responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

V.

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

No. 759. *Miranda* v. *Arizona*.

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present.[66] Two hours later, the

[66] Miranda was also convicted in a separate trial on an unrelated robbery charge not presented here for review. A statement introduced at that trial was obtained from Miranda during the same interrogation which resulted in the confession involved here. At the robbery trial, one officer testified that during the interrogation he did not tell Miranda that anything he said would be held against him or that he could consult with an attorney. The other officer stated that they had both told Miranda that anything he said would be used against him and that he was not required by law to tell them anything.

officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me." [67]

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. 98 Ariz. 18, 401 P. 2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights. Cf. *Haynes* v. *Washington*, 373 U. S.

[67] One of the officers testified that he read this paragraph to Miranda. Apparently, however, he did not do so until after Miranda had confessed orally.

503, 512–513 (1963); *Haley* v. *Ohio*, 332 U. S. 596, 601 (1948) (opinion of MR. JUSTICE DOUGLAS).

No. 760. *Vignera* v. *New York.*

Petitioner, Michael Vignera, was picked up by New York police on October 14, 1960, in connection with the robbery three days earlier of a Brooklyn dress shop. They took him to the 17th Detective Squad headquarters in Manhattan. Sometime thereafter he was taken to the 66th Detective Squad. There a detective questioned Vignera with respect to the robbery. Vignera orally admitted the robbery to the detective. The detective was asked on cross-examination at trial by defense counsel whether Vignera was warned of his right to counsel before being interrogated. The prosecution objected to the question and the trial judge sustained the objection. Thus, the defense was precluded from making any showing that warnings had not been given. While at the 66th Detective Squad, Vignera was identified by the store owner and a saleslady as the man who robbed the dress shop. At about 3 p. m. he was formally arrested. The police then transported him to still another station, the 70th Precinct in Brooklyn, "for detention." At 11 p. m. Vignera was questioned by an assistant district attorney in the presence of a hearing reporter who transcribed the questions and Vignera's answers. This verbatim account of these proceedings contains no statement of any warnings given by the assistant district attorney. At Vignera's trial on a charge of first degree robbery, the detective testified as to the oral confession. The transcription of the statement taken was also introduced in evidence. At the conclusion of the testimony, the trial judge charged the jury in part as follows:

> "The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what

I said? I am telling you what the law of the State of New York is."

Vignera was found guilty of first degree robbery. He was subsequently adjudged a third-felony offender and sentenced to 30 to 60 years' imprisonment.[68] The conviction was affirmed without opinion by the Appellate Division, Second Department, 21 App. Div. 2d 752, 252 N. Y. S. 2d 19, and by the Court of Appeals, also without opinion, 15 N. Y. 2d 970, 207 N. E. 2d 527, 259 N. Y. S. 2d 857, remittitur amended, 16 N. Y. 2d 614, 209 N. E. 2d 110, 261 N. Y. S. 2d 65. In argument to the Court of Appeals, the State contended that Vignera had no constitutional right to be advised of his right to counsel or his privilege against self-incrimination.

We reverse. The foregoing indicates that Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible.

No. 761. *Westover* v. *United States.*

At approximately 9:45 p. m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and at about 11:45 p. m. he was booked. Kansas City police interrogated West-

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[68] Vignera thereafter successfully attacked the validity of one of the prior convictions, *Vignera* v. *Wilkins*, Civ. 9901 (D. C. W. D. N. Y. Dec. 31, 1961) (unreported), but was then resentenced as a second-felony offender to the same term of imprisonment as the original sentence. R. 31–33.

over on the night of his arrest. He denied any knowledge of criminal activities. The next day local officers interrogated him again throughout the morning. Shortly before noon they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and a bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

Westover was tried by a jury in federal court and convicted of the California robberies. His statements were introduced at trial. He was sentenced to 15 years' imprisonment on each count, the sentences to run consecutively. On appeal, the conviction was affirmed by the Court of Appeals for the Ninth Circuit. 342 F. 2d 684.

We reverse. On the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement.[69] At the

[69] The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in *Escobedo* and, of course, prior to our decision today making the

time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from West-

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objection available, the failure to object at trial does not constitute a waiver of the claim. See, *e. g., United States ex rel Angelet* v. *Fay*, 333 F. 2d 12, 16 (C. A. 2d Cir. 1964), aff'd, 381 U. S. 654 (1965). Cf. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78 (1943).

over the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

No. 584. *California* v. *Stewart.*

In the course of investigating a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant, respondent, Roy Allen Stewart, was pointed out to Los Angeles police as the endorser of dividend checks taken in one of the robberies. At about 7:15 p. m., January 31, 1963, police officers went to Stewart's house and arrested him. One of the officers asked Stewart if they could search the house, to which he replied, "Go ahead." The search turned up various items taken from the five robbery victims. At the time of Stewart's arrest, police also arrested Stewart's wife and three other persons who were visiting him. These four were jailed along with Stewart and were interrogated. Stewart was taken to the University Station of the Los Angeles Police Department where he was placed in a cell. During the next five days, police interrogated Stewart on nine different occasions. Except during the first interrogation session, when he was confronted with an accusing witness, Stewart was isolated with his interrogators.

During the ninth interrogation session, Stewart admitted that he had robbed the deceased and stated that he had not meant to hurt her. Police then brought Stewart before a magistrate for the first time. Since there was no evidence to connect them with any crime, the police then released the other four persons arrested with him.

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances,

however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder and fixed the penalty as death. On appeal, the Supreme Court of California reversed. 62 Cal. 2d 571, 400 P. 2d 97, 43 Cal. Rptr. 201. It held that under this Court's decision in *Escobedo*, Stewart should have been advised of his right to remain silent and of his right to counsel and that it would not presume in the face of a silent record that the police advised Stewart of his rights.[70]

We affirm.[71] In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of

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[70] Because of this disposition of the case, the California Supreme Court did not reach the claims that the confession was coerced by police threats to hold his ailing wife in custody until he confessed, that there was no hearing as required by *Jackson* v. *Denno*, 378 U. S. 368 (1964), and that the trial judge gave an instruction condemned by the California Supreme Court's decision in *People* v. *Morse*, 60 Cal. 2d 631, 388 P. 2d 33, 36 Cal. Rptr. 201 (1964).

[71] After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U. S. C. § 1257 (3) (1964 ed.), we denied the motion. 383 U. S. 903.

these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege.

Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed.

It is so ordered.

MR. JUSTICE CLARK, dissenting in Nos. 759, 760, and 761, and concurring in the result in No. 584.

It is with regret that I find it necessary to write in these cases. However, I am unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough. Nor can I join in the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals" [1] are, as I read them, merely writings in this field by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court [2] are rare exceptions to the thousands of cases

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[1] *E. g.*, Inbau & Reid, Criminal Interrogation and Confessions (1962); O'Hara, Fundamentals of Criminal Investigation (1956); Dienstein, Technics for the Crime Investigator (1952); Mulbar, Interrogation (1951); Kidd, Police Interrogation (1940).

[2] As developed by my Brother HARLAN, *post*, pp. 506–514, such cases, with the exception of the long-discredited decision in *Bram* v. *United States*, 168 U. S. 532 (1897), were adequately treated in terms of due process.

that appear every year in the law reports. The police agencies—all the way from municipal and state forces to the federal bureaus—are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion.

I.

The *ipse dixit* of the majority has no support in our cases. Indeed, the Court admits that "we might not find the defendants' statements [here] to have been involuntary in traditional terms." *Ante*, p. 457. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. *Escobedo* v. *Illinois*, 378 U. S. 478, 490–491 (1964). Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.[3]

[3] The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As my Brother HARLAN points out, *post*, pp. 521–523, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. 484–486, to be as strict as

Since there is at this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast.

II.

Custodial interrogation has long been recognized as "undoubtedly an essential tool in effective law enforcement." *Haynes* v. *Washington,* 373 U. S. 503, 515 (1963). Recognition of this fact should put us on guard against the promulgation of doctrinaire rules. Especially is this true where the Court finds that "the Constitution has prescribed" its holding and where the light of our past cases, from *Hopt* v. *Utah,* 110 U. S. 574, (1884), down to *Haynes* v. *Washington, supra,* is to

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those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover* v. *United States,* 342 F. 2d 684, 685 (1965) ("right to consult counsel"); *Jackson* v. *United States,* 337 F. 2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that whenever the suspect "decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point . . . . When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states: "[T]hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, [are advised] of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge." So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself and that he may have counsel appointed only when brought before the judge or at trial—but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

the contrary. Indeed, even in *Escobedo* the Court never hinted that an affirmative "waiver" was a prerequisite to questioning; that the burden of proof as to waiver was on the prosecution; that the presence of counsel—absent a waiver—during interrogation was required; that a waiver can be withdrawn at the will of the accused; that counsel must be furnished during an accusatory stage to those unable to pay; nor that admissions and exculpatory statements are "confessions." To require all those things at one gulp should cause the Court to choke over more cases than *Crooker* v. *California*, 357 U. S. 433 (1958), and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958), which it expressly overrules today.

The rule prior to today—as Mr. Justice Goldberg, the author of the Court's opinion in *Escobedo*, stated it in *Haynes* v. *Washington*—depended upon "a totality of circumstances evidencing an involuntary . . . admission of guilt." 373 U. S., at 514. And he concluded:

> "Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused. . . . We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded." *Id.*, at 514–515.

III.

I would continue to follow that rule. Under the "totality of circumstances" rule of which my Brother Goldberg spoke in *Haynes*, I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary.

Rather than employing the arbitrary Fifth Amendment rule [4] which the Court lays down I would follow the more pliable dictates of the Due Process Clauses of the Fifth and Fourteenth Amendments which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody. In this way we would not be acting in the dark nor in one full sweep changing the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society. It will be soon enough to go further when we are able to appraise with somewhat better accuracy the effect of such a holding.

