motivated by a desire to harass or be conducted in bad faith, the findings indicate that such was the case here.

[38] See *Freeman* v. *Bee Machine Co.*, 319 U. S. 448; *General Investment Co.* v. *Lake Shore & Mich. So. R. Co.*, 260 U. S. 261.

the decision of an antitrust issue that might have been raised in a state-court proceeding would be tantamount to holding that the federal defense *must* be asserted in the state action. Such a holding could not be reconciled with the congressional decision to confer exclusive jurisdiction of the private enforcement of the antitrust laws on the federal courts. Quite plainly, therefore, this is not the kind of case in which abstention is even arguably proper.

When principles of federalism are invoked to defend a violation of the Sherman Act, one is inevitably reminded of the fundamental issue that was resolved only a few years before the anti-injunction statute was passed. Perhaps more than any other provision in the Constitution, it was the Commerce Clause that transformed the ineffective coalition created by the Articles of Confederation into a great Nation.

> "It was . . . to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.
>
> . . . . . .
>
> "So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the commerce clause in the new structure of power.
>
> ". . . On this fact as much as any other we may safely say rests the vast economic development and present industrial power of the nation. To it may be credited largely the fact we are an independent and democratic country today." W. Rutledge, A Declaration of Legal Faith 25–27 (1947).

Only by ignoring this chapter in our history could we invoke principles of federalism to defeat enforcement of the "Magna Carta of free enterprise" [39] enacted pursuant to Congress' plenary power to regulate commerce among the States.

I respectfully dissent.

[39] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Associates,* 405 U. S. 596, 610. See also *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219, 235–236.

SCHOOL DISTRICT OF OMAHA ET AL. *v.* UNITED STATES ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 76–705. Decided June 29, 1977

Where neither the Court of Appeals nor the District Court, in addressing itself to the remedial school desegregation plan for Omaha, Neb., mandated by an earlier decision of the Court of Appeals, addressed itself to the inquiry now required by *Dayton Board of Education* v. *Brinkman, ante,* p. 406, the Court of Appeals' judgment is vacated, and the case is remanded for reconsideration.

Certiorari granted; 541 F. 2d 708, vacated and remanded.

PER CURIAM.

This school desegregation case involves the School District of Omaha, Neb. The District Court in a comprehensive opinion extensively reviewed the evidence presented by the parties, and recognized that there was considerable racial imbalance in school attendance patterns. Applying a legal standard which placed the burden of proving intentional segregative actions on the respondents, and which regarded the natural and foreseeable consequences of petitioners' conduct as "neither determinative nor immaterial" but as "one additional factor to be weighed," the District Court concluded that the respondent had not carried the burden of proving a deliberate policy of racial segregation. 389 F. Supp. 293. On appeal, the Court of Appeals rejected the legal standard applied by the District Court, 521 F. 2d 530, stating that a "presumption of segregative intent" arises from actions or omissions whose natural and foreseeable result is to "bring about or maintain segregation." *Id.,* at 535. Reviewing the facts found by the District Court concerning faculty assignment, student transfers, optional attendance zones, school con-

struction, and the deterioration of one high school in the district, the Court of Appeals generally accepted these factual findings. In each instance, however, it concluded that there was sufficient evidence under the legal standard it adopted to shift the burden of proof to the petitioners. Finding that in no instance had the petitioners carried their rebuttal burden, the Court of Appeals remanded for the formulation of a systemwide remedy. We denied certiorari. 423 U. S. 946.

Following the explicit instruction of the Court of Appeals, the District Court promulgated an extensive plan involving, among other elements, the systemwide transportation of pupils. On petitioners' appeal, the Court of Appeals for the Eighth Circuit affirmed. 541 F. 2d 708.

In *Washington* v. *Davis,* 426 U. S. 229, 239 (1976), we said:

> "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."

We restated and amplified the implications of this holding in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252 (1977).

Neither the Court of Appeals nor the District Court, in addressing itself to the remedial plan mandated by the earlier decision of the Court of Appeals, addressed itself to the inquiry required by our opinion in *Dayton Board of Education* v. *Brinkman, ante,* p. 406, in which we said:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The

remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Ante,* at 420.

The petition for certiorari is accordingly granted, the judgment of the Court of Appeals is vacated, and the case is remanded for reconsideration in the light of *Arlington Heights* and *Dayton.*

It is so ordered.

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

The Court's remand of this case for reconsideration in light of *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252 (1977), and *Dayton Board of Education* v. *Brinkman, ante,* p. 406, is inappropriate because wholly unnecessary. The Court of Appeals concluded that "segregation in the Omaha School District was intentionally created and maintained by the defendants." 521 F. 2d 530, 532–533 (1975). The petitioners did not contest in the Court of Appeals the finding of the District Court that the Omaha public schools are segregated. *Ibid.* The Court of Appeals carefully reviewed the abundant evidence in the record bearing on segregative intent and concluded that the evidence justified a presumption that segregative intent permeated petitioners' policies concerning faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of the 96% black Tech High School. *Id.,* at 537–546. Relying on *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U. S. 189, 210 (1973), the Court of Appeals further found that the petitioners did not rebut this presumption because they "failed to carry *their burden of establishing that segregative intent was not among the factors which motivated their actions.*" 521 F. 2d, at 536, 537 (emphasis supplied). We denied certiorari. 423 U. S. 946 (1975). When the case came before the Court

of Appeals for the second time a year later, the court explicitly reviewed its prior holding in light of our intervening decision in *Washington* v. *Davis,* 426 U. S. 229 (1976), and found nothing in that case to cause it to revise its earlier opinion. 541 F. 2d 708, 709 (1976).

Arlington Heights, supra, did not make new law, but only applied the holding of *Washington* v. *Davis* that discrimination must be purposeful to be unconstitutional. *Arlington Heights* interpreted *Washington* v. *Davis* to mean that an action in which an "invidious discriminatory purpose was a motivating factor" is unconstitutional, and that proof that a decision is "motivated in part by a racially discriminatory purpose" shifts the burden of proof to the alleged discriminator. 429 U. S., at 270–271, n. 21. The conclusion of the Court of Appeals that the defendants "failed to carry their burden of establishing that segregative intent was not among the factors which motivated their actions" was based on language from our decision in *Keyes, supra,* but it so faithfully applies the *Arlington Heights* formulation that it reads as if the Court of Appeals had anticipated precisely what *Arlington Heights* would hold five months later. I cannot imagine that the Court of Appeals will do, or properly can do, anything on remand except reaffirm its judgment with a recitation of its gratification that *Arlington Heights* had been correctly anticipated.

Dayton, supra, reaffirmed the already well-established principle that the scope of the remedy must be commensurate with the scope of the constitutional violation. *Ante,* at 420. In this case, the District Court ordered a comprehensive decree to remedy the effects of past discrimination, and the Court of Appeals affirmed. As is evident from a reading of the first Court of Appeals opinion describing the massive systemwide intentional segregation in the Omaha School District, a comprehensive order is entirely appropriate. A less comprehen-

sive order would simply not remedy fully the unconstitutional conditions that have been found to exist in the school system. I would affirm the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, dissenting.

For the reasons stated by MR. JUSTICE BRENNAN, I cannot join the Court's summary disposition of this case. I would deny certiorari.

BRENNAN ET AL. *v.* ARMSTRONG ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76–809. Decided June 29, 1977

Where neither the District Court in ordering development of a remedial school desegregation plan for Milwaukee, Wis., nor the Court of Appeals in affirming, addressed itself to the inquiry now mandated by *Dayton Board of Education* v. *Brinkman, ante,* p. 406, the Court of Appeals' judgment is vacated, and the case is remanded for reconsideration.

Certiorari granted; 539 F. 2d 625, vacated and remanded.

PER CURIAM.

This school desegregation case involves the school system in the city of Milwaukee, Wis. The District Court here made various findings of segregative acts on the part of petitioner School Board members, appointed a Special Master "to develop a plan for the desegregation of the Milwaukee public school system," and certified its order for interlocutory appeal to the Court of Appeals for the Seventh Circuit. *Amos* v. *Board of School Directors,* 408 F. Supp. 765. The Court of Appeals, observing that there was "an unexplained hiatus between specific findings of fact and conclusory findings of segregative intent," stated that the District Court is "entitled to a presumption of consistency" and concluded that the findings of the District Court were not clearly erroneous. 539 F. 2d 625. Neither the District Court in ordering development of a remedial plan, nor the Court of Appeals in affirming, addressed itself to the inquiry mandated by our opinion in *Dayton Board of Education* v. *Brinkman, ante,* p. 406, in which we said:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution

> of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Ante,* at 420.

The petition for certiorari is accordingly granted, the judgment of the Court of Appeals is vacated, and the case is remanded for reconsideration in the light of *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252 (1977), and *Dayton.*

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

My concern over the Court's misuse of summary dispositions prompts this dissent.

The Court's explanation of its action gives the erroneous impression that the Court of Appeals' decision related to the question of what kind of remedy is appropriate in this case. Quite the contrary, there was no remedy issue before the Court of Appeals, and that court considered no such issue.

The District Court concluded in a 60-page opinion that "school authorities engaged in practices with the intent and for the purpose of creating and maintaining a segregated school system, and that such practices had the effect of causing current conditions of segregation in the Milwaukee public schools." *Amos* v. *Board of School Directors,* 408 F. Supp. 765, 818 (ED Wis. 1976). Recognizing that "remedial efforts may well be for naught if the determination of liability is ultimately reversed on appeal," *id.,* at 824, Judge Reynolds certified this issue of law for interlocutory appeal. To further ensure appealability, he entered a general order enjoining future racial discrimination and directing the defendants to formulate desegregation plans. App. 140–141. This order did not call for any particular kind of desegregation plan. Thus,

when the case reached the Court of Appeals, the only issue before it was the existence of a violation.[1] After a careful review of the evidence, it concluded that the District Court's finding of intentional segregation was not clearly erroneous. 539 F. 2d 625 (CA7 1976).