I would affirm the convictions in *Miranda* v. *Arizona*, No. 759; *Vignera* v. *New York*, No. 760; and *Westover* v. *United States*, No. 761. In each of those cases I find from the circumstances no warrant for reversal. In

[4] In my view there is "no significant support" in our cases for the holding of the Court today that the Fifth Amendment privilege, in effect, forbids custodial interrogation. For a discussion of this point see the dissenting opinion of my Brother WHITE, post, pp. 526–531.

California v. *Stewart*, No. 584, I would dismiss the writ of certiorari for want of a final judgment, 28 U. S. C. § 1257 (3) (1964 ed.); but if the merits are to be reached I would affirm on the ground that the State failed to fulfill its burden, in the absence of a showing that appropriate warnings were given, of proving a waiver or a totality of circumstances showing voluntariness. Should there be a retrial, I would leave the State free to attempt to prove these elements.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

I. INTRODUCTION.

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a fourfold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel

brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.[1]

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

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[1] My discussion in this opinion is directed to the main questions decided by the Court and necessary to its decision; in ignoring some of the collateral points, I do not mean to imply agreement.

II. Constitutional Premises.

It is most fitting to begin an inquiry into the constitutional precedents by surveying the limits on confessions the Court has evolved under the Due Process Clause of the Fourteenth Amendment. This is so because these cases show that there exists a workable and effective means of dealing with confessions in a judicial manner; because the cases are the baseline from which the Court now departs and so serve to measure the actual as opposed to the professed distance it travels; and because examination of them helps reveal how the Court has coasted into its present position.

The earliest confession cases in this Court emerged from federal prosecutions and were settled on a nonconstitutional basis, the Court adopting the common-law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible. *Hopt* v. *Utah*, 110 U. S. 574; *Pierce* v. *United States*, 160 U. S. 355. While a later case said the Fifth Amendment privilege controlled admissibility, this proposition was not itself developed in subsequent decisions.[2] The Court did, however, heighten the test of admissibility in federal trials to one of voluntariness "in fact," *Wan* v.

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[2] The case was *Bram* v. *United States*, 168 U. S. 532 (quoted, *ante*, p. 461). Its historical premises were afterwards disproved by Wigmore, who concluded "that no assertions could be more unfounded." 3 Wigmore, Evidence § 823, at 250, n. 5 (3d ed. 1940). The Court in *United States* v. *Carignan*, 342 U. S. 36, 41, declined to choose between *Bram* and Wigmore, and *Stein* v. *New York*, 346 U. S. 156, 191, n. 35, cast further doubt on *Bram*. There are, however, several Court opinions which assume in dicta the relevance of the Fifth Amendment privilege to confessions. *Burdeau* v. *McDowell*, 256 U. S. 465, 475; see *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 347. On *Bram* and the federal confession cases generally, see Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 959–961 (1966).

United States, 266 U. S. 1, 14 (quoted, *ante*, p. 462), and then by and large left federal judges to apply the same standards the Court began to derive in a string of state court cases.

This new line of decisions, testing admissibility by the Due Process Clause, began in 1936 with *Brown* v. *Mississippi*, 297 U. S. 278, and must now embrace somewhat more than 30 full opinions of the Court.[3] While the voluntariness rubric was repeated in many instances, *e. g.*, *Lyons* v. *Oklahoma*, 322 U. S. 596, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. To travel quickly over the main themes, there was an initial emphasis on reliability, *e. g.*, *Ward* v. *Texas*, 316 U. S. 547, supplemented by concern over the legality and fairness of the police practices, *e. g.*, *Ashcraft* v. *Tennessee*, 322 U. S. 143, in an "accusatorial" system of law enforcement, *Watts* v. *Indiana*, 338 U. S. 49, 54, and eventually by close attention to the individual's state of mind and capacity for effective choice, *e. g.*, *Gallegos* v. *Colorado*, 370 U. S. 49. The outcome was a continuing re-evaluation on the facts of each case of *how much* pressure on the suspect was permissible.[4]

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[3] Comment, 31 U. Chi. L. Rev. 313 & n. 1 (1964), states that by the 1963 Term 33 state coerced-confession cases had been decided by this Court, apart from *per curiams*. *Spano* v. *New York*, 360 U. S. 315, 321, n. 2, collects 28 cases.

[4] Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel, 66 Col. L. Rev. 62, 73 (1966): "In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice." See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 452–458 (1964); Developments, *supra*, n. 2, at 964–984.

Among the criteria often taken into account were threats or imminent danger, *e. g., Payne* v. *Arkansas,* 356 U. S. 560, physical deprivations such as lack of sleep or food, *e. g., Reck* v. *Pate,* 367 U. S. 433, repeated or extended interrogation, *e. g., Chambers* v. *Florida,* 309 U. S. 227, limits on access to counsel or friends, *Crooker* v. *California,* 357 U. S. 433; *Cicenia* v. *Lagay,* 357 U. S. 504, length and illegality of detention under state law, *e. g., Haynes* v. *Washington,* 373 U. S. 503, and individual weakness or incapacities, *Lynumn* v. *Illinois,* 372 U. S. 528. Apart from direct physical coercion, however, no single default or fixed combination of defaults guaranteed exclusion, and synopses of the cases would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility. But to mark just what point had been reached before the Court jumped the rails in *Escobedo* v. *Illinois,* 378 U. S. 478, it is worth capsulizing the then-recent case of *Haynes* v. *Washington,* 373 U. S. 503. There, Haynes had been held some 16 or more hours in violation of state law before signing the disputed confession, had received no warnings of any kind, and despite requests had been refused access to his wife or to counsel, the police indicating that access would be allowed after a confession. Emphasizing especially this last inducement and rejecting some contrary indicia of voluntariness, the Court in a 5-to-4 decision held the confession inadmissible.

There are several relevant lessons to be drawn from this constitutional history. The first is that with over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time, see *Culombe* v. *Connecticut,* 367 U. S. 568, 635 (concurring opinion of THE CHIEF JUSTICE), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts.

Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty,[5] and the lower courts may often have been yet more tolerant. Of course the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. *Powers* v. *United States*, 223 U. S. 303; *Wilson* v. *United States*, 162 U. S. 613. As recently as *Haynes* v. *Washington*, 373 U. S. 503, 515, the Court openly acknowledged that questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement." Accord, *Crooker* v. *California*, 357 U. S. 433, 441.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect "in the unfettered exercise of his own will," *Malloy* v. *Hogan*, 378 U. S. 1, 8, and that "a prisoner is not 'to be made the deluded instrument of his own conviction,'" *Culombe* v. *Connecticut*, 367 U. S. 568, 581 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word "voluntary" may be deemed some-

[5] See the cases synopsized in Herman, *supra*, n. 4, at 456, nn. 36–39. One not too distant example is *Stroble* v. *California*, 343 U. S. 181, in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

what misleading, especially when one considers many of the confessions that have been brought under its umbrella. See, *e. g., supra,* n. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but in any event one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompè l'oeil.* The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, "the *history* of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents . . . ." 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961). Practice under the two doctrines has also differed in a number of important respects.[6]

[6] Among the examples given in 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961), are these: the privilege applies to any witness, civil or criminal, but the confession rule protects only criminal defendants; the privilege deals only with compulsion, while the confession rule may exclude statements obtained by trick or promise; and where the privilege has been nullified—as by the English Bankruptcy Act—the confession rule may still operate.

Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person "in any criminal case to be a witness against himself." Cf. Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1, 25–26 (1965).

Though weighty, I do not say these points and similar ones are conclusive, for, as the Court reiterates, the privilege embodies basic principles always capable of expansion.[7] Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial rather than inquisitorial values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this indeed is why at present "the kinship of the two rules [governing confessions and self-incrimination] is too apparent for denial." McCormick, Evidence 155 (1954). Since extension of the general principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

Having decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test.[8]

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[7] Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege. See generally Maguire, Evidence of Guilt § 2.03, at 15–16 (1959).

[8] This, of course, is implicit in the Court's introductory announcement that "[o]ur decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964) [extending the Fifth Amendment privilege to the States] necessitates

It then emerges from a discussion of *Escobedo* that the Fifth Amendment requires for an admissible confession that it be given by one distinctly aware of his right not to speak and shielded from "the compelling atmosphere" of interrogation. See *ante*, pp. 465–466. From these key premises, the Court finally develops the safeguards of warning, counsel, and so forth. I do not believe these premises are sustained by precedents under the Fifth Amendment.[9]

The more important premise is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid *all* pressure to incriminate one's self in the situations covered by it. On the contrary, it has been held that failure to incriminate one's self can result in denial of removal of one's case from state to federal court, *Maryland* v. *Soper*, 270 U. S. 9; in refusal of a military commission, *Orloff* v. *Willoughby*, 345 U. S. 83; in denial of a discharge in bankruptcy, *Kaufman* v. *Hurwitz*, 176 F. 2d 210; and in numerous other adverse consequences. See 8 Wigmore, Evidence § 2272, at 441–444, n. 18 (McNaughton rev. 1961); Maguire, Evidence of Guilt § 2.062 (1959). This is not to say that short of jail or torture any sanction is permissible in any case; policy and history alike may impose sharp limits. See, *e. g.*,

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an examination of the scope of the privilege in state cases as well." *Ante*, p. 463. It is also inconsistent with *Malloy* itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has in recent years been "the same standard" as that imposed in federal prosecutions assertedly by the Fifth Amendment. 378 U. S., at 7.

[9] I lay aside *Escobedo* itself; it contains no reasoning or even general conclusions addressed to the Fifth Amendment and indeed its citation in this regard seems surprising in view of *Escobedo*'s primary reliance on the Sixth Amendment.

Griffin v. *California*, 380 U. S. 609. However, the Court's unspoken assumption that *any* pressure violates the privilege is not supported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.

The Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections. A number of lower federal court cases have held that grand jury witnesses need not always be warned of their privilege, *e. g.*, *United States* v. *Scully*, 225 F. 2d 113, 116, and Wigmore states this to be the better rule for trial witnesses. See 8 Wigmore, Evidence § 2269 (McNaughton rev. 1961). Cf. *Henry* v. *Mississippi*, 379 U. S. 443, 451–452 (waiver of constitutional rights by counsel despite defendant's ignorance held allowable). No Fifth Amendment precedent is cited for the Court's contrary view. There might of course be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning but that is a different matter entirely. See *infra*, pp. 516–517.