This Court now vacates the Court of Appeals judgment and remands for reconsideration in light of two cases. One of those cases [2] is merely a routine application of *Washington* v. *Davis,* 426 U. S. 229, which was correctly construed by the Court of Appeals.[3] The other case is relevant to the issue of liability, if at all, only because it supports the Court of Appeals.[4]

Of course, in formulating a remedy, the District Court will need to consider cases such as *Milliken* v. *Bradley, ante,* p. 267, and *Dayton Board of Education* v. *Brinkman, ante,* p. 406, if there is any dispute about the proper scope of the remedy. But since no such issue has ever been decided by the Court of Appeals, there is nothing for it to reconsider in light of these cases. These cases certainly provide no justification for vacating the judgment affirming the District Court's conclusion that the petitioners have violated the Constitution. This Court's hasty action will unfortunately lead to unnecessary

---

[1] After the case was argued in the Court of Appeals on June 2, 1976 (see 539 F. 2d 625), the District Court entered a broader remedy. App. 142, 144.

[2] *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252.

[3] The Court of Appeals cited *Washington* v. *Davis* as holding that "a 'racially discriminatory purpose' is essential to an equal protection violation in school cases, as in other cases," and that "[p]urpose may . . . be inferred from 'the totality of the relevant facts,' which may include discriminatory impact," 539 F. 2d, at 633–634, quoting *Washington* v. *Davis,* 426 U. S., at 242.

[4] *Dayton Board of Education* v. *Brinkman, ante,* p. 406, is primarily a remedy case and therefore irrelevant to the action of the Court of Appeals in this case. It does, however, stress the limitations on appellate review in this area, such as the "clearly erroneous" rule, *ante,* at 417, which the Court of Appeals scrupulously followed, *e. g.,* 539 F. 2d, at 637.

work by already overburdened Circuit Judges, who have given this case far more study than this Court had time to give it. Nevertheless, it is quite clear that after respectful reconsideration the Court of Appeals remains free to re-enter its original judgment.

In my opinion the petition for certiorari should be denied. However, since the Court has granted the petition, and since it is not our practice to review findings of fact which the Court of Appeals has already determined to be supported by the record, I would affirm the judgment.

FINCH *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76–1206. Decided June 29, 1977

Where, prior to any declaration of guilt or innocence, the District Court dismissed an information against petitioner on the ground that it failed to state an offense, the Government's appeal from the dismissal was barred by the Double Jeopardy Clause.

Certiorari granted; 548 F. 2d 822, vacated and remanded.

PER CURIAM.

In an information filed in the United States District Court for the District of Montana, petitioner was charged with knowingly fishing on a portion of the Big Horn River in Montana reserved for use by the Crow Indians, in violation of 18 U. S. C. § 1165. The case was submitted to the District Court on an agreed statement of facts, which showed that petitioner had cast his lure into the river while standing on land owned by the State of Montana within the exterior boundaries of the Crow Reservation. After considering the stipulated facts and reviewing the applicable treaties, the court dismissed the information for failure to state an offense. 395 F. Supp. 205 (1975).

On the Government's appeal, the Court of Appeals for the Ninth Circuit reversed. 548 F. 2d 822 (1976). The court held that the appeal was permissible under 18 U. S. C. § 3731 and the Double Jeopardy Clause because, as in *United States* v. *Wilson,* 420 U. S. 332 (1975), no further factual proceedings would be required in the District Court in the event that its legal conclusions were found to be erroneous:

> "Here, as in *Wilson,* it is easy to separate factual resolutions from determinations of law. No additional facts must be found to determine whether the stipulation supports the conviction of the defendant. The only determination to be made is a legal one." 548 F. 2d, at 827.

On the merits, the court viewed the pertinent treaties differently from the District Court and held that petitioner had violated 18 U. S. C. § 1165 "by willfully and knowingly fishing without lawful authority or permission of the tribe." 548 F. 2d, at 835. The court directed entry of a judgment of conviction.

We think that the Court of Appeals was without jurisdiction to entertain the appeal. When the District Court dismissed the information, jeopardy had attached, see *Serfass* v. *United States,* 420 U. S. 377, 388 (1975), but no formal finding of guilt or innocence had been entered, see *United States* v. *Jenkins,* 420 U. S. 358 (1975); *Lee* v. *United States,* 432 U. S. 23, 28 n. 4, 29 n. 7 (1977). In these circumstances, the holding of *United States* v. *Wilson* is inapposite. A successful Government appeal "would not justify a reversal with instructions to reinstate the general finding of guilt: there was no such finding, in form or substance, to reinstate." *United States* v. *Jenkins, supra,* at 368. Absent a plea of guilty or nolo contendere, see Fed. Rule Crim. Proc. 11, a verdict or general finding of guilt by the trial court is a necessary predicate to conviction. See Rule 23 (c). Because the dismissal was granted prior to any declaration of guilt or innocence, "on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged," *Lee, supra,* at 30, we hold that the Government's appeal was barred by the Double Jeopardy Clause.

We grant the petition for certiorari, vacate the judgment of the Court of Appeals, and remand to that court with directions that the appeal be dismissed.

It is so ordered.

MR. JUSTICE STEVENS would grant certiorari and set the case for oral argument.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

I dissent from the summary disposition of this case for two reasons. The first is that the factual assumption, made

both by the Court of Appeals for the Ninth Circuit and by this Court, that petitioner and respondent had agreed to submit the issue of guilt to the District Court on the "agreed statement of facts" is by no means clear from Judge Battin's principal opinion in this case, 395 F. Supp. 205. My second reason for disagreeing with summary disposition is that this Court has never passed on any claim of double jeopardy where the issues were submitted on an agreed statement of facts, rather than to a jury for its verdict or to the court for a finding of guilt or innocence after hearing witnesses. While I am not prepared to say that the Court's decision on the legal issue involved here is wrong, I am not sufficiently convinced that it is right so as to justify summary disposition without either argument or briefing on the merits.

The Court states that "[t]he case was submitted to the District Court on an agreed statement of facts," and "[a]fter considering the stipulated facts and reviewing the applicable treaties, the court dismissed the information for failure to state an offense." The Court of Appeals for the Ninth Circuit put the matter much the same way. Implicit in this statement is that the submission involved a waiver of petitioner's right to jury trial and both his and the Government's consent that the District Court decide the issue of guilt or innocence. The District Court's opinion in the case, however, is by no means clear on these points. That court put the matter this way:

> "On June 14, 1974, the defendant filed a motion to dismiss said information. The parties submitted extensive and well-considered memoranda of law. On September 4, 1974 an order was filed wherein I denied the motion to dismiss and noted that the information was sufficient on its face. An Agreed Statement of Facts and additional memoranda of law have been filed. Additionally, counsel for the Crow Tribe of Indians and the State of Montana, Department of Fish and Game, have appeared herein as *amici curiae*.

> "After a thorough review of the file, I am compelled to reconsider my order dated September 4, 1974, wherein I denied defendant's motion to dismiss. I conclude that the information is not sufficient on its face for several reasons." *Id.*, at 207.

While this statement is by no means inconsistent with an agreement by the parties to submit the issue of guilt or innocence to the District Court, neither is it inconsistent with an agreement by the parties to submit on an agreed statement of facts a motion for reconsideration of the motion to dismiss the information, which the District Court had previously denied. This factual uncertainty, unless somehow clarified, would lead me to deny certiorari in this case in order that this Court not render an advisory opinion on what may be an important double jeopardy question.

The Court of Appeals, proceeding on the hypothesis that the case had been submitted to the District Court for a determination of guilt or innocence, as well as the sufficiency of the information, decided that jeopardy *had* attached. It therefore proceeded to inquire whether a reversal of the District Court's dismissal of the information would require further factual determinations, and therefore constitute double jeopardy under *United States* v. *Jenkins,* 420 U. S. 358 (1975), or would instead be governed by *United States* v. *Wilson,* 420 U. S. 332 (1975).

I agree with the Court that the Court of Appeals' alignment of this case with *Wilson* rather than with *Jenkins* was conclusory and gave too little attention to the ways in which this case differs from *Wilson.* But I do not think the opposite result is so obvious as to warrant summary disposition. In deciding the question of law which this case poses, I do not think we can ignore three double jeopardy decisions which have intervened since the *Jenkins-Wilson-Serfass* (*Serfass* v. *United States,* 420 U. S. 377 (1975)) trilogy of two years ago. *United States* v. *Dinitz,* 424 U. S. 600 (1976),

qualified the "manifest necessity" requirement of *United States* v. *Perez,* 9 Wheat. 579 (1824), where a mistrial was granted at the request of the defendant. Its stress on the absence of prosecutorial overreaching or misconduct, while in no way inconsistent with that trilogy, nonetheless emphasized more of a balancing and fairness test than the sort of "bright line" distinction set forth in *Wilson* and *Jenkins. United States* v. *Martin Linen Supply Co.,* 430 U. S. 564 (1977), and *Lee* v. *United States,* 432 U. S. 23 (1977), likewise read more in terms of balancing and of "double jeopardy values" than in terms of the strict *Wilson-Jenkins* distinction.

If there has been some shift in emphasis in the Court's cases this Term, it seems to me that the submission of the issue of guilt or innocence on an agreed statement of facts not only factually distinguishes this case from *Jenkins,* but is a factor to be weighed in any balancing test against a finding of double jeopardy. We have held that the Double Jeopardy Clause bars repeated prosecutions not only to reduce the possibility that an innocent man will finally be convicted, but to avoid subjecting defendants "to embarrassment, expense and ordeal and compelling [them] to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States,* 355 U. S. 184, 187–188 (1957). See *United States* v. *Jorn,* 400 U. S. 470, 479 (1971). Since if the Court's factual hypothesis is right, the facts of this case are not in issue, not only is some of the embarrassment and ordeal absent, but the expense that would normally be involved in a full-scale retrial with its calling of witnesses for both sides is likewise avoided.

The factual uncertainties in this case are not entirely unrelated to the double jeopardy questions involved. Because we have never decided a case involving double jeopardy claims where the issue of guilt or innocence was submitted to the court on an agreed statement of facts without the calling of any witnesses, we have never had occasion to pass on

when jeopardy attaches in such a situation. Assuming that the factual uncertainties in the procedural history of the case can be clarified, and that the issue of guilt or innocence was submitted to the trial judge, I do not believe this case is controlled by *Jenkins*. The double jeopardy issues which it raises are not as straightforward as suggested in the Court's summary disposition. If the Court feels this case should be decided on the merits, I would therefore grant certiorari and have it briefed and argued.

HARRIS *v.* OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 76–5663. Decided June 29, 1977

Where petitioner had been convicted of felony-murder based on his companion's killing of a victim during the course of an armed robbery, the Double Jeopardy Clause of the Fifth Amendment barred a separate prosecution of petitioner for the lesser crime of robbery with firearms, since conviction of the greater crime of murder could not be had without conviction of the lesser crime.

Certiorari granted; 555 P. 2d 76, reversed.

PER CURIAM.

A clerk in a Tulsa, Okla., grocery store was shot and killed by a companion of petitioner in the course of a robbery of the store by the two men. Petitioner was convicted of felony-murder in Oklahoma State court. The opinion of the Oklahoma Court of Criminal Appeals in this case states that "[i]n a felony murder case, the proof of the underlying felony [here robbery with firearms] is needed to prove the intent necessary for a felony murder conviction." 555 P. 2d 76, 80–81 (1976). Petitioner nevertheless was thereafter brought to trial and convicted on a separate information charging the robbery with firearms, after denial of his motion to dismiss on the ground that this prosecution violated the Double Jeopardy Clause of the Fifth Amendment because he had been already convicted of the offense in the felony-murder trial. The Oklahoma Court of Criminal Appeals affirmed.

When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one.* *In re*

*The State conceded in its response to the petition for certiorari that "in the Murder case, it was necessary for all the ingredients of the under-

Nielsen, 131 U. S. 176 (1889); cf. *Brown* v. *Ohio,* 432 U. S. 161 (1977). "[A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *In re Nielsen, supra,* at 188. See also *Waller* v. *Florida,* 397 U. S. 387 (1970); *Grafton* v. *United States,* 206 U. S. 333, 352 (1907).

The motion for leave to proceed *in forma pauperis* is granted, the petition for writ of certiorari is granted, and the judgment of the Court of Criminal Appeals is

Reversed.

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

I join the Court's opinion but in any event would reverse on a ground not addressed by the Court, namely, that the State did not prosecute the two informations in one proceeding. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the 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 *Thompson* v. *Oklahoma,* 429 U. S. 1053 (1977) (BRENNAN, J., dissenting from denial of certiorari), and cases collected therein.

---

lying felony of Robbery with Firearms to be proved . . . ." Brief in Opposition 4.

Reporter's Note

The next page is purposely numbered 901. The numbers between 683 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 27 THROUGH JUNE 29, 1977

JUNE 27, 1977

Affirmed on Appeal

No. 75–6721. DOE ET AL. *v.* STEWART, COMMISSIONER, HEALTH AND RESOURCES ADMINISTRATION OF LOUISIANA. Affirmed on appeal from D. C. E. D. La. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN dissent.

No. 76–680. JERNIGAN, SECRETARY OF STATE OF ARKANSAS *v.* LENDALL. Appeal from D. C. E. D. Ark. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment affirmed.

No. 76–1020. SOCIALIST WORKERS PARTY ET AL. *v.* EU, SECRETARY OF STATE OF CALIFORNIA. Affirmed on appeal from D. C. N. D. Cal.

Appeal Dismissed

No. 75–1809. RABINOVITCH *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. Appeal from D. C. E. D. N. Y. dismissed. Reported below: 406 F. Supp. 1233.

Vacated and Remanded on Appeal

No. 75–813. WESTBY, SECRETARY, DEPARTMENT OF SOCIAL SERVICES OF SOUTH DAKOTA, ET AL. *v.* DOE ET AL. Appeal from D. C. S. D. Judgment vacated and case remanded for further consideration in light of *Beal* v. *Doe,* 432 U. S. 438 (1977), and *Maher* v. *Roe,* 432 U. S. 464 (1977). MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would affirm the judgment. Reported below: 402 F. Supp. 140.

No. 75–1749. Toia, Acting Commissioner, Department of Social Services of New York, et al. *v.* Klein et al. Appeal from D. C. E. D. N. Y. Motion of appellees for leave to proceed *in forma pauperis* granted, judgment vacated, and case remanded for further consideration in light of *Beal* v. *Doe,* 432 U. S. 438 (1977), and *Maher* v. *Roe,* 432 U. S. 464 (1977). Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun would affirm the judgment. Reported below: 409 F. Supp. 731.

No. 76–595. Levitt, Comptroller of New York, et al. *v.* Committee for Public Education & Religious Liberty et al.; and

No. 76–713. La Salle Academy et al. *v.* Committee for Public Education & Religious Liberty et al. Appeals from D. C. S. D. N. Y. Judgment vacated and cases remanded for further consideration in light of *Wolman* v. *Walter, ante,* p. 229. Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stevens would affirm the judgment. Reported below: 414 F. Supp. 1174.

No. 76–846. Rush et al. *v.* Savchuk. Appeal from Sup. Ct. Minn. Judgment vacated and case remanded for further consideration in light of *Shaffer* v. *Heitner, ante,* p. 186. Reported below: 311 Minn. 480, 245 N. W. 2d 624.

No. 76–1503. Atchison, Topeka & Santa Fe Railway Co. et al. *v.* Wichita Board of Trade et al. Appeal from D. C. Kan. Judgment vacated and case remanded with directions to remand case to the Interstate Commerce Commission for further consideration in connection with its reconsideration of *Secretary of Agriculture* v. *Interstate Commerce Commission,* No. 76–1026 (CADC Mar. 11, 1977), on remand from the United States Court of Appeals for the District of Columbia Circuit. Mr. Justice Powell took no part in the consideration or decision of this appeal.

No. 76–1144. Minnesota Civil Liberties Union et al. *v.* Casmey, Commissioner of Education, et al. Appeal from D. C. Minn. Judgment vacated and case remanded for further consideration in light of *Wolman* v. *Walter, ante,* p. 229.

Certiorari Granted—Vacated and Remanded

No. 75–478. Parker Seal Co. *v.* Cummins, 429 U. S. 65. Petition for rehearing granted. Judgment of this Court, entered November 2, 1976, and judgment of the United States Court of Appeals for the Sixth Circuit are vacated. Case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *TWA* v. *Hardison,* 432 U. S. 63 (1977). Mr. Justice Stevens took no part in the consideration or decision of this case. Reported below: 516 F. 2d 544.

No. 75–1745. Barbour *v.* North Carolina. Ct. App. N. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Patterson* v. *New York,* 432 U. S. 197 (1977), and *Hankerson* v. *North Carolina,* 432 U. S. 233 (1977). Reported below: 28 N. C. App. 259, 220 S. E. 2d 812.

No. 76–85. Hunter *v.* North Carolina. Ct. App. N. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Patterson* v. *New York,* 432 U. S. 197 (1977), and *Hankerson* v. *North Carolina,* 432 U. S. 233 (1977). Reported below: 28 N. C. App. 456, 221 S. E. 2d 837.

No. 75–6852. Burke *v.* North Carolina. Ct. App. N. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Patterson* v. *New York,* 432 U. S. 197 (1977), and *Hankerson* v. *North Carolina,* 432 U. S. 233 (1977). Reported below: 28 N. C. App. 469, 221 S. E. 2d 713.

No. 75–6907. BARKER *v.* NORTH CAROLINA. Ct. App. N. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Patterson* v. *New York,* 432 U. S. 197 (1977), and *Hankerson* v. *North Carolina,* 432 U. S. 233 (1977). Reported below: 28 N. C. App. 729, 222 S. E. 2d 490.

No. 76–86. MCCLATCHY NEWSPAPERS ET AL. *v.* NOBLE ET UX. C. A. 9th Cir. Motion of American Newspaper Publishers Assn. for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Continental T. V., Inc.* v. *GTE Sylvania Inc., ante,* p. 36. Reported below: 533 F. 2d 1081 and 537 F. 2d 1030.

No. 76–641. P. C. PFEIFFER CO., INC., ET AL. *v.* FORD ET AL.; and

No. 76–1166. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR *v.* JACKSONVILLE SHIPYARDS, INC., ET AL. C. A. 5th Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Northeast Marine Terminal Co.* v. *Caputo,* 432 U. S. 249 (1977). Reported below: 539 F. 2d 533.

No. 76–724. ESTELLE, CORRECTIONS DIRECTOR *v.* MCDONALD. C. A. 5th 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 *Wainwright* v. *Sykes, ante,* p. 72. Reported below: 536 F. 2d 667.

No. 76–730. ADKINS *v.* I. T. O. CORPORATION OF BALTIMORE ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Northeast Marine Terminal Co.* v. *Caputo,* 432 U. S. 249 (1977). Reported below: 529 F. 2d 1080.

No. 76–1361. J. A. McCarthy, Inc., et al. *v.* Bradshaw et al. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Northeast Marine Terminal Co.* v. *Caputo,* 432 U. S. 249 (1977). Reported below: 547 F. 2d 1161.

No. 76–1498. Davis *v.* Kentucky. Sup. Ct. Ky. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Brown* v. *Ohio,* 432 U. S. 161 (1977), and *Price* v. *Georgia,* 398 U. S. 323 (1970). Reported below: 545 S. W. 2d 644.

No. 76–5722. Schleis *v.* United States. C. A. 8th 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 *United States* v. *Chadwick, ante,* p. 1. Reported below: 543 F. 2d 59.

No. 76–6714. McKenzie *v.* Montana. Sup. Ct. Mont. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Patterson* v. *New York,* 432 U. S. 197 (1977). Reported below: 171 Mont. 278, 557 P. 2d 1023.

Miscellaneous Orders

No. A–881 (76–5325). Browder *v.* Director, Department of Corrections of Illinois. C. A. 7th Cir. [Certiorari granted, 429 U. S. 1072.] Application for enlargement from custody, presented to Mr. Justice Powell, and by him referred to the Court, denied.

No. A–1030. Timmons *v.* McGrath. Sup. Ct. S. C. Application for stay of execution and enforcement of judgment below, presented to Mr. Justice Marshall, and by him referred to the Court, denied.