A closing word must be said about the Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court but whose judicial precedents turn out to be linchpins of the confession rules announced today. To support its requirement of a knowing and intelligent waiver, the Court cites *Johnson* v. *Zerbst*, 304 U. S. 458, *ante*, p. 475; appointment of counsel for the indigent suspect is tied to *Gideon* v. *Wainwright*, 372 U. S. 335, and *Douglas* v. *California*, 372 U. S. 353, *ante*, p. 473; the silent-record doctrine is borrowed from *Carnley* v. *Cochran*, 369 U. S. 506, *ante*, p. 475, as is the right to an express offer of counsel, *ante*, p. 471. All these cases imparting glosses to the Sixth Amendment concerned counsel at trial or on appeal. While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe

the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.[10]

The only attempt in this Court to carry the right to counsel into the station house occurred in *Escobedo*, the Court repeating several times that that stage was no less "critical" than trial itself. See 378 U. S., 485–488. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective defendant may all be equally "critical" yet provision of counsel and advice on that score have never been thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to himself. This danger shrinks markedly in the police station where indeed the lawyer in fulfilling his professional responsibilities of necessity may become an obstacle to truthfinding. See *infra*, n. 12. The Court's summary citation of the Sixth Amendment cases here seems to me best described as "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Friendly, *supra*, n. 10, at 950.

III. Policy Considerations.

Examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due

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[10] Since the Court conspicuously does not assert that the Sixth Amendment itself warrants its new police-interrogation rules, there is no reason now to draw out the extremely powerful historical and precedential evidence that the Amendment will bear no such meaning. See generally Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 943–948 (1965).

compensation for its weakness in constitutional law. The foregoing discussion has shown, I think, how mistaken is the Court in implying that the Constitution has struck the balance in favor of the approach the Court takes. *Ante*, p. 479. Rather, precedent reveals that the Fourteenth Amendment in practice has been construed to strike a different balance, that the Fifth Amendment gives the Court little solid support in this context, and that the Sixth Amendment should have no bearing at all. Legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser." *Ashcraft* v. *Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). Until today, the role of the Constitution has been only to sift out *undue* pressure, not to assure spontaneous confessions.[11]

[11] See *supra*, n. 4, and text. Of course, the use of terms like voluntariness involves questions of law and terminology quite as much as questions of fact. See *Collins* v. *Beto*, 348 F. 2d 823, 832 (concurring opinion); Bator & Vorenberg, *supra*, n. 4, at 72–73.

The Court's new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all.[12] In short, the benefit of this new regime is simply to lessen or wipe out the inherent compulsion and inequalities to which the Court devotes some nine pages of description. *Ante,* pp. 448–456.

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it.[13] There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs

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[12] The Court's vision of a lawyer "mitigat[ing] the dangers of untrustworthiness" (*ante,* p. 470) by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. *Watts* v. *Indiana,* 338 U. S. 49, 59 (separate opinion of Jackson, J.): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." See Enker & Elsen, Counsel for the Suspect, 49 Minn. L. Rev. 47, 66–68 (1964).

[13] This need is, of course, what makes so misleading the Court's comparison of a probate judge readily setting aside as involuntary the will of an old lady badgered and beleaguered by the new heirs. *Ante,* pp. 457–458, n. 26. With wills, there is no public interest save in a totally free choice; with confessions, the solution of crime is a countervailing gain, however the balance is resolved.

must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation. See, *supra*, n. 12.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete, see Developments, *supra*, n. 2, at 941–944, and little is added by the Court's reference to the FBI experience and the resources believed wasted in interrogation. See *infra*, n. 19, and text. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control,[14] and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

While passing over the costs and risks of its experiment, the Court portrays the evils of normal police questioning in terms which I think are exaggerated. Albeit stringently confined by the due process standards interrogation is no doubt often inconvenient and unpleasant for the suspect. However, it is no less so for a man to be arrested and jailed, to have his house searched, or to stand trial in court, yet all this may properly happen to the most innocent given probable cause, a warrant, or an indictment. Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.

This brief statement of the competing considerations seems to me ample proof that the Court's preference is highly debatable at best and therefore not to be read into

[14] See, *e. g.*, the voluminous citations to congressional committee testimony and other sources collected in *Culombe* v. *Connecticut*, 367 U. S. 568, 578–579 (Frankfurter, J., announcing the Court's judgment and an opinion).

the Constitution. However, it may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. *Miranda* v. *Arizona* serves best, being neither the hardest nor easiest of the four under the Court's standards.[15]

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade. He had "an emotional illness" of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was "alert and oriented as to time, place, and person," intelligent within normal limits, competent to stand trial, and sane within the legal definition. At the police station, the victim picked Miranda out of a lineup, and two officers then took him into a separate room to interrogate him, starting about 11:30 a. m. Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises and—I will assume this though the record is uncertain, *ante,* 491–492 and nn. 66–67—without any effective warnings at all.

Miranda's oral and written confessions are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were ob-

[15] In *Westover,* a seasoned criminal was practically given the Court's full complement of warnings and did not heed them. The *Stewart* case, on the other hand, involves long detention and successive questioning. In *Vignera,* the facts are complicated and the record somewhat incomplete.

tained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.[16]

The tenor of judicial opinion also falls well short of supporting the Court's new approach. Although *Escobedo* has widely been interpreted as an open invitation to lower courts to rewrite the law of confessions, a significant heavy majority of the state and federal decisions in point have sought quite narrow interpretations.[17] Of

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[16] "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (Cardozo, J.).

[17] A narrow reading is given in: *United States* v. *Robinson*, 354 F. 2d 109 (C. A. 2d Cir.); *Davis* v. *North Carolina*, 339 F. 2d 770 (C. A. 4th Cir.); *Edwards* v. *Holman*, 342 F. 2d 679 (C. A. 5th Cir.); *United States ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837 (C. A. 7th Cir.); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33; *State* v. *Fox*, — Iowa —, 131 N. W. 2d 684; *Rowe* v. *Commonwealth*, 394 S. W. 2d 751 (Ky.); *Parker* v. *Warden*, 236 Md. 236, 203 A. 2d 418; *State* v. *Howard*, 383 S. W. 2d 701 (Mo.); *Bean* v. *State*, — Nev. —, 398 P. 2d 251; *State* v. *Hodgson*, 44 N. J. 151, 207 A. 2d 542; *People* v. *Gunner*, 15 N. Y. 2d 226, 205 N. E. 2d 852; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A. 2d 288; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169.

An ample reading is given in: *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (C. A. 3d Cir.); *Wright* v. *Dickson*,

the courts that have accepted the invitation, it is hard to know how many have felt compelled by their best guess as to this Court's likely construction; but none of the state decisions saw fit to rely on the state privilege against self-incrimination, and no decision at all has gone as far as this Court goes today.[18]

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, *Johnson* v. *Zerbst*, 304 U. S. 458, *Mapp* v. *Ohio*, 367 U. S. 643, and *Gideon* v. *Wainwright*, 372 U. S. 335. In *Johnson*, which established that appointed counsel must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had in fact been recently fixed as Department of Justice policy. See Beaney, Right to Counsel 29–30, 36–42 (1955). In *Mapp*, which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted some such rule. See 367 U. S., at 651. In *Gideon*, which extended *Johnson* v. *Zerbst* to the States, an *amicus* brief was filed by 22 States and Commonwealths urging that course; only two States besides that of the respondent came forward to protest. See 372 U. S., at 345. By contrast, in this case new restrictions on police

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336 F. 2d 878 (C. A. 9th Cir.); *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361; *State* v. *Dufour*, — R. I. —, 206 A. 2d 82; *State* v. *Neely*, 239 Ore. 487, 395 P. 2d 557, modified, 398 P. 2d 482.

The cases in both categories are those readily available; there are certainly many others.

[18] For instance, compare the requirements of the catalytic case of *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361, with those laid down today. See also Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 670.

questioning have been opposed by the United States and in an *amicus* brief signed by 27 States and Commonwealths, not including the three other States which are parties. No State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own.

The Court in closing its general discussion invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States. A brief résumé will suffice to show that none of these jurisdictions has struck so one-sided a balance as the Court does today. Heaviest reliance is placed on the FBI practice. Differing circumstances may make this comparison quite untrustworthy,[19] but in any event the FBI falls sensibly short of the Court's formalistic rules. For example, there is no indication that FBI agents must obtain an affirmative "waiver" before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind. And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him; the thrust of the Court's rules is to induce the suspect to obtain appointed counsel before continuing the interview. See *ante*, pp. 484–486. Apparently American military practice, briefly mentioned by the Court, has these same limits and is still less favorable to the suspect than the FBI warning, making no mention of appointed counsel. Developments, *supra*, n. 2, at 1084–1089.

The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of

[19] The Court's *obiter dictum* notwithstanding, *ante*, p. 486, there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual.

the accused as against those of society when other data are considered. Concededly, the English experience is most relevant. In that country, a caution as to silence but not counsel has long been mandated by the "Judges' Rules," which also place other somewhat imprecise limits on police cross-examination of suspects. However, in the court's discretion confessions can be and apparently quite frequently are admitted in evidence despite disregard of the Judges' Rules, so long as they are found voluntary under the common-law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify.[20]

India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. See Developments, *supra*, n. 2, at 1106–1110; *Reg. v. Ramasamy* [1965] A. C. 1 (P. C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and in many other respects Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country.[21] The Court ends its survey by imputing

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[20] For citations and discussion covering each of these points, see Developments, *supra*, n. 2, at 1091–1097, and Enker & Elsen, *supra*, n. 12, at 80 & n. 94.

[21] On comment, see Hardin, Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland, 113 U. Pa. L. Rev. 165, 181 and nn. 96–97 (1964). Other examples are less stringent search and seizure rules and no automatic exclusion for violation of them, *id.*, at 167–169; guilt based on majority jury verdicts, *id.*, at 185; and pre-trial discovery of evidence on both sides, *id.*, at 175.

added strength to our privilege against self-incrimination since, by contrast to other countries, it is embodied in a written Constitution. Considering the liberties the Court has today taken with constitutional history and precedent, few will find this emphasis persuasive.