No. A–1071. KNAPP *v.* ARIZONA. Application for stay of execution of sentence of death entered by the Superior Court of Arizona, in and for the County of Maricopa, on Jan. 6, 1975, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, granted pending timely filing and disposition of a petition for writ of certiorari.

No. A–1081 (76–6965). JORDAN *v.* ARIZONA. Sup. Ct. Ariz. Application for stay of execution of sentence of death entered by the Superior Court of Arizona, in and for the County of Maricopa, on Mar. 13, 1975, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, granted pending disposition of the case in this Court.

No. D–75. IN RE DISBARMENT OF PLENTY. Disbarment entered. [For earlier order, see 429 U. S. 937.]

No. D–98. IN RE DISBARMENT OF RENSHAW. Disbarment entered. [For earlier order, see 430 U. S. 927.]

No. D–113. IN RE DISBARMENT OF LIBRACH. It is ordered that Burton A. Librach of Clayton, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 76–6707. CROWLEY *v.* UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT;

No. 76–6726. WILLIAMS *v.* PHILLIPS, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL.; and

No. 76–6754. CLARK *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 76–1662. UNITED STATES *v.* BOARD OF COMMISSIONERS OF SHEFFIELD ET AL. Appeal from D. C. N. D. Ala. Probable jurisdiction noted. Reported below: 430 F. Supp. 786.

Certiorari Granted

No. 76–1346. LORILLARD, A DIVISION OF LOEW'S THEATRES, INC. *v.* PONS. C. A. 4th Cir. Certiorari granted. Reported below: 549 F. 2d 950.

No. 76–1476. J. W. BATESON CO., INC., ET AL. *v.* UNITED STATES EX REL. BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 179 U. S. App. D. C. 325, 551 F. 2d 1284.

No. 76–1040. SANABRIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. Reported below: 548 F. 2d 1.

No. 76–1114. CALIFORNIA ET AL. *v.* SOUTHLAND ROYALTY CO. ET AL.;

No. 76–1133. EL PASO NATURAL GAS CO. *v.* SOUTHLAND ROYALTY CO. ET AL.; and

No. 76–1587. FEDERAL POWER COMMISSION *v.* SOUTHLAND ROYALTY CO. ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 543 F. 2d 1134.

No. 76–6513. BELL *v.* OHIO. Sup. Ct. Ohio. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted limited to Question 1 presented by the petition. Reported below: 48 Ohio St. 2d 270, 358 N. E. 2d 556.

Certiorari Denied

No. 75–1654. BRANCH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 288 N. C. 514, 220 S. E. 2d 495.

No. 75–7001. KIRK ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 534 F. 2d 1262.

238-670 O - 79 - 46

No. 75–6866. FAVORS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 137 Ga. App. 25, 223 S. E. 2d 11.

No. 76–242. NOBLE ET UX. *v.* MCCLATCHY NEWSPAPERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 533 F. 2d 1081.

No. 76–359. U. S. INDUSTRIES, INC., ET AL. *v.* GREGG. C. A. 3d Cir. Certiorari denied. Reported below: 540 F. 2d 142.

No. 76–537. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* HOPKINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 533 F. 2d 163.

No. 76–571. JOHN T. CLARK & SON OF BOSTON, INC., ET AL. *v.* STOCKMAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 539 F. 2d 264.

No. 76–706. MARITIME TERMINALS, INC., ET AL. *v.* BROWN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 542 F. 2d 903.

No. 76–880. HALTER MARINE FABRICATORS, INC., ET AL. *v.* NULTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 539 F. 2d 533.

No. 76–910. EDWIN K. WILLIAMS & CO.-EAST, INC., ET AL. *v.* EDWIN K. WILLIAMS & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 542 F. 2d 1053.

No. 76–1033. EVANS, TRUSTEE IN BANKRUPTCY *v.* S. S. KRESGE CO. C. A. 3d Cir. Certiorari denied. Reported below: 544 F. 2d 1184.

No. 76–1093. DRAVO CORP. ET AL. *v.* MAXIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 545 F. 2d 374.

No. 76–1164. SNYDER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 547 F. 2d 1165.

No. 76–1191. UNITED STATES *v.* CITY OF ALBUQUERQUE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 545 F. 2d 110.

No. 76–1194. SPAGNOLO *v.* UNITED STATES;
No. 76–6221. FUSCO *v.* UNITED STATES; and
No. 76–6723. FALVO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 546 F. 2d 1117.

No. 76–1294. SESHACHALAM *v.* CREIGHTON UNIVERSITY SCHOOL OF MEDICINE. C. A. 8th Cir. Certiorari denied. Reported below: 549 F. 2d 79.

No. 76–1319. BURLEIGH HOUSE CONDOMINIUM, INC. *v.* BUCHWALD, TRUSTEE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 57.

No. 76–1364. APPLESTEIN *v.* SIMONS. Ct. App. N. Y. Certiorari denied. Reported below: 40 N. Y. 2d 1091, 360 N. E. 2d 1105.

No. 76–1372. TODARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 1300.

No. 76–1405. GALLAGHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 76–1407. MERCANTILE TRUST COMPANY NATIONAL ASSN. *v.* ST. LOUIS COUNTY NATIONAL BANK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 548 F. 2d 716.

No. 76–1413. BRAINERD *v.* DANN, COMMISSIONER OF PATENTS AND TRADEMARKS. C. C. P. A. Certiorari denied. Reported below: 546 F. 2d 434.

No. 76–1428. ST. CLAIR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 552 F. 2d 57.

No. 76–1466. HIGA *v.* STETSON, SECRETARY OF THE AIR FORCE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 549 F. 2d 152.

No. 76–1531. LEX TEX LTD., INC. *v.* UNIVERSAL TEXTURED YARNS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 541 F. 2d 1127.

No. 76–1538. GRAYCO LAND ESCROW, LTD., ET AL. *v.* WONG ET AL. Sup. Ct. Hawaii. Certiorari denied. Reported below: 57 Haw. 436, 559 P. 2d 264.

No. 76–1541. DARVIN *v.* COUNTY OF ORANGE ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 76–1544. KNUTSON ET AL. *v.* DAILY REVIEW, INC., ET AL.; and

No. 76–1545. DAILY REVIEW, INC., ET AL. *v.* KNUTSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 548 F. 2d 795.

No. 76–1549. NEW YORK *v.* YARTER. Ct. App. N. Y. Certiorari denied. Reported below: 41 N. Y. 2d 830, 361 N. E. 2d 1041.

No. 76–1551. MOODY ET UX. *v.* WILLIE ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 754.

No. 76–1562. PIERPONT *v.* ALLEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 551 F. 2d 308.

No. 76–1574. CENTRAL BANK OF CLAYTON *v.* CLAYTON BANK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 2d 102.

No. 76–1589. DAWKINS *v.* NABISCO, INC., BAKERY & CONFECTIONERY UNION LOCAL NO. 42. C. A. 5th Cir. Certiorari denied. Reported below: 549 F. 2d 396.

No. 76–1619. CRUTCHER-ROLFS-CUMMINGS, INC. *v.* BALLARD. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 540 S. W. 2d 380.

No. 76–1666. QUINN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 554 F. 2d 522.

No. 76–1672. ABRAMSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 553 F. 2d 1164.

No. 76–1693. LYLES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 76–5132. AVILES *v.* UNITED STATES; and
No. 76–5143. SORIANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 535 F. 2d 658.

No. 76–5887. BETHEA *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 365 A. 2d 64.

No. 76–6063. KAMPSHOFF *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 53 App. Div. 2d 325, 385 N. Y. S. 2d 672.

No. 76–6104. FRIESEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 545 F. 2d 672.

No. 76–6238. KEENER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 238 Ga. 7, 230 S. E. 2d 846.

No. 76–6254. HOOD *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 76–6296. RICHARDS *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 906.

No. 76–6410. MEEKS *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 545 F. 2d 9.

No. 76–6429. CRUZ *v.* SKELTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 543 F. 2d 86.

No. 76–6511. O'BERRY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 546 F. 2d 1204.

No. 76–6436. NEGRON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 548 F. 2d 1085.

No. 76–6546. PICHA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 76–6548. KELLY *v.* UNITED STATES; and
No. 76–6549. POWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 551 F. 2d 760.

No. 76–6552. RUSSILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 550 F. 2d 1330.

No. 76–6553. LOMAN ET VIR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 551 F. 2d 164.

No. 76–6589. HOUSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 76–6591. JARDAN *v.* UNITED STATES; and
No. 76–6611. HUDSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 552 F. 2d 216.

No. 76–6597. EDMOND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 1256.

No. 76–6702. EVANS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 336 So. 2d 703.

No. 76–6709. REECE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 172 Mont. 551, 562 P. 2d 1129.

No. 76–6712. FINNEGAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 33 Md. App. 251, 364 A. 2d 124.

No. 76–6787. SANCHEZ-RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 551 F. 2d 862.

No. 76–6818. BARKER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 76–6822. SANFRATELLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 76–6825. GREATHOUSE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 76–6827. FREEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 76–6832. YELARDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 548 F. 2d 665.

No. 75–6847. LIPSCOMB *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 76–6854. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 76–6856. FONTANA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 76–6857. KENDRICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 554 F. 2d 1071.

No. 76–6866. MASTRIAN *v.* WOOD, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 554 F. 2d 813.

No. 75–6492. WINFREY *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 526 F. 2d 592.

No. 76–301. GARRISON, WARDEN *v.* RESENDEZ. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 528 F. 2d 1310.

No. 76–358. NEW YORK *v.* BROWN. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 40 N. Y. 2d 381, 353 N. E. 2d 811.

No. 76–471. NEW YORK *v.* CONSOLAZIO. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 40 N. Y. 2d 446, 354 N. E. 2d 801.

No. 76–959. MAGGIO, WARDEN *v.* NEWMAN. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 539 F. 2d 502.

No. 76–871. PRESTIGE LINCOLN-MERCURY, INC., ET AL. *v.* QUALITY MERCURY, INC., ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 542 F. 2d 466.

No. 76–900. ERIE LACKAWANNA RAILWAY CO. *v.* COLE. C. A. 6th Cir. Motion of National Railway Labor Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 541 F. 2d 528.

No. 76–978. BRIDGETON HOSPITAL ASSN. ET AL. *v.* DOE ET AL. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN would deny the petition, it appearing that the judgment below rests upon adequate state grounds. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 71 N. J. 478, 366 A. 2d 641.

No. 76–1411. ST. LOUIS BOARD OF EDUCATION *v.* CALDWELL ET AL. C. A. 8th Cir. Motion of the individual respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. Reported below: 546 F. 2d 768.

No. 76–1564. REGAN ET AL. *v.* ZURAK ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 550 F. 2d 86.

No. 76–1441. HEUBLEIN, INC., ET AL. *v.* WATERS ET AL. C. A. 9th Cir. Motion of respondent Waters for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 547 F. 2d 466.

No. 76–1552. MARRIOTT CORP. *v.* RICHARD ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 549 F. 2d 303.

No. 76–6720. RICHMOND *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 114 Ariz. 186, 560 P. 2d 41.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would vacate the death sentence in this case.

Rehearing Granted. (See No. 75–478, *supra.*)

Rehearing Denied

No. 75–1013. BRONCUCIA *v.* COLORADO, 431 U. S. 937;

No. 75–1105. REID *v.* MEMPHIS PUBLISHING CO., 429 U. S. 964;

No. 75–1153. ABOOD ET AL. *v.* DETROIT BOARD OF EDUCATION ET AL., 431 U. S. 209;

No. 76–352. CHAPPELLE *v.* GREATER BATON ROUGE AIRPORT DISTRICT ET AL., 431 U. S. 159.

No. 76–986. NETELKOS ET AL. *v.* UNITED STATES, 431 U. S. 953;

No. 76–1179. ASHCROFT, ATTORNEY GENERAL OF MISSOURI *v.* MATTIS, 431 U. S. 171; and

No. 76–1267. CRAVERO ET AL. *v.* UNITED STATES, 430 U. S. 983. Petitions for rehearing denied.

No. 76–1271. HOOPES *v.* UNITED STATES, 431 U. S. 954;

No. 76–1422. SHANAHAN *v.* RITTENHOUSE, PROSECUTOR OF HUNTERDON COUNTY, 431 U. S. 951;

No. 76–1469. SPEROW ET AL. *v.* UNITED STATES, 431 U. S. 930;

No. 76–6191. PIERCE *v.* GEORGIA, 431 U. S. 930;

No. 76–6287. HALL *v.* BUREAU OF EMPLOYMENT AGENCIES, 431 U. S. 920;

No. 76–6329. ROBINSON *v.* UNITED STATES, 431 U. S. 920;

No. 76–6452. LELAND *v.* UNITED STATES, 431 U. S. 957;

No. 76–6458. BAXTER *v.* CORNETT, WARDEN, 431 U. S. 941;

No. 76–6543. LEE *v.* EWING, COLE, ERDMAN & EUBANK ET AL., 431 U. S. 942; and

No. 76–6647. ALLEY *v.* DODGE HOTEL ET AL., 431 U. S. 958. Petitions for rehearing denied.

No. 76–1081. MITCHELL ET AL. *v.* UNITED STATES, 431 U. S. 933. Petition for rehearing denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

JUNE 29, 1977

Appeal Dismissed

No. 76–694. BUCKLEY ET AL. *v.* MCRAE ET AL. Appeal from D. C. E. D. N. Y. dismissed. Second renewed application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Reported below: 421 F. Supp. 533.

Vacated and Remanded on Appeal

No. 76–1113. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. Appeal from D. C. E. D. N. Y. Judgment vacated and case remanded for further consideration in light of *Maher* v. *Roe,* 432 U. S. 464 (1977), and *Beal* v. *Doe,* 432 U. S. 438 (1977). Reported below: 421 F. Supp. 533.

No. 76–1225. CONSUMERS UNION OF THE UNITED STATES, INC., ET AL. *v.* VIRGINIA STATE BAR ET AL.; and

No. 76–1337. VIRGINIA STATE BAR ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL. Appeals from E. D. E. D. Va. Judgment vacated and cases remanded for further consideration in light of *Bates* v. *State Bar of Arizona*, *ante*, p. 350. Reported below: 427 F. Supp. 506.

Certiorari Granted—Vacated and Remanded. (See also No. 76–705, *ante*, p. 667; No. 76–809, *ante*, p. 672; and No. 76–1206, *ante*, p. 676.)

No. 74–5174. EBERHEART *v.* GEORGIA; and

No. 74–5954. HOOKS *v.* GEORGIA. Sup. Ct. Ga. Petitioners in these cases were sentenced to death. Imposition and carrying out of the death penalty constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Coker* v. *Georgia*, *ante*, p. 584. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the death penalties imposed, and cases remanded for further proceedings. Reported below: No. 74–5174, 232 Ga. 247, 206 S. E. 2d 12; No. 75–5954, 233 Ga. 149, 210 S. E. 2d 668.

Certiorari Granted—Reversed. (See No. 76–5663, *ante*, p. 682).

Miscellaneous Orders

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. It is ordered that the Honorable Walter E. Hoffman, Senior Judge of the United States District Court for the Eastern District of Virginia, is appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem

necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier orders herein, see, *e. g.*, 423 U. S. 1.]

No. 73, Orig. CALIFORNIA *v.* NEVADA. Motion for leave to file bill of complaint granted. It is ordered that the Honorable Robert Van Pelt, Senior Judge of the United States District Court for the District of Nebraska, is appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

Certiorari Denied

No. 76–1209. General Motors Corp. *v.* Stewart et al. C. A. 7th Cir. Certiorari denied. Reported below: 542 F. 2d 445.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1974, 1975, AND 1976

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1974	1975	1976	1974	1975	1976	1974	1975	1976	1974	1975	1976
Number of cases on docket	12	14	8	2, 308	2, 352	2, 324	2, 348	2, 395	2, 398	4, 668	4, 761	4, 730
Number disposed of during term	4	7	2	1, 877	1, 810	1, 852	1, 966	1, 989	2, 064	3, 847	3, 806	3, 918
Number remaining on docket	8	7	6	431	542	472	382	406	334	821	955	812

	TERMS		
	1974	1975	1976
Cases argued during term	175	179	176
Number disposed of by full opinions	144	160	154
Number disposed of by per curiam opinions	20	16	22
Number set for reargument	11	3	0
Cases granted review during term	172	172	169
Cases reviewed and decided without oral argument	157	186	207
Total cases to be available for argument at outset of following term	100	99	88

JULY 7, 1977

INDEX

ADMISSIBILITY OF INCULPATORY STATEMENTS. See **Habeas Corpus.**

ADVERTISING BY ATTORNEYS. See **Antitrust Acts,** 2; **Constitutional Law,** VII, 3–5.

AID TO NONPUBLIC SCHOOLS. See **Constitutional Law,** VII, 2.

AIRCRAFT CRASHES. See **Federal-State Relations,** 1.

AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970. See **Procedure.**

ALABAMA. See **Civil Rights Act of 1964,** 1, 2.

ANTI-INJUNCTION ACT. See **Federal-State Relations,** 2.

ANTITRUST ACTS. See also **Federal-State Relations,** 2.

1. *Location restriction—Application of rule of reason rather than per se rule.*—Under standard for creation of *per se* rules stated in *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5, there is no justification for distinction drawn in *United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365, between restrictions imposed in sale and nonsale transactions. Similarly, facts of this case do not present a situation justifying a *per se* rule. Accordingly, *per se* rule stated in *Schwinn* ("Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it," *id.,* at 379), is overruled, and location restriction used by respondent manufacturer of television sets whereby number of retail franchises granted for any given area was limited and each franchisee was required to sell respondent's products only from location or locations at which it was franchised, should be judged under traditional rule-of-reason standard whereby factfinder weighs all of circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Continental T. V., Inc. v. GTE Sylvania Inc., p. 36

2. *Sherman Act—Restraint on attorney advertising.*—Restraint upon attorney advertising imposed by Arizona Supreme Court wielding power of State over practice of law is not subject to attack under Sherman Act. Bates v. State Bar of Arizona, p. 350.

APPEALS. See **Constitutional Law,** VI, 1.

ARIZONA. See **Antitrust Acts**, 2; **Constitutional Law**, VII, 3–5.

ASSOCIATIONAL RIGHTS. See **Constitutional Law**, VII, 1, 7.

ATTORNEYS. See **Antitrust Acts**, 2; **Constitutional Law**, VII, 3–5.

BILLS OF ATTAINDER. See **Constitutional Law**, I.

BONA FIDE OCCUPATIONAL QUALIFICATION. See **Civil Rights Act of 1964**, 1, 2.

BREACHES OF CONTRACT. See **Federal-State Relations**, 1.

BROADCAST OF PERFORMER'S ACT. See **Constitutional Law**, VII, 6; **Jurisdiction**, 2.

CAPITAL PUNISHMENT. See **Constitutional Law**, III.

CHURCH-RELATED SCHOOLS. See **Constitutional Law**, VII, 2.

CHURCH-STATE ENTANGLEMENT. See **Constitutional Law**, VII, 2.

CIVIL RIGHTS ACT OF 1964.

1. *Employment discrimination—Hiring of prison guards—Gender criteria.*—In particular circumstances of this case, District Court erred in rejecting appellant Alabama corrections officials' contention that regulation establishing gender criteria for assigning "correctional counselors" (prison guards) to "contact" positions (positions requiring close physical proximity to inmates) falls within narrow ambit of bona-fide-occupational-qualification exception of § 703 (e) of Act, it appearing from evidence that Alabama maintains a prison system where violence is order of day, inmate access to guards is facilitated by dormitory living arrangements, every correctional institution is understaffed, and a substantial portion of inmate population is composed of sex offenders mixed at random with other prisoners, and that therefore use of women guards in "contact" positions in maximum-security male penitentiaries would pose a substantial security problem, directly linked to sex of prison guard. Dothard v. Rawlinson, p. 321.