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive re-examination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the American Law Institute, headed by Professors Vorenberg and Bator of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States.[22] Studies are also being conducted by the District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research.[23] There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.[24]

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[22] Of particular relevance is the ALI's drafting of a Model Code of Pre-Arraignment Procedure, now in its first tentative draft. While the ABA and National Commission studies have wider scope, the former is lending its advice to the ALI project and the executive director of the latter is one of the reporters for the Model Code.

[23] See Brief for the United States in *Westover*, p. 45. The N. Y. Times, June 3, 1966, p. 41 (late city ed.) reported that the Ford Foundation has awarded $1,100,000 for a five-year study of arrests and confessions in New York.

[24] The New York Assembly recently passed a bill to require certain warnings before an admissible confession is taken, though the rules are less strict than are the Court's. N. Y. Times, May 24, 1966, p. 35 (late city ed.).

It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past.[25] But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

IV. Conclusions.

All four of the cases involved here present express claims that confessions were inadmissible, not because of coercion in the traditional due process sense, but solely because of lack of counsel or lack of warnings concerning counsel and silence. For the reasons stated in this opinion, I would adhere to the due process test and reject the new requirements inaugurated by the Court. On this premise my disposition of each of these cases can be stated briefly.

In two of the three cases coming from state courts, *Miranda* v. *Arizona* (No. 759) and *Vignera* v. *New York* (No. 760), the confessions were held admissible and no other errors worth comment are alleged by petitioners.

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[25] The Court waited 12 years after *Wolf* v. *Colorado*, 338 U. S. 25, declared privacy against improper state intrusions to be constitutionally safeguarded before it concluded in *Mapp* v. *Ohio*, 367 U. S. 643, that adequate state remedies had not been provided to protect this interest so the exclusionary rule was necessary.

I would affirm in these two cases. The other state case is *California* v. *Stewart* (No. 584), where the state supreme court held the confession inadmissible and reversed the conviction. In that case I would dismiss the writ of certiorari on the ground that no final judgment is before us, 28 U. S. C. § 1257 (1964 ed.); putting aside the new trial open to the State in any event, the confession itself has not even been finally excluded since the California Supreme Court left the State free to show proof of a waiver. If the merits of the decision in *Stewart* be reached, then I believe it should be reversed and the case remanded so the state supreme court may pass on the other claims available to respondent.

In the federal case, *Westover* v. *United States* (No. 761), a number of issues are raised by petitioner apart from the one already dealt with in this dissent. None of these other claims appears to me tenable, nor in this context to warrant extended discussion. It is urged that the confession was also inadmissible because not voluntary even measured by due process standards and because federal-state cooperation brought the *McNabb-Mallory* rule into play under *Anderson* v. *United States*, 318 U. S. 350. However, the facts alleged fall well short of coercion in my view, and I believe the involvement of federal agents in petitioner's arrest and detention by the State too slight to invoke *Anderson*. I agree with the Government that the admission of the evidence now protested by petitioner was at most harmless error, and two final contentions—one involving weight of the evidence and another improper prosecutor comment—seem to me without merit. I would therefore affirm Westover's conviction.

In conclusion: Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipi-

tously taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (separate opinion): "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common-law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluding coerced confessions matured about 100 years later, "[b]ut there is nothing in the reports to suggest that the theory has its roots in the privilege against self-incrimination. And so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates." Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 18 (1949).

Our own constitutional provision provides that no person "shall be compelled in any criminal case to be a witness against himself." These words, when "[c]onsidered in the light to be shed by grammar and the dictionary . . . appear to signify simply that nobody shall be

compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant." Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 2. And there is very little in the surrounding circumstances of the adoption of the Fifth Amendment or in the provisions of the then existing state constitutions or in state practice which would give the constitutional provision any broader meaning. Mayers, The Federal Witness' Privilege Against Self-Incrimination: Constitutional or Common-Law? 4 American Journal of Legal History 107 (1960). Such a construction, however, was considerably narrower than the privilege at common law, and when eventually faced with the issues, the Court extended the constitutional privilege to the compulsory production of books and papers, to the ordinary witness before the grand jury and to witnesses generally. *Boyd* v. *United States,* 116 U. S. 616, and *Counselman* v. *Hitchcock,* 142 U. S. 547. Both rules had solid support in common-law history, if not in the history of our own constitutional provision.

A few years later the Fifth Amendment privilege was similarly extended to encompass the then well-established rule against coerced confessions: "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Bram* v. *United States,* 168 U. S. 532, 542. Although this view has found approval in other cases, *Burdeau* v. *McDowell,* 256 U. S. 465, 475; *Powers* v. *United States,* 223 U. S. 303, 313; *Shotwell* v. *United States,* 371 U. S. 341, 347, it has also been questioned, see *Brown* v. *Mississippi,* 297 U. S. 278, 285; *United States* v. *Carignan,*

342 U. S. 36, 41; *Stein* v. *New York*, 346 U. S. 156, 191, n. 35, and finds scant support in either the English or American authorities, see generally *Regina* v. *Scott*, Dears. & Bell 47; 3 Wigmore, Evidence § 823 (3d ed. 1940), at 249 ("a confession is not rejected because of any connection with the *privilege against self-crimination*"), and 250, n. 5 (particularly criticizing *Bram*); 8 Wigmore, Evidence § 2266, at 400–401 (McNaughton rev. 1961). Whatever the source of the rule excluding coerced confessions, it is clear that prior to the application of the privilege itself to state courts, *Malloy* v. *Hogan*, 378 U. S. 1, the admissibility of a confession in a state criminal prosecution was tested by the same standards as were applied in federal prosecutions. *Id.*, at 6–7, 10.

Bram, however, itself rejected the proposition which the Court now espouses. The question in *Bram* was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable the Court's inquiry could have ended there. After examining the English and American authorities, however, the Court declared that:

> "In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary." 168 U. S., at 558.

In this respect the Court was wholly consistent with prior and subsequent pronouncements in this Court.

Thus prior to *Bram* the Court, in *Hopt* v. *Utah*, 110 U. S. 574, 583–587, had upheld the admissibility of a

confession made to police officers following arrest, the record being silent concerning what conversation had occurred between the officers and the defendant in the short period preceding the confession. Relying on *Hopt*, the Court ruled squarely on the issue in *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55:

> "Counsel for the accused insist that there cannot be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offence. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises. Wharton's Cr. Ev. 9th ed. §§ 661, 663, and authorities cited."

Accord, *Pierce* v. *United States*, 160 U. S. 355, 357.

And in *Wilson* v. *United States*, 162 U. S. 613, 623, the Court had considered the significance of custodial interrogation without any antecedent warnings regarding the right to remain silent or the right to counsel. There the defendant had answered questions posed by a Commissioner, who had failed to advise him of his rights, and his answers were held admissible over his claim of involuntariness. "The fact that [a defendant] is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. . . . And it is laid down

that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned."

Since *Bram*, the admissibility of statements made during custodial interrogation has been frequently reiterated. *Powers* v. *United States*, 223 U. S. 303, cited *Wilson* approvingly and held admissible as voluntary statements the accused's testimony at a preliminary hearing even though he was not warned that what he said might be used against him. Without any discussion of the presence or absence of warnings, presumably because such discussion was deemed unnecessary, numerous other cases have declared that "[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible," *McNabb* v. *United States*, 318 U. S. 332, 346; accord, *United States* v. *Mitchell*, 322 U. S. 65, despite its having been elicited by police examination, *Wan* v. *United States*, 266 U. S. 1, 14; *United States* v. *Carignan*, 342 U. S. 36, 39. Likewise, in *Crooker* v. *California*, 357 U. S. 433, 437, the Court said that "the bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained." And finally, in *Cicenia* v. *Lagay*, 357 U. S. 504, a confession obtained by police interrogation after arrest was held voluntary even though the authorities refused to permit the defendant to consult with his attorney. See generally *Culombe* v. *Connecticut*, 367 U. S. 568, 587–602 (opinion of Frankfurter, J.); 3 Wigmore, Evidence § 851, at 313 (3d ed. 1940); see also Joy, Admissibility of Confessions 38, 46 (1842).

Only a tiny minority of our judges who have dealt with the question, including today's majority, have considered in-custody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as

every member knows, has left standing literally thousands of criminal convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

II.

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution.[1] This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in terms of the long-range interest of the country. At the very least the Court's text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. De-

[1] Of course the Court does not deny that it is departing from prior precedent; it expressly overrules *Crooker* and *Cicenia*, *ante*, at 479, n. 48, and it acknowledges that in the instant "cases we might not find the defendants' statements to have been involuntary in traditional terms," *ante*, at 457.

cisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.

III.

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if *compelled*. Hence the core of the Court's opinion is that because of the "compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [in custody] can truly be the product of his free choice," *ante*, at 458, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years' experience. Nor does it assert that its novel conclusion reflects a changing consensus among state courts, see *Mapp* v. *Ohio*, 367 U. S. 643, or that a succession of cases had steadily eroded the old rule and proved it unworkable, see *Gideon* v. *Wainwright*, 372 U. S. 335. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may

have occurred in the wake of more recent decisions of state appellate tribunals or this Court. But even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence.[2] Insofar as appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.

Although in the Court's view in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as "Do you have anything to say?" or "Did you kill your wife?" his response, if there is one, has somehow been compelled, even if the accused has

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[2] In fact, the type of sustained interrogation described by the Court appears to be the exception rather than the rule. A survey of 399 cases in one city found that in almost half of the cases the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11, 41–45 (1962). Questioning tends to be confused and sporadic and is usually concentrated on confrontations with witnesses or new items of evidence, as these are obtained by officers conducting the investigation. See generally LaFave, Arrest: The Decision to Take a Suspect into Custody 386 (1965); ALI, A Model Code of Pre-Arraignment Procedure, Commentary § 5.01, at 170, n. 4 (Tent. Draft No. 1, 1966).

been clearly warned of his right to remain silent. Common sense informs us to the contrary. While one may say that the response was "involuntary" in the sense the question provoked or was the occasion for the response and thus the defendant was induced to speak out when he might have remained silent if not arrested and not questioned, it is patently unsound to say the response is compelled.