2. *Employment discrimination—Hiring of prison guards—Height and weight requirements—Women applicants.*—District Court did not err in holding that Title VII of Act prohibited application of statutory height and weight requirements for "correctional counselors" (prison guards) in Alabama to appellee woman applicant and class she represents. To establish prima facie case of employment discrimination, a plaintiff need only show that facially neutral standards in question, such as Alabama's height and weight standards, select applicants for hire in a significantly discriminatory pattern, and here showing of disproportionate impact of height and weight standards on women based on national statistics, rather than on comparative statistics of actual applicants, sufficed to make out

CIVIL RIGHTS ACT OF 1964—Continued.
prima facie case, which appellant state corrections officials failed to rebut. Dothard v. Rawlinson, p. 321.

3. *Employment discrimination—Pattern or practice—Hiring of teachers.*—In United States' action against petitioner school district and district officials alleging that they were engaged in a "pattern or practice" of teacher employment discrimination in violation of Title VII of Act, which became applicable to petitioners as public employers on March 24, 1972, Court of Appeals erred in disregarding statistical data in record dealing with district's hiring after it became subject to Title VII and court should have remanded case to District Court for further findings as to relevant labor market area and for an ultimate determination whether district has engaged in a pattern or practice of employment discrimination since March 24, 1972. Though Court of Appeals was correct in view that a proper comparison was between racial composition of district's teaching staff and racial composition of qualified public school teacher population in relevant labor market, it erred in disregarding possibility that prima facie statistical proof in record might at trial court level be rebutted by statistics dealing with district's post-Act hiring practices such as with respect to number of Negroes hired compared to total number of Negro applicants. Hazelwood School District v. United States, p. 299.

CLAYTON ACT. See **Federal-State Relations**, 2.

COMMERCIAL SPEECH. See **Constitutional Law**, VII, 3–5.

CONSTITUTIONAL LAW. See also **Jurisdiction**, 2; **Schools**, 2.

I. Bill of Attainder Clause.

Presidential Recordings and Materials Preservation Act.—PRMPA, which directs Administrator of General Services to take custody of Presidential papers and tape recordings of appellant former President pending screening by Government archivists in order to return to appellant those personal and private in nature and to preserve those having historical value and to make materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person may invoke," does not violate Bill of Attainder Clause. Nixon v. Administrator of General Services, p. 425.

II. Due Process.

State jurisdiction over nonresidents.—Delaware's assertion of jurisdiction over appellants (individual defendants in shareholder's derivative suit), based solely on statutory presence of appellants' property in Delaware, violates Due Process Clause, which "does not contemplate that a state may make binding a judgment . . . against an individual or cor-

CONSTITUTIONAL LAW—Continued.

porate defendant with which the state has no contacts, ties, or relations." Shaffer v. Heitner, p. 186.

III. Eighth Amendment.

Death sentence for rape—Cruel and unusual punishment.—Georgia Supreme Court's judgment upholding death sentence for rape is reversed, and case is remanded. Coker v. Georgia, p. 584.

IV. Eleventh Amendment.

Imposition of school desegregation costs on State.—In District Court's school desegregation decree to remedy *de jure* segregation in Detroit school system, wherein court included educational components in areas of reading, in-service teacher training, testing, and counseling, requirement that state defendants pay one-half additional costs attributable to such components does not violate Eleventh Amendment, since District Court was authorized to provide prospective equitable relief, even though such relief requires expenditure of money by State. Milliken v. Bradley, p. 267.

V. Equal Protection of the Laws.

Restrictions on prisoners' labor union.—Prohibition of North Carolina Department of Correction regulation against receipt by and distribution to prison inmates of bulk mail from appellee prisoners' labor Union as well as prohibition of Union meetings among inmates, whereas service organizations, such as Jaycees and Alcoholics Anonymous, were given bulk mailing and meeting rights, does not violate Equal Protection Clause. Prison does not constitute a "public forum," and appellant prison officials demonstrated a rational basis for distinguishing between Union (which occupied an adversary role and espoused a purpose illegal under North Carolina law) and service organizations (which performed rehabilitation services). Jones v. North Carolina Prisoners' Union, p. 119.

VI. Fifth Amendment.

1. *Double jeopardy—Dismissal of information—Government appeal.*—Where, prior to any declaration of guilt or innocence, District Court dismissed an information against petitioner on ground that it failed to state an offense, Government's appeal from dismissal was barred by Double Jeopardy Clause. Finch v. United States, p. 676.

2. *Double jeopardy—Subsequent prosecution for lesser crime.*—Where petitioner had been convicted of felony-murder based on his companion's killing of a victim during course of an armed robbery, Double Jeopardy Clause of Fifth Amendment barred a separate prosecution of petitioner for lesser crime of robbery with firearms, since conviction of greater crime of murder could not be had without conviction of lesser crime. Harris v. Oklahoma, p. 682.

CONSTITUTIONAL LAW—Continued.

VII. First Amendment.

1. *Associational rights—Presidential Recordings and Materials Preservation Act.*—PRMPA, which directs Administrator of General Services to take custody of Presidential papers and tape recordings of appellant former President pending screening by Government archivists in order to return to appellant those personal and private in nature and to preserve those having historical value and to make materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person may invoke," does not significantly interfere with or chill appellant's First Amendment associational rights. Nixon v. Administrator of General Services, p. 425.

2. *Freedom of religion—State aid to nonpublic schools.*—Those portions of Ohio statute authorizing State to provide nonpublic school pupils with textbooks, standardized testing and scoring, diagnostic services, and therapeutic and remedial services are constitutional. But those portions of statute relating to instructional materials and equipment and field trip services are unconstitutional. Wolman v. Walter, p. 229.

3. *Freedom of speech—Attorney advertising—Protected conduct.*—On this record, appellant attorneys' newspaper advertisement of their "legal clinic," stating that they were offering "legal services at very reasonable fees," and listing their fees for certain services, is not misleading and falls within scope of First Amendment protection. Bates v. State Bar of Arizona, p. 350.

4. *Freedom of speech—Overbreadth doctrine—Professional advertising—Protected conduct by attorneys.*—First Amendment overbreadth doctrine, which represents a departure from traditional rule that a person may not challenge a statute on ground that it might be applied unconstitutionally in circumstances other than those before court, is inapplicable to professional advertising, a context where it is not necessary to further its intended objective, and appellant attorneys must therefore demonstrate that their specific conduct in advertising their "legal clinic" was constitutionally protected. Bates v. State Bar of Arizona, p. 350.

5. *Freedom of speech—Suppression of attorney advertising.*—Commercial speech, which serves individual and societal interests in assuring informed and reliable decisionmaking, is entitled to some First Amendment protection, and justifications advanced by appellee State Bar are inadequate to support suppression of all advertising by attorneys. Bates v. State Bar of Arizona, p. 350.

6. *Freedom of the press—Broadcast of performer's entire act.*—First and Fourteenth Amendments do not immunize news media when they broadcast a performer's entire act without his consent, and Constitution

CONSTITUTIONAL LAW—Continued.
no more prevents a State from requiring respondent broadcasting company to compensate petitioner for broadcasting his entire "human cannonball" act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to copyright owner, or to film or broadcast a prize fight or a baseball game, where promoters or participants had other plans for publicizing event. Zacchini v. Scripps-Howard Broadcasting Co., p. 562.

7. *Right of association—Freedom of speech—Restrictions on prisoners' labor union.*—North Carolina Department of Correction regulations prohibiting prisoners from soliciting other inmates to join appellee prisoners' labor Union and barring Union meetings and bulk mailings concerning Union from outside sources, do not violate First Amendment as made applicable to States by Fourteenth. Jones v. North Carolina Prisoners' Union, p. 119.

VIII. Fourth Amendment.

Search and seizure—Warrantless search of footlocker.—Where federal narcotics agents, an hour and a half after arresting respondents upon their arrival by train in Boston, opened, without respondents' consent or a search warrant, a double-locked footlocker, which respondents had transported on train and which agents had taken to federal building in Boston, respondents were entitled to protection of Warrant Clause of Fourth Amendment, with evaluation of a neutral magistrate, before their privacy interests in contents of footlocker were invaded. United States v. Chadwick, p. 1.

IX. Presidential Privilege.

Presidential Recordings and Materials Preservation Act.—PRMPA, which directs Administrator of General Services to take custody of Presidential papers and tape recordings of appellant former President pending screening by Government archivists in order to return to appellant those personal and private in nature and to preserve those having historical value and to make materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person may invoke," does not on its face violate Presidential privilege of confidentiality. Nixon v. Administrator of General Services, p. 425.

X. Right of Privacy.

Presidential Recordings and Materials Preservation Act.—PRMPA, which directs Administrator of General Services to take custody of Presidential papers and tape recordings of appellant former President pending screening by Government archivists in order to return to appellant those personal and private in nature and to preserve those having historical value and to make materials available for use in judicial proceedings sub-

CONSTITUTIONAL LAW—Continued.

ject to "any rights, defenses or privileges which the Federal Government or any person may invoke," does not unconstitutionally invade appellant's right of privacy. Nixon v. Administrator of General Services, p. 425.

XI. Separation of Powers.

Presidential Recordings and Materials Preservation Act.—PRMPA, which directs Administrator of General Services to take custody of Presidential papers and tape recordings of appellant former President pending screening by Government archivists in order to return to appellant those personal and private in nature and to preserve those having historical value and to make materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person may invoke," does not on its face violate principle of separation of powers. Nixon v. Administrator of General Services, p. 425.

XII. Tenth Amendment.

States' reserved powers—Effect on school desegregation decree.—With respect to District Court's decree to remedy *de jure* segregation in Detroit school system, Tenth Amendment's reservation of nondelegated power to States is not implicated by a federal court's judgment enforcing express prohibitions of unlawful state conduct enacted by Fourteenth Amendment, nor are principles of federalism abrogated by decree. Milliken v. Bradley, p. 267.

CONTEMPORANEOUS-OBJECTION RULE. See **Habeas Corpus.**

CONTRACTS. See **Federal-State Relations,** 1.

CONTROLLING STATE LAW. See **Federal-State Relations,** 1.

CORRECTIONAL COUNSELORS. See **Civil Rights Act of 1964,** 1, 2.

COSTS OF SCHOOL DESEGREGATION. See **Constitutional Law,** IV.

COUNTY AIRPORTS. See **Federal-State Relations,** 1.