Today's result would not follow even if it were agreed that to some extent custodial interrogation is inherently coercive. See *Ashcraft* v. *Tennessee,* 322 U. S. 143, 161 (Jackson, J., dissenting). The test has been whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer," *Lisenba* v. *California,* 314 U. S. 219, 241, and whether physical or psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed," *Haynes* v. *Washington,* 373 U. S. 503, 513; *Lynumn* v. *Illinois,* 372 U. S. 528, 534. The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry. See, *e. g., Ashcraft* v. *Tennessee,* 322 U. S. 143; *Haynes* v. *Washington,* 373 U. S. 503.[3]

[3] By contrast, the Court indicates that in applying this new rule it "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Ante,* at 468. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. See *United States* v. *Bolden,* 355 F. 2d 453

But it has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will.

If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation. Compare *Tot* v. *United States*, 319 U. S. 463, 466; *United States* v. *Romano*, 382 U. S. 136. *A fortiori* that would be true of the extension of the rule to exculpatory statements, which the Court effects after a brief discussion of why, in the Court's view, they must be deemed incriminatory but without any discussion of why they must be deemed coerced. See *Wilson* v. *United States*, 162 U. S. 613, 624. Even if one were to postulate that the Court's concern is not that all confessions induced by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.

On the other hand, even if one assumed that there was an adequate factual basis for the conclusion that all confessions obtained during in-custody interrogation are the product of compulsion, the rule propounded by

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(C. A. 7th Cir. 1965), petition for cert. pending No. 1146, O. T. 1965 (Secret Service agent); *People* v. *Du Bont*, 235 Cal. App. 2d 844, 45 Cal. Rptr. 717, pet. for cert. pending No. 1053, Misc., O. T. 1965 (former police officer).

the Court would still be irrational, for, apparently, it is only if the accused is also warned of his right to counsel and waives both that right and the right against self-incrimination that the inherent compulsiveness of interrogation disappears. But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint? And why if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth, and that is what the accused does, is the situation any less coercive insofar as the accused is concerned? The Court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policemen, to waive his right to consult an attorney. It expects, however, that the accused will not often waive the right; and if it is claimed that he has, the State faces a severe, if not impossible burden of proof.

All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That amendment deals with compelling the accused himself. It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against com-

pelled self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a "need for counsel to protect the Fifth Amendment privilege . . . ." *Ante,* at 470. The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege.

In sum, for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts.

IV.

Criticism of the Court's opinion, however, cannot stop with a demonstration that the factual and textual bases for the rule it propounds are, at best, less than compelling. Equally relevant is an assessment of the rule's consequences measured against community values. The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is "to respect the inviolability of the human personality" and to require government to produce the evidence against the accused by its own independent labors. *Ante,* at 460. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight.

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to

advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, see *Escobedo* v. *Illinois*, 378 U. S. 478, 499 (dissenting opinion). Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown* v. *Walker*, 161 U. S. 591, 596; see also *Hopt* v. *Utah*, 110 U. S. 574, 584–585. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutary rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the

task of sorting out inadmissible evidence and must be replaced by the *per se* rule which is now imposed. Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed by its likely undesirable impact on other very relevant and important interests.

The most basic function of any government is to provide for the security of the individual and of his property. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 455. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

The modes by which the criminal laws serve the interest in general security are many. First the murderer who has taken the life of another is removed from the streets, deprived of his liberty and thereby prevented from repeating his offense. In view of the statistics on recidivism in this country [4] and of the number of instances

[4] Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on "Careers in Crime," which it publishes in its Uniform Crime Reports. Of 92,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years the group had accumulated 434,000 charges. FBI, Uniform Crime Reports—1964, 27-28. In 1963 and 1964 between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to a term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as Federal Offenders: 1964); Administrative

in which apprehension occurs only after repeated offenses, no one can sensibly claim that this aspect of the criminal law does not prevent crime or contribute significantly to the personal security of the ordinary citizen.

Secondly, the swift and sure apprehension of those who refuse to respect the personal security and dignity of their neighbor unquestionably has its impact on others who might be similarly tempted. That the criminal law is wholly or partly ineffective with a segment of the population or with many of those who have been apprehended and convicted is a very faulty basis for concluding that it is not effective with respect to the great bulk of our citizens or for thinking that without the criminal laws,

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Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25–27 (hereinafter cited as Federal Offenders: 1963). During the same two years in the District Court for the District of Columbia between 28% and 35% of those sentenced had prior prison records and from 37% to 40% had a prior record less than prison. Federal Offenders: 1964, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia: 1963, 8, 10 (hereinafter cited as District of Columbia Offenders: 1963).

A similar picture is obtained if one looks at the subsequent records of those released from confinement. In 1964, 12.3% of persons on federal probation had their probation revoked because of the commission of major violations (defined as one in which the probationer has been committed to imprisonment for a period of 90 days or more, been placed on probation for over one year on a new offense, or has absconded with felony charges outstanding). Twenty-three and two-tenths percent of parolees and 16.9% of those who had been mandatorily released after service of a portion of their sentence likewise committed major violations. Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts: 1965, 138. See also Mandel et al., Recidivism Studied and Defined, 56 J. Crim. L., C. & P. S. 59 (1965) (within five years of release 62.33% of sample had committed offenses placing them in recidivist category).

or in the absence of their enforcement, there would be no increase in crime. Arguments of this nature are not borne out by any kind of reliable evidence that I have seen to this date.

Thirdly, the law concerns itself with those whom it has confined. The hope and aim of modern penology, fortunately, is as soon as possible to return the convict to society a better and more law-abiding man than when he left. Sometimes there is success, sometimes failure. But at least the effort is made, and it should be made to the very maximum extent of our present and future capabilities.

The rule announced today will measurably weaken the ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials.[5] Criminal trials, no

[5] Eighty-eight federal district courts (excluding the District Court for the District of Columbia) disposed of the cases of 33,381 criminal defendants in 1964. Only 12.5% of those cases were actually tried. Of the remaining cases, 89.9% were terminated by convictions upon pleas of guilty and 10.1% were dismissed. Stated differently, approximately 90% of all convictions resulted from guilty pleas. Federal Offenders: 1964, *supra*, note 4, 3–6. In the District Court for the District of Columbia a higher percentage, 27%, went to trial, and the defendant pleaded guilty in approximately 78% of the cases terminated prior to trial. *Id.*, at 58–59. No reliable statistics are available concerning the percentage of cases in which guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.

Perhaps of equal significance is the number of instances of known crimes which are not solved. In 1964, only 388,946, or 23.9% of 1,626,574 serious known offenses were cleared. The clearance rate ranged from 89.8% for homicides to 18.7% for larceny. FBI, Uniform Crime Reports—1964, 20–22, 101. Those who would replace interrogation as an investigatorial tool by modern scientific investigation techniques significantly overestimate the effectiveness of present procedures, even when interrogation is included.

matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. See Federal Offenders: 1964, *supra,* note 4, at 6 (Table 4), 59 (Table 1); Federal Offenders: 1963, *supra,* note 4, at 5 (Table 3); District of Columbia Offenders: 1963, *supra,* note 4, at 2 (Table 1). But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of

course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Nor can this decision do other than have a corrosive effect on the criminal law as an effective device to prevent crime. A major component in its effectiveness in this regard is its swift and sure enforcement. The easier it is to get away with rape and murder, the less the deterrent effect on those who are inclined to attempt it. This is still good common sense. If it were not, we should posthaste liquidate the whole law enforcement establishment as a useless, misguided effort to control human conduct.

And what about the accused who has confessed or would confess in response to simple, noncoercive questioning and whose guilt could not otherwise be proved? Is it so clear that release is the best thing for him in every case? Has it so unquestionably been resolved that in each and every case it would be better for him not to confess and to return to his environment with no attempt whatsoever to help him? I think not. It may well be that in many cases it will be no less than a callous disregard for his own welfare as well as for the interests of his next victim.

There is another aspect to the effect of the Court's rule on the person whom the police have arrested on probable cause. The fact is that he may not be guilty at all and may be able to extricate himself quickly and simply if he were told the circumstances of his arrest and were asked to explain. This effort, and his release, must now await the hiring of a lawyer or his appointment by the court, consultation with counsel and then a session with the police or the prosecutor. Similarly, where probable cause exists to arrest several suspects, as where the body of the victim is discovered in a house having several residents, compare *Johnson* v. *State*, 238 Md. 140, 207 A. 2d 643 (1965), cert. denied, 382 U. S. 1013, it will often

be true that a suspect may be cleared only through the results of interrogation of other suspects. Here too the release of the innocent may be delayed by the Court's rule.

Much of the trouble with the Court's new rule is that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved. It applies to every defendant, whether the professional criminal or one committing a crime of momentary passion who is not part and parcel of organized crime. It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnapping, see *Brinegar* v. *United States,* 338 U. S. 160, 183 (Jackson, J., dissenting); *People* v. *Modesto,* 62 Cal. 2d 436, 446, 398 P. 2d 753, 759 (1965), those involving the national security, see *United States* v. *Drummond,* 354 F. 2d 132, 147 (C. A. 2d Cir. 1965) (*en banc*) (espionage case), pet. for cert. pending, No. 1203, Misc., O. T. 1965; cf. *Gessner* v. *United States,* 354 F. 2d 726, 730, n. 10 (C. A. 10th Cir. 1965) (upholding, in espionage case, trial ruling that Government need not submit classified portions of interrogation transcript), and some of those involving organized crime. In the latter context the lawyer who arrives may also be the lawyer for the defendant's colleagues and can be relied upon to insure that no breach of the organization's security takes place even though the accused may feel that the best thing he can do is to cooperate.

At the same time, the Court's *per se* approach may not be justified on the ground that it provides a "bright line" permitting the authorities to judge in advance whether interrogation may safely be pursued without jeopardizing the admissibility of any information obtained as a consequence. Nor can it be claimed that judicial time and effort, assuming that is a relevant consideration,

will be conserved because of the ease of application of the new rule. Escobedo's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused effectively waived his rights, and whether nonconfessional evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

Applying the traditional standards to the cases before the Court, I would hold these confessions voluntary. I would therefore affirm in Nos. 759, 760, and 761, and reverse in No. 584.

EXHIBIT 27

KEYISHIAN ET AL. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

No. 105. Argued November 17, 1966.—Decided January 23, 1967.

Appellants, faculty members of the State University of New York and a nonfaculty employee, brought this action for declaratory and injunctive relief, claiming that New York's teacher loyalty laws and regulations are unconstitutional. Their continued employment had been terminated or was threatened when each appellant faculty member refused to comply with a requirement of the university trustees that he certify that he was not a Communist and that if he had ever been one he had so advised the university president; and the nonfaculty employee refused to state under oath whether he had advocated or been a member of a group which advocated forceful overthrow of the government. Under § 3021 of New York's Education Law "treasonable or seditious" utterances or acts are grounds for dismissal from the public school system, as well as under § 105, subd. 3, of the Civil Service Law. Other provisions of § 105 of the Civil Service Law disqualify from the civil service or employment in the educational system any person advocating or involved with the distribution of written material which advocates the forceful overthrow of the government. Section 3021 does not define "treasonable or seditious." Section 105, subd. 3, provides that "treasonable word or act" shall mean "treason" as defined in the Penal Law and "seditious word or act" shall mean "criminal anarchy" as therein defined. Section 3022 (the Feinberg Law) of the Education Law requires the State Board of Regents to issue regulations for the disqualification or removal on loyalty grounds of faculty or other personnel in the state educational system, to make a list of "subversive" organizations, and to provide that membership therein constitutes prima facie evidence of disqualification for employment. The Board listed the National and State Communist Parties as "subversive organizations" under the law, but shortly before the trial of this case the university trustees' certificate requirement was rescinded and it was announced that no person would be ineligible for employment "solely" because he refused to sign the

certificate, and that §§ 3021 and 3022 of the Education Law and § 105 of the Civil Service Law constituted part of the employment contract. A three-judge District Court sustained the constitutionality of these provisions against appellants' challenges of vagueness and overbreadth and dismissed the complaint. *Held:*

1. *Adler* v. *Board of Education*, 342 U. S. 485, in which this Court upheld some aspects of the New York teacher loyalty plan before its extension to state institutions of higher learning, is not controlling, the vagueness issue presented here involving § 3021 and § 105 not having been decided in *Adler*, and the validity of the subversive organization membership provision of § 3022 having been upheld for reasons subsequently rejected by this Court. Pp. 593–595.

2. The rescission of the certificate requirement does not moot this case, as the substance of the statutory and regulatory complex challenged by appellants remains. P. 596.

3. Section 3021 of the Education Law and § 105, subds. 1 (a), 1 (b), and 3, of the Civil Service Law as implemented by the machinery created pursuant to § 3022 of the Education Law, are unconstitutionally vague, since no teacher can know from § 3021 of the Education Law and § 105, subd. 3, of the Civil Service Law what constitutes the boundary between "seditious" and nonseditious utterances and acts, and the other provisions may well prohibit the employment of one who advocates doctrine abstractly without any attempt to incite others to action, and may be construed to cover mere expression of belief. Pp. 597–604.

(a) These provisions, which have not been interpreted by the New York courts, can have a stifling effect on the "free play of the spirit which all teachers ought especially to cultivate and practice" (*Wieman* v. *Updegraff*, 344 U. S. 183, 195 (concurring opinion)). Pp. 601–602.

(b) Academic freedom is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. P. 603.

(c) The prolixity and profusion of statutes, regulations, and administrative machinery, and manifold cross-references to interrelated enactments and rules aggravate the problem of vagueness of wording. P. 604.

4. The provisions of the Civil Service Law (§ 105, subd. 1 (c)) and the Education Law (§ 3022, subd. 2), which make Communist Party membership, as such, prima facie evidence of disqualifica-

tion for employment in the public school system are "overbroad" and therefore unconstitutional. Pp. 605–610.

(a) Constitutional doctrine after this Court's upholding of § 3022, subd. 2, in *Adler* has rejected its major premise that public employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. P. 605.

(b) Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for imposing sanctions. Pp. 606–610.

255 F. Supp. 981, reversed and remanded.

Richard Lipsitz argued the cause for appellants. With him on the briefs was *Rosario J. Di Lorenzo.*

Ruth V. Iles, Assistant Attorney General of New York, argued the cause for appellees Board of Regents et al. With her on the brief were *Louis J. Lefkowitz,* Attorney General, and *Ruth Kessler Toch,* Acting Solicitor General. *John C. Crary, Jr.,* argued the cause and filed a brief for appellees Board of Trustees of the State University of New York et al.

Osmond K. Fraenkel filed a brief for the American Civil Liberties Union et al., as *amici curiae,* urging reversal. *Ralph F. Fuchs, Bernard Wolfman* and *Herman I. Orentlicher* filed a brief for the American Association of University Professors, as *amicus curiae.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellants were members of the faculty of the privately owned and operated University of Buffalo, and became state employees when the University was merged in 1962 into the State University of New York, an institution of higher education owned and operated by the State of New York. As faculty members of the State University their continued employment was conditioned upon their compliance with a New York plan, formulated

partly in statutes and partly in administrative regulations,[1] which the State utilizes to prevent the appointment or retention of "subversive" persons in state employment.

Appellants Hochfield and Maud were Assistant Professors of English, appellant Keyishian an instructor in English, and appellant Garver, a lecturer in philosophy. Each of them refused to sign, as regulations then in effect required, a certificate that he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York. Each was notified that his failure to sign the certificate would require his dismissal. Keyishian's one-year-term contract was not renewed because of his failure to sign the certificate. Hochfield and Garver, whose contracts still had time to run, continue to teach, but subject to proceedings for their dismissal if the constitutionality of the New York plan is sustained. Maud has voluntarily resigned and therefore no longer has standing in this suit.

Appellant Starbuck was a nonfaculty library employee and part-time lecturer in English. Personnel in that classification were not required to sign a certificate but were required to answer in writing under oath the question, "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?" Starbuck refused to answer the question and as a result was dismissed.

Appellants brought this action for declaratory and injunctive relief, alleging that the state program violated the Federal Constitution in various respects. A three-

[1] The text of the pertinent statutes and administrative regulations in effect at the time of trial appears in the Appendix to the opinion.

judge federal court held that the program was constitutional. 255 F. Supp. 981.[2] We noted probable jurisdiction of appellants' appeal, 384 U. S. 998. We reverse.

I.

We considered some aspects of the constitutionality of the New York plan 15 years ago in *Adler* v. *Board of Education,* 342 U. S. 485. That litigation arose after New York passed the Feinberg Law which added § 3022 to the Education Law.[3] The Feinberg Law was enacted to implement and enforce two earlier statutes. The first was a 1917 law, now § 3021 of the Education Law, under which "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act" is a ground for dismissal from the public school system. The second was a 1939 law which was § 12–a of the Civil Service Law when *Adler* was decided and, as amended, is now § 105 of that law. This law disqualifies from the civil service and from employment in the educational system any person who advocates the overthrow of government by force, violence, or any unlawful means, or publishes material advocating such overthrow or organizes or joins any society or group of persons advocating such doctrine.

The Feinberg Law charged the State Board of Regents with the duty of promulgating rules and regulations providing procedures for the disqualification or removal of persons in the public school system who violate the 1917 law or who are ineligible for appointment to or

[2] The District Court initially refused to convene a three-judge court, 233 F. Supp. 752, and was reversed by the Court of Appeals for the Second Circuit. 345 F. 2d 236.

[3] For the history of New York loyalty-security legislation, including the Feinberg Law, see Chamberlain, Loyalty and Legislative Action, and that author's article in Gellhorn, The States and Subversion 231.

retention in the public school system under the 1939 law. The Board of Regents was further directed to make a list, after notice and hearing, of "subversive" organizations, defined as organizations which advocate the doctrine of overthrow of government by force, violence, or any unlawful means. Finally, the Board was directed to provide in its rules and regulations that membership in any listed organization should constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the State.

The Board of Regents thereupon promulgated rules and regulations containing procedures to be followed by appointing authorities to discover persons ineligible for appointment or retention under the 1939 law, or because of violation of the 1917 law. The Board also announced its intention to list "subversive" organizations after requisite notice and hearing, and provided that membership in a listed organization after the date of its listing should be regarded as constituting prima facie evidence of disqualification, and that membership prior to listing should be presumptive evidence that membership has continued, in the absence of a showing that such membership was terminated in good faith. Under the regulations, an appointing official is forbidden to make an appointment until after he has first inquired of an applicant's former employers and other persons to ascertain whether the applicant is disqualified or ineligible for appointment. In addition, an annual inquiry must be made to determine whether an appointed employee has ceased to be qualified for retention, and a report of findings must be filed.

Adler was a declaratory judgment suit in which the Court held, in effect, that there was no constitutional infirmity in former § 12–a or in the Feinberg Law on their faces and that they were capable of constitutional application. But the contention urged in this case that

both § 3021 and § 105 are unconstitutionally vague was not heard or decided. Section 3021 of the Education Law was challenged in *Adler* as unconstitutionally vague, but because the challenge had not been made in the pleadings or in the proceedings in the lower courts, this Court refused to consider it. 342 U. S., at 496. Nor was any challenge on grounds of vagueness made in *Adler* as to subdivisions 1 (a) and (b) of § 105 of the Civil Service Law.[4] Subdivision 3 of § 105 was not added until 1958. Appellants in this case timely asserted below the unconstitutionality of all these sections on grounds of vagueness and that question is now properly before us for decision. Moreover, to the extent that *Adler* sustained the provision of the Feinberg Law constituting membership in an organization advocating forceful overthrow of government a ground for disqualification, pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested. *Adler* is therefore not dispositive of the constitutional issues we must decide in this case.

II.