COURT-ORDERED SCHOOL DESEGREGATION PLANS. See **Constitutional Law,** IV; **Schools.**

CRIMINAL LAW. See **Constitutional Law,** III; VI; VIII; **Habeas Corpus.**

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** III.

CUSTODY OF PRESIDENTIAL MATERIALS. See **Constitutional Law,** I; VII, 1; IX; X; XI.

DAYTON, OHIO. See **Schools,** 2.

DEATH SENTENCES. See **Constitutional Law,** III.

DE JURE SCHOOL SEGREGATION. See **Constitutional Law**, IV; XII; **Schools**, 1.

DELAWARE. See **Constitutional Law**, II; **Jurisdiction**, 1.

DESEGREGATION DECREES. See **Constitutional Law**, IV; XII; **Schools**, 1, 2.

DETROIT, MICH. See **Constitutional Law**, IV; XII; **Schools**, 1.

DISCRIMINATION. See **Civil Rights Act of 1964**; **Constitutional Law**, IV; XII; **Schools**.

DISMISSAL OF INFORMATION. See **Constitutional Law**, VI, 1.

DISTRICT COURTS. See **Constitutional Law**, IV; XII; **Schools**, 1.

DIVERSITY ACTIONS. See **Federal-State Relations**, 1.

DOUBLE JEOPARDY. See **Constitutional Law**, VI.

DUE PROCESS. See **Constitutional Law**, II.

EIGHTH AMENDMENT. See **Constitutional Law**, III.

ELEVENTH AMENDMENT. See **Constitutional Law**, IV.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, V.

ESTABLISHMENT CLAUSE. See **Constitutional Law**, VII, 2.

EXECUTIVE BRANCH. See **Constitutional Law**, XI.

FEDERAL AVIATION ADMINISTRATION. See **Federal-State Relations**, 1.

FEDERAL COMMON LAW. See **Federal-State Relations**, 1.

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL-STATE RELATIONS. See also **Constitutional Law**, XII; **Habeas Corpus**; **Indians.**

1. *Aircraft crash—County airport—Contract with Federal Aviation Administration—State law as applicable to breach of contract claim.*—In petitioners' consolidated diversity actions against respondent county arising out of an aircraft crash at county's airport, state rather than federal law applies to resolution of petitioners' claim that, as, respectively, survivors of deceased passengers, assignee of aircraft owner, and a burn victim, they are third-party beneficiaries of grant contracts between county and FAA whereby county agreed to restrict use of land adjacent to or near airport to activities compatible with normal aircraft operations, including landings and takeoffs; that county breached these contracts by

FEDERAL-STATE RELATIONS—Continued.

operating a garbage dump adjacent to airport; and that cause of crash was ingestion of birds swarming from dump into aircraft's jet engines shortly after takeoff. Miree v. DeKalb County, p. 25.

2. *Anti-Injunction Act—§ 16 of Clayton Act as exception.*—Court of Appeals' judgment holding that § 16 of Clayton Act (which authorizes any person to seek injunctive relief against violations of antitrust laws) is an express exception to Anti-Injunction Act (which prohibits a federal court from enjoining state-court proceedings "except as expressly authorized by Act of Congress") is reversed and case is remanded. Vendo Co. v. Lektro-Vend Corp., p. 623.

FIFTH AMENDMENT. See **Constitutional Law**, VI.

FIRST AMENDMENT. See **Constitutional Law**, VII; **Jurisdiction**, 2.

FISHING RIGHTS OF INDIANS. See **Indians.**

FLORIDA. See **Habeas Corpus.**

FOOTLOCKER SEARCHES. See **Constitutional Law**, VIII.

FOURTEENTH AMENDMENT. See **Constitutional Law**, II; V; VII, 6, 7; XII; **Jurisdiction**, 2.

FOURTH AMENDMENT. See **Constitutional Law**, VIII.

FRANCHISE AGREEMENTS. See **Antitrust Acts**, 1.

FREEDOM OF RELIGION. See **Constitutional Law**, VII, 2.

FREEDOM OF SPEECH. See **Constitutional Law**, VII, 3–5, 7.

FREEDOM OF THE PRESS. See **Constitutional Law**, VII, 6; **Jurisdiction**, 2.

GENDER CRITERIA IN HIRING EMPLOYEES. See **Civil Rights Act of 1964**, 1, 2.

GENERAL SERVICES ADMINISTRATION. See **Constitutional Law**, I; VII, 1; IX; X; XI.

GEORGIA. See **Constitutional Law**, III.

GOVERNMENT APPEALS. See **Constitutional Law**, VI, 1.

GOVERNMENT ARCHIVISTS. See **Constitutional Law**, I; VII, 1; IX; X; XI.

GOVERNMENT CONTRACTS. See **Federal-State Relations**, 1.

HABEAS CORPUS.

Admissibility of inculpatory statements—Failure to make timely objection.—Respondent's failure at his state murder trial to make timely

HABEAS CORPUS—Continued.
objection under Florida contemporaneous-objection rule to admission of his inculpatory statements made to police officers, absent a showing of cause for noncompliance and some showing of actual prejudice, bars federal habeas corpus review of his claim of inadmissibility of statements by reason of his lack of understanding of warnings read to him pursuant to *Miranda* v. *Arizona*, 384 U. S. 436. Wainwright v. Sykes, p. 72.

HEIGHT AND WEIGHT EMPLOYMENT REQUIREMENTS. See **Civil Rights Act of 1964**, 1, 2.

HIRING OF PRISON GUARDS. See **Civil Rights Act of 1964**, 1, 2.

HIRING OF TEACHERS. See **Civil Rights Act of 1964**, 3.

"HUMAN CANNONBALL" ACT. See **Constitutional Law**, VII, 6; **Jurisdiction**, 2.

INCOME TAXES. See **Internal Revenue Code.**

INCULPATORY STATEMENTS. See **Habeas Corpus.**

INDIANS.

1. *State-court jurisdiction over Indian tribe and its members.*—Absent an effective waiver or consent, a state court may not exercise jurisdiction over a recognized Indian tribe, but tribal sovereign immunity here does not impair Washington Superior Court's authority to adjudicate rights of individual tribal members over whom it properly obtained personal jurisdiction in litigation involving regulation of their fishing activities both on and off reservation, and hence only those portions of judgment that involve relief against petitioner Tribe itself must be vacated in order to honor Tribe's valid claim of immunity. Puyallup Tribe v. Washington Game Dept., p. 165.

2. *Treaty fishing rights.*—Neither petitioner Tribe nor its members have an exclusive right, under Treaty of Medicine Creek, to take steelhead trout passing through reservation. It not only appears that Tribe, pursuant to Acts of Congress passed after treaty was entered into, alienated in fee simple absolute all areas of reservation abutting on Puyallup River, but, moreover, Tribe's treaty right to fish "at all usual and accustomed places" is to be exercised "in common with all citizens of the Territory," and is subject to reasonable regulation by the State pursuant to its power to conserve an important natural resource. Fair apportionment of steelhead catch between Indian net fishing and non-Indian sport fishing directed by *Washington Game Dept.* v. *Puyallup Tribe*, 414 U. S. 44, could not be effective if Indians retained power to take an unlimited number of steelhead within reservation. Puyallup Tribe v. Washington Game Dept., p. 165.

INDIAN TREATIES. See **Indians.**

INJUNCTIONS. See **Federal-State Relations,** 2.

IN REM JURISDICTION. See **Constitutional Law,** II; **Jurisdiction,** 1.

INTERNAL REVENUE CODE.

Life insurance companies—Unpaid premiums—Portions includible in company's assets and gross premium income.—"Net valuation" portion of unpaid life insurance premiums (portion state law requires a life insurance company to add to its reserves), but not "loading" portion (portion to be used to pay salesmen's commissions, other expenses such as state taxes and overhead, and profits), is required to be included in a life insurance company's assets and gross premium income, as well as in its reserves, for purposes of computing its federal income tax liability, notwithstanding such computation necessitates making a fictional assumption that "net valuation" portion has been paid but that "loading" portion has not. This treatment of unpaid premiums is in accordance with § 818 (a) of Code (as added by Life Insurance Company Income Tax Act of 1959), which requires computations of life insurance company's income taxes to be made "in a manner consistent with the manner required for purposes of the annual statement approved by the National Association of Insurance Commissioners," unless NAIC procedures are inconsistent with accrual accounting rules, and to extent that Treasury Regulations require different treatment of unpaid premiums they are inconsistent with § 818 (a) and therefore invalid. Commissioner v. Standard Life & Acc. Ins. Co., p. 148.

INVASION OF PRIVACY. See **Constitutional Law,** VIII.

JURISDICTION. See also **Constitutional Law,** II; **Indians.**

1. *State jurisdiction over nonresidents—Quasi in rem action.*—Whether or not a State can assert jurisdiction over a nonresident must be evaluated according to minimum-contacts standard of *International Shoe Co.* v. *Washington,* 326 U. S. 310. In order to justify an exercise of jurisdiction *in rem,* basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in the thing." Presence of property in a State may bear upon existence of jurisdiction by providing contacts among forum State, defendant, and litigation. But where—as in instant *quasi in rem* shareholder's derivative action, wherein stock shares and options in defendant corporation belonging to individual defendant nonresidents of Delaware were sequestered pursuant to Delaware statute—property serving as basis for state-court jurisdiction is completely unrelated to plaintiff's cause of action, presence of property alone, *i. e.,* absent other ties among defendant, State, and litigation, would not support State's jurisdiction. Shaffer v. Heitner, p. 186.

JURISDICTION—Continued.

2. *Supreme Court—Federal question—Inadequate state ground.*—In petitioner's state action against respondent broadcasting company for alleged "unlawful appropriation" of his "professional property" by videotaping, without his consent, his entire "human cannonball" act at county fair and later showing it on television news program, it appears from Ohio Supreme Court's opinion syllabus (which is to be looked to for rule of law in case), as clarified by opinion itself, that judgment below did not rest on an adequate and independent state ground but rested solely on federal grounds in that court considered First and Fourteenth Amendments to be source of respondent's privilege to include in its newscasts matters of public interest that would otherwise be protected by the state-law right of publicity, absent an intent to injure or appropriate for some nonprivileged purpose, and therefore this Court has jurisdiction to decide federal issue. Zacchini v. Scripps-Howard Broadcasting Co., p. 562.