A 1953 amendment extended the application of the Feinberg Law to personnel of any college or other institution of higher education owned and operated by the State or its subdivisions. In the same year, the Board of Regents, after notice and hearing, listed the Communist Party of the United States and of the State of New York as "subversive organizations." In 1956 each applicant for an appointment or the renewal of an appointment was required to sign the so-called "Feinberg Certificate" declaring that he had read the Regents Rules and understood that the Rules and the statutes

[4] The sole "vagueness" contention in *Adler* concerned the word "subversive," appearing in the preamble to and caption of § 3022. 342 U. S., at 496.

constituted terms of employment, and declaring further that he was not a member of the Communist Party, and that if he had ever been a member he had communicated that fact to the President of the State University. This was the certificate that appellants Hochfield, Maud, Keyishian, and Garver refused to sign.

In June 1965, shortly before the trial of this case, the Feinberg Certificate was rescinded and it was announced that no person then employed would be deemed ineligible for continued employment "solely" because he refused to sign the certificate. In lieu of the certificate, it was provided that each applicant be informed before assuming his duties that the statutes, §§ 3021 and 3022 of the Education Law and § 105 of the Civil Service Law, constituted part of his contract. He was particularly to be informed of the disqualification which flowed from membership in a listed "subversive" organization. The 1965 announcement further provides: "Should any question arise in the course of such inquiry such candidate may request . . . a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment." A brochure is also given new applicants. It outlines and explains briefly the legal effect of the statutes and invites any applicant who may have any question about possible disqualification to request an interview. The covering announcement concludes that "a prospective appointee who does not believe himself disqualified need take no affirmative action. No disclaimer oath is required."

The change in procedure in no wise moots appellants' constitutional questions raised in the context of their refusal to sign the now abandoned Feinberg Certificate. The substance of the statutory and regulatory complex remains and from the outset appellants' basic claim has been that they are aggrieved by its application.

III.

Section 3021 requires removal for "treasonable or seditious" utterances or acts. The 1958 amendment to § 105 of the Civil Service Law, now subdivision 3 of that section, added such utterances or acts as a ground for removal under that law also.[5] The same wording is used in both statutes—that "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts" shall be ground for removal. But there is a vital difference between the two laws. Section 3021 does not define the terms "treasonable or

[5] There is no merit in the suggestion advanced by the Attorney General of New York for the first time in his brief in this Court that § 3021 of the Education Law and § 105, subd. 3, of the Civil Service Law are not "pertinent to our inquiry." Section 3022 of the Education Law incorporates by reference the provisions of both, thereby rendering them applicable to faculty members of all colleges and institutions of higher education. One of the reasons why the Court of Appeals ordered the convening of a three-judge court was that a substantial federal question was presented by the fact that "Adler . . . refused to pass upon the constitutionality of section 3021 . . . [and that] several statutory amendments, such as Section 105 (3) of the Civil Service Law, are all subsequent to Adler." 345 F. 2d 236, 238. The three-judge court also properly found these provisions applicable to appellants in holding them constitutional. It is significant that appellees consistently defended the constitutionality of these sections in the courts below. Moreover, the three-judge court rendered its decision upon the basis of a "Stipulation of Fact," paragraph 20 of which recites:

"Section 3022 incorporates in full by reference and implements Section 105 of the Civil Service Law and Section 3021 of the New York State Education Law as follows: Subdivision (1) of Section 3022, as amended . . . directs the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system or any college or institution of higher education owned by the State of New York or any political subdivision thereof, by reason of violation of any of the provisions of Section 105 of the Civil Service Law or Section 3021 of the New York State Education Law."

seditious" as used in that section; in contrast, subdivision 3 of § 105 of the Civil Service Law provides that the terms "treasonable word or act" shall mean "treason" as defined in the Penal Law and the terms "seditious word or act" shall mean "criminal anarchy" as defined in the Penal Law.

Our experience under the Sedition Act of 1798, 1 Stat. 596, taught us that dangers fatal to First Amendment freedoms inhere in the word "seditious." See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 273–276. And the word "treasonable," if left undefined, is no less dangerously uncertain. Thus it becomes important whether, despite the omission of a similar reference to the Penal Law in § 3021, the words as used in that section are to be read as meaning only what they mean in subdivision 3 of § 105. Or are they to be read more broadly and to constitute utterances or acts "seditious" and "treasonable" which would not be so regarded for the purposes of § 105?

Even assuming that "treasonable" and "seditious" in § 3021 and § 105, subd. 3, have the same meaning, the uncertainty is hardly removed. The definition of "treasonable" in the Penal Law presents no particular problem. The difficulty centers upon the meaning of "seditious." Subdivision 3 equates the term "seditious" with "criminal anarchy" as defined in the Penal Law. Is the reference only to Penal Law § 160, defining criminal anarchy as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means"? But that section ends with the sentence "The advocacy of such doctrine either by word of mouth or writing is a felony." Does that sentence draw into § 105, Penal Law § 161, proscribing "advocacy of criminal anarchy"? If so, the

possible scope of "seditious" utterances or acts has virtually no limit. For under Penal Law § 161, one commits the felony of advocating criminal anarchy if he ". . . publicly displays any book . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means." [6] Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy? It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on "those with a conscientious and scrupulous regard for such undertakings." *Baggett* v. *Bullitt*, 377 U. S. 360, 374. Even were it certain that the definition referred to in § 105 was solely Penal Law § 160, the scope of § 105 still remains indefinite. The teacher cannot know the extent, if any, to which a "seditious" utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between "seditious" and nonseditious utterances and acts.

Other provisions of § 105 also have the same defect of vagueness. Subdivision 1 (a) of § 105 bars employment of any person who "by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite

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[6] Penal Law §§ 160–161 are to be replaced effective September 1, 1967, by a single provision entitled "criminal advocacy."

others to action in furtherance of unlawful aims.[7] See *Herndon* v. *Lowry*, 301 U. S. 242; *Yates* v. *United States*, 354 U. S. 298; *Noto* v. *United States*, 367 U. S. 290; *Scales* v. *United States*, 367 U. S. 203. And in prohibiting "advising" the "doctrine" of unlawful overthrow does the statute prohibit mere "advising" of the existence of the doctrine, or advising another to support the doctrine? Since "advocacy" of the doctrine of forceful overthrow is separately prohibited, need the person "teaching" or "advising" this doctrine himself "advocate" it? Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?

Similar uncertainty arises as to the application of subdivision 1 (b) of § 105. That subsection requires the disqualification of an employee involved with the distribution of written material "containing or advocating, advising or teaching the doctrine" of forceful overthrow, and who himself "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein." Here again, mere advocacy of abstract doctrine is apparently included.[8] And does

[7] The New York State Legislative Committee on Public Employee Security Procedures, in describing this provision, noted:

"In disqualifying for employment those who advocate or teach the 'doctrine' of the violent overthrow of government, [§ 105] is to be distinguished from the language of the Smith Act (18 U. S. C. §§ 371, 2385), which has been construed by the Supreme Court to make it criminal to incite to 'action' for the forcible overthrow of government, but not to teach the 'abstract doctrine' of such forcible overthrow. *Yates* v. *United States*, 354 U. S. 298 (1957)." 1958 N. Y. State Legis. Annual 70, n. 1.

[8] Compare the Smith Act, 18 U. S. C. § 2385, which punishes one who "prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of" unlawful overthrow, provided he is shown to have an "intent to cause the overthrow or destruction of any such government."

the prohibition of distribution of matter "containing" the doctrine bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolutions? The additional requirement, that the person participating in distribution of the material be one who "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine" of forceful overthrow, does not alleviate the uncertainty in the scope of the section, but exacerbates it. Like the language of § 105, subd. 1 (a), this language may reasonably be construed to cover mere expression of belief. For example, does the university librarian who recommends the reading of such materials thereby "advocate . . . the . . . propriety of adopting the doctrine contained therein"?

We do not have the benefit of a judicial gloss by the New York courts enlightening us as to the scope of this complicated plan.[9] In light of the intricate administrative machinery for its enforcement, this is not surprising. The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says." *Baggett* v. *Bullitt*, *supra*, at 374. The result must be to stifle "that free play of the spirit which all teachers ought especially to cultivate and practice . . . ."[10] That probability is enhanced by the provisions requiring an

[9] This is not a case where abstention pending state court interpretation would be appropriate, *Baggett* v. *Bullitt*, *supra*, at 375–379; *Dombrowski* v. *Pfister*, 380 U. S. 479, 489–490.

[10] *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (Frankfurter, J., concurring).

annual review of every teacher to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws. For a memorandum warns employees that under the statutes "subversive" activities may take the form of "[t]he writing of articles, the distribution of pamphlets, the endorsement of speeches made or articles written or acts performed by others," and reminds them "that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case."

There can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion. But "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488. The principle is not inapplicable because the legislation is aimed at keeping subversives out of the teaching ranks. In *De Jonge* v. *Oregon*, 299 U. S. 353, 365, the Court said:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker, supra,* at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." *United States* v. *Associated Press,* 52 F. Supp. 362, 372. In *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250, we said:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *N. A. A. C. P.* v. *Button,*

371 U. S. 415, 438; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.*, at 432–433. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone . . . ." *Speiser* v. *Randall*, 357 U. S. 513, 526. For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *N. A. A. C. P.* v. *Button, supra*, at 433. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. See *Stromberg* v. *California*, 283 U. S. 359, 369; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Baggett* v. *Bullitt*, *supra*.

The regulatory maze created by New York is wholly lacking in "terms susceptible of objective measurement." *Cramp* v. *Board of Public Instruction*, *supra*, at 286. It has the quality of "extraordinary ambiguity" found to be fatal to the oaths considered in *Cramp* and *Baggett* v. *Bullitt*. "[M]en of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Baggett* v. *Bullitt*, *supra*, at 367. Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules.

We therefore hold that § 3021 of the Education Law and subdivisions 1 (a), 1 (b) and 3 of § 105 of the Civil Service Law as implemented by the machinery created pursuant to § 3022 of the Education Law are unconstitutional.

IV.

Appellants have also challenged the constitutionality of the discrete provisions of subdivision 1 (c) of § 105 and subdivision 2 of the Feinberg Law, which make Communist Party membership, as such, prima facie evidence of disqualification. The provision was added to subdivision 1 (c) of § 105 in 1958 after the Board of Regents, following notice and hearing, listed the Communist Party of the United States and the Communist Party of the State of New York as "subversive" organizations. Subdivision 2 of the Feinberg Law was, however, before the Court in *Adler* and its constitutionality was sustained. But constitutional doctrine which has emerged since that decision has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. Teachers, the Court said in *Adler*, "may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." 342 U. S., at 492. The Court also stated that a teacher denied employment because of membership in a listed organization "is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice." *Id.*, at 493.

However, the Court of Appeals for the Second Circuit correctly said in an earlier stage of this case, ". . . the theory that public employment which may be denied altogether may be subjected to any conditions, regardless

of how unreasonable, has been uniformly rejected." *Keyishian* v. *Board of Regents*, 345 F. 2d 236, 239. Indeed, that theory was expressly rejected in a series of decisions following *Adler*. See *Wieman* v. *Updegraff*, 344 U. S. 183; *Slochower* v. *Board of Education*, 350 U. S. 551; *Cramp* v. *Board of Public Instruction*, *supra*; *Baggett* v. *Bullitt*, *supra*; *Shelton* v. *Tucker*, *supra*; *Speiser* v. *Randall*, *supra*; see also *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Torcaso* v. *Watkins*, 367 U. S. 488. In *Sherbert* v. *Verner*, 374 U. S. 398, 404, we said: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

We proceed then to the question of the validity of the provisions of subdivision 1 (*e*) of § 105 and subdivision 2 of § 3022, barring employment to members of listed organizations. Here again constitutional doctrine has developed since *Adler*. Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants.

In *Elfbrandt* v. *Russell*, 384 U. S. 11, we said, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." *Id.*, at 17. We there struck down a statutorily required oath binding the state employee not to become a member of the Communist Party with knowledge of its unlawful purpose, on threat of discharge and perjury prosecution if the oath were violated. We found that "[a]ny lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent,' would run afoul of the Constitution was set at rest by our decision in *Aptheker* v. *Secretary of State*, 378 U. S. 500." *Elfbrandt* v. *Russell*, *supra*, at 16. In *Aptheker* we held that Party membership, without knowl-

edge of the Party's unlawful purposes *and* specific intent to further its unlawful aims, could not constitutionally warrant deprivation of the right to travel abroad. As we said in *Schneiderman* v. *United States*, 320 U. S. 118, 136, "[U]nder our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization . . . do not subscribe unqualifiedly to all of its platforms or asserted principles." "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here." *Elfbrandt, supra*, at 19. Thus mere Party membership, even with knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment, see *Scales* v. *United States*, 367 U. S. 203; *Noto* v. *United States*, 367 U. S. 290; *Yates* v. *United States*, 354 U. S. 298;[11] nor may it warrant a finding of moral unfitness justifying disbarment. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232.

These limitations clearly apply to a provision, like § 105, subd. 1 (c), which blankets all state employees, regardless of the "sensitivity" of their positions. But even the Feinberg Law provision, applicable primarily to activities of teachers, who have captive audiences of young minds, are subject to these limitations in favor of freedom of expression and association; the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest, and has been documented in recent studies.[12] *Elfbrandt* and *Aptheker* state the

[11] Whether or not loss of public employment constitutes "punishment," cf. *United States* v. *Lovett*, 328 U. S. 303, there can be no doubt that the repressive impact of the threat of discharge will be no less direct or substantial.

[12] See Lazarsfeld & Thielens, The Academic Mind 92–112, 192–217; Biddle, The Fear of Freedom 155 *et seq.*; Jahoda & Cook,

governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations.

Measured against this standard, both Civil Service Law § 105, subd. 1 (c), and Education Law § 3022, subd. 2, sweep overbroadly into association which may not be proscribed. The presumption of disqualification arising from proof of mere membership may be rebutted, but only by (a) a denial of membership, (b) a denial that the organization advocates the overthrow of government by force, or (c) a denial that the teacher has knowledge of such advocacy. *Lederman* v. *Board of Education*, 276 App. Div. 527, 96 N. Y. S. 2d 466, aff'd, 301 N. Y. 476, 95 N. E. 2d 806.[13] Thus proof of nonactive membership or a showing of the absence of intent to further unlawful aims will not rebut the presumption and defeat dismissal. This is emphasized in official administrative interpretations. For example, it is said in a letter addressed to prospective appointees by the President of the State University, "You will note that . . . both the Law and regulations are very specifically directed toward the elimination and nonappointment of 'Communists' from or to our teaching ranks . . . ." The Feinberg Certificate was even more explicit: "Anyone who is a

Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs, 61 Yale L. J. 295 (1952). See generally, MacIver, Academic Freedom in Our Time; Hullfish, Educational Freedom in an Age of Anxiety; Konvitz, Expanding Liberties 86–108; Morris, Academic Freedom and Loyalty Oaths, 28 Law & Contemp. Prob. 487 (1963).

[13] In light of our disposition, we need not consider appellants' contention that the burden placed on the employee of coming forward with substantial rebutting evidence upon proof of membership in a listed organization is constitutionally impermissible. Compare *Speiser* v. *Randall*, 357 U. S. 513.

member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University." (Emphasis supplied.) This official administrative interpretation is supported by the legislative preamble to the Feinberg Law, § 1, in which the legislature concludes as a result of its findings that "it is essential that the laws prohibiting persons who are *members* of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced." (Emphasis supplied.)

Thus § 105, subd. 1 (c), and § 3022, subd. 2, suffer from impermissible "overbreadth." *Elfbrandt* v. *Russell, supra,* at 19; *Aptheker* v. *Secretary of State, supra; N. A. A. C. P.* v. *Button, supra; Saia* v. *New York,* 334 U. S. 558; *Schneider* v. *State,* 308 U. S. 147; *Lovell* v. *Griffin,* 303 U. S. 444; cf. *Hague* v. *C. I. O.,* 307 U. S. 496, 515–516; see generally *Dombrowski* v. *Pfister,* 380 U. S. 479, 486. They seek to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights. Where statutes have an overbroad sweep, just as where they are vague, "the hazard of loss or substantial impairment of those precious rights may be critical," *Dombrowski* v. *Pfister, supra,* at 486, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe. As we said in *Shelton* v. *Tucker, supra,* at 488, "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

We therefore hold that Civil Service Law § 105, subd. 1 (c), and Education Law § 3022, subd. 2, are invalid insofar as they proscribe mere knowing membership

without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

Civil Service Law.

§ 105. Subversive activities; disqualification

1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof.

2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of

any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason," as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

EDUCATION LAW.

§ 3021. Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. Elimination of subversive persons from the public school system

1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

RULES OF THE BOARD OF REGENTS.

(Adopted July 15, 1949.)

ARTICLE XVIII.

SUBVERSIVE ACTIVITIES.

Section 244. Disqualification or removal of superintendents, teachers and other employes.

1 The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a* of the Civil Service Law.

a Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein re-

*Now section 105.

ferred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision *b* of this paragraph.

d The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision *b* of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision *d* of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2 Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a* of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute prima facie evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3 On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions

*Now section 105.

herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4 Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

PENAL LAW.

§ 160. Criminal anarchy defined

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

§ 161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

RESOLUTIONS OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK.

Resolved that Resolution 65–100 adopted May 13, 1965, be and the same hereby is, amended to read as follows:

Resolved that Resolution No. 56–98 adopted on October 11, 1956, incorporated into the Policies of

the Board of Trustees as Section 3 of Title B of Article XI thereof, and the Procedure on New Academic Appointments therein referred to, be, and the same hereby are, *Rescinded*, and

Further Resolved that Title B of Article XI of the Policies of the Board of Trustees be amended by adding a new Section 3 thereto to read as follows:

§ 3. Procedure for appointments.

Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or

recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment.

Further Resolved that this resolution shall become effective July 1, 1965, provided, however, that this resolution shall become effective immediately with respect to appointments made or recommended prior to July 1, 1965 to take effect on or after that date.

Resolved that any person presently employed or heretofore employed by the University who has failed to sign the certificate required by the Procedure on New Academic Appointments adopted on October 11, 1956, shall not be deemed disqualified or ineligible solely by reason of such failure, for appointment or reappointment in the professional service of the University in the manner provided in new Section 3 of Title B of Article XI of the Policies of the Board of Trustees as adopted by resolution this day; and

Further Resolved that any person presently employed by the University shall not be deemed incligible or disqualified for continuance in his employment during the prescribed term thereof, nor be subject to charges of misconduct, solely by reason of such failure, provided he is found qualified for such continuance by the Chief Administrative officer of the institution at which he is employed in accordance with the procedures prescribed in said new Section 3 of Title B of Article XI of the Policies of the Board of Trustees.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

The blunderbuss fashion in which the majority couches "its artillery of words," together with the morass of cases it cites as authority and the obscurity of their application

to the question at hand, makes it difficult to grasp the true thrust of its decision. At the outset, it is therefore necessary to focus on its basis.

This is a declaratory judgment action testing the *application* of the Feinberg Law to appellants. The certificate and statement once required by the Board of Trustees of the State University and upon which appellants base their attack were, before the case was tried, abandoned by the Board and are no longer required to be made. Despite this fact the majority proceeds to its decision striking down New York's Feinberg Law and other statutes as applied to appellants on the basis of the old certificate and statement. It does not explain how the statute can be applied to appellants under procedures which have been for almost two years a dead letter. The issues posed are, therefore, purely abstract and entirely speculative in character. The Court under such circumstances has in the past refused to pass upon constitutional questions. In addition, the appellants have neither exhausted their administrative remedies, nor pursued the remedy of judicial review of agency action as provided earlier by subdivision (d) of § 12–a of the Civil Service Law. Finally, one of the sections stricken, § 105, subd. 3, has been amended by a revision which under its terms will not become effective until September 1, 1967. (Laws 1965, c. 1030, § 240.15, Revised Penal Law of 1965.)

I.

The old certificate upon which the majority operates required all of the appellants