LABOR UNIONS. See **Constitutional Law**, V; VII, 7.

LAWYERS. See **Antitrust Acts**, 2; **Constitutional Law**, VII, 3–5.

LEGAL CLINICS. See **Constitutional Law**, VII, 3–5.

LIFE INSURANCE COMPANY INCOME TAX ACT OF 1959. See **Internal Revenue Code.**

LOCATION RESTRICTIONS ON RETAIL FRANCHISES. See **Antitrust Acts**, 1.

MILWAUKEE, WIS. See **Schools**, 5.

MINIMUM-CONTACTS STANDARD. See **Constitutional Law**, II; **Jurisdiction**, 1.

MIRANDA WARNINGS. See **Habeas Corpus.**

NEGROES. See **Civil Rights Act of 1964**, 3; **Constitutional Law**, IV; XII.

NEWS MEDIA. See **Constitutional Law**, VII, 6; **Jurisdiction**, 2.

NONPUBLIC SCHOOLS. See **Constitutional Law**, VII, 2.

NONRESIDENTS AS SUBJECT TO STATE-COURT JURISDICTION. See **Constitutional Law**, II; **Jurisdiction**, 1.

NORTH CAROLINA. See **Constitutional Law**, V; VII, 7.

OHIO. See **Constitutional Law**, VII, 2.

OMAHA, NEB. See **Schools**, 3, 4.

OVERBREADTH DOCTRINE. See **Constitutional Law**, VII, 3–5.

PAROCHIAL SCHOOLS. See **Constitutional Law**, VII, 2.

PATTERN OR PRACTICE OF EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964**, 3.

PERFORMER'S RIGHT TO COMPENSATION FOR BROADCAST OF HIS ACT. See **Constitutional Law**, VII, 6; **Jurisdiction**, 2.

PER SE VIOLATIONS OF SHERMAN ACT. See **Antitrust Acts**, 1.

PERSONAL-LUGGAGE SEARCHES. See **Constitutional Law**, VIII.

PRECLUSION OF CLAIM NOT RAISED IN COURTS BELOW. See **Procedure.**

PRESIDENTIAL PRIVILEGE OF CONFIDENTIALITY. See **Constitutional Law**, IX.

PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT. See **Constitutional Law**, I; VII, 1; IX; X; XI.

PRIMA FACIE CASE. See **Civil Rights Act of 1964.**

PRISONERS' LABOR UNIONS. See **Constitutional Law**, V; VII, 7.

PRISON GUARDS. See **Civil Rights Act of 1964**, 1, 2.

PRIVACY RIGHTS. See **Constitutional Law**, VIII; X.

PRIVATE SCHOOLS. See **Constitutional Law**, VII, 2.

PRIVILEGE OF NEWS MEDIA AS TO BROADCAST OF PERFORMER'S ACT. See **Constitutional Law**, VII, 6; **Jurisdiction**, 2.

PROCEDURE.

Supreme Court—Preclusion of claim not pleaded, argued, or briefed in courts below.—Petitioners' claim, argued in this Court, that Airport and Airway Development Act of 1970 provides an implied civil right of action to recover for injury due to violation of Act, will not be considered where it was neither pleaded, argued, nor briefed in courts below. Miree v. DeKalb County, p. 25.

PROFESSIONAL ADVERTISING. See **Antitrust Acts**, 2; **Constitutional Law**, VII, 3–5.

PROHIBITIONS AGAINST PRISONERS' LABOR UNION ACTIVITIES. See **Constitutional Law**, V; VII, 7.

PUBLIC ACCESS TO PRESIDENTIAL MATERIALS. See **Constitutional Law**, I; VII, 1; IX; X; XI.

QUASI IN REM JURISDICTION. See **Constitutional Law**, II; **Jurisdiction**, 1.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964**, 3; **Constitutional Law**, IV; XII; **Schools.**

RAPE. See **Constitutional Law**, III.

REGULATION OF INDIANS' FISHING ACTIVITIES. See **Indians.**

RELEVANT LABOR MARKET. See **Civil Rights Act of 1964**, 3.

REMEDIES FOR SCHOOL SEGREGATION. See **Constitutional Law**, IV; XII; **Schools.**

RESTRAINTS ON ATTORNEY ADVERTISING. See **Antitrust Acts**, 2.

RESTRAINTS ON COMPETITION. See **Antitrust Acts**, 1.

RESTRICTIONS ON PRISONERS' LABOR UNIONS. See **Constitutional Law**, V; VII, 7.

RIGHT OF ASSOCIATION. See **Constitutional Law**, VII, 1, 7.

RIGHT OF PRIVACY. See **Constitutional Law**, VIII; X.

RULE-OF-REASON STANDARD FOR ANTITRUST VIOLATIONS. See **Antitrust Acts**, 1.

SCHOOL DESEGREGATION DECREES. See **Constitutional Law**, IV; XII; **Schools**, 1, 2.

SCHOOLS. See also **Civil Rights Act of 1964**, 3; **Constitutional Law**, IV; VII, 2; XII.

1. *Desegregation decree—Compensatory or remedial educational programs.*—As part of a desegregation decree a district court can, if record warrants, order compensatory or remedial educational programs for schoolchildren who have been subjected to past acts of *de jure* segregation. Here the District Court, acting on substantial evidence in record, did not abuse its discretion in approving a remedial plan for Detroit school system going beyond pupil assignments and adopting specific programs that had been proposed by local school authorities. Where, as here, a constitutional violation has been found, remedy does not "exceed" violation if remedy is tailored to cure "*condition* that offends the Constitution," *i. e.*, Detroit's *de jure* segregated school system. Milliken v. Bradley, p. 267.

2. *Desegregation decree—Propriety of systemwide remedy.*—Judged most favorably to respondent parents of black children, District Court's findings of constitutional violations on part of petitioner School Board in operation of Dayton, Ohio, school system did not suffice to justify systemwide remedy. Dayton Board of Education v. Brinkman, p. 406.

3. *Desegregation decree—Propriety of systemwide remedy.*—In a case like this, where mandatory racial segregation has long since ceased, it must be first determined if school board intended to, and did in fact, discriminate, and all appropriate additional evidence should be adduced; and only

SCHOOLS—Continued.

if systemwide discrimination is shown may there be a systemwide remedy. Dayton Board of Education v. Brinkman, p. 406.

4. *Remedial school desegregation plan—Required inquiry.*—Where neither Court of Appeals nor District Court, in addressing itself to remedial school desegregation plan for Omaha, Neb., mandated by an earlier decision of Court of Appeals, addressed itself to inquiry now required by *Dayton Board of Education* v. *Brinkman, ante,* p. 406, Court of Appeals' judgment is vacated, and case is remanded for reconsideration. School District of Omaha v. United States, p. 667.

5. *Remedial school desegregation plan—Required inquiry.*—Where neither District Court in ordering development of a remedial school desegregation plan for Milwaukee, Wis., nor Court of Appeals in affirming, addressed itself to inquiry now mandated by *Dayton Board of Education* v. *Brinkman, ante,* p. 406, Court of Appeals' judgment is vacated, and case is remanded for reconsideration. Brennan v. Armstrong, p. 672.

SCREENING OF PRESIDENTIAL MATERIALS. See **Constitutional Law,** I; VII, 1; IX; X; XI.

SEARCHES AND SEIZURES. See **Constitutional Law,** VIII.

SECTARIAN SCHOOLS. See **Constitutional Law,** VII, 2.

SEGREGATED SCHOOLS. See **Constitutional Law,** IV; XII; **Schools.**

SEPARATION OF POWERS. See **Constitutional Law,** XI.

SEQUESTRATION OF PROPERTY. See **Constitutional Law,** II; **Jurisdiction,** 1.

SEX DISCRIMINATION. See **Civil Rights Act of 1964,** 1, 2.

SHERMAN ACT. See **Antitrust Acts.**

SOVEREIGN IMMUNITY OF INDIAN TRIBES. See **Indians.**

STATE AID TO NONPUBLIC SCHOOLS. See **Constitutional Law,** VII, 2.

STATE COURTS' JURISDICTION OVER INDIANS. See **Indians.**

STATE COURTS' JURISDICTION OVER NONRESIDENTS. See **Constitutional Law,** II; **Jurisdiction,** 1.

STATES' OBLIGATIONS TO PAY COSTS OF SCHOOL DESEGREGATION. See **Constitutional Law,** IV.

STATISTICAL DISPARITIES IN HIRING. See **Civil Rights Act of 1964,** 3.

STEELHEAD TROUT. See **Indians.**

SUBSEQUENT PROSECUTION FOR LESSER CRIME. See **Constitutional Law**, VI, 2.

SUPREME COURT. See **Jurisdiction**, 2; **Procedure.**

SYSTEMWIDE REMEDIES FOR SCHOOL SEGREGATION. See **Schools**, 2–5.

TAPE RECORDINGS OF PRESIDENT. See **Constitutional Law**, I; VII, 1; IX; X; XI.

TAXES. See **Internal Revenue Code.**

TEACHERS. See **Civil Rights Act of 1964**, 3.

TELEVISING OF PERFORMER'S ACT. See **Constitutional Law**, VII, 6; **Jurisdiction**, 2.

TELEVISION SET MANUFACTURERS. See **Antitrust Acts**, 1.

TENTH AMENDMENT. See **Constitutional Law**, XII.

THIRD-PARTY BENEFICIARIES. See **Federal-State Relations**, 1.

UNIONS. See **Constitutional Law**, V; VII, 7.

UNLAWFUL EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964.**

UNPAID LIFE INSURANCE PREMIUMS. See **Internal Revenue Code.**

UNREASONABLE RESTRAINTS ON COMPETITION. See **Antitrust Acts**, 1.

UNREASONABLE SEARCHES AND SEIZURES. See **Constitutional Law**, VIII.

VIDEOTAPE OF PERFORMER'S ACT. See **Constitutional Law**, VII, 6; **Jurisdiction**, 2.

WARRANTLESS SEARCHES. See **Constitutional Law**, VIII.

OAMGENPUB0543

E00002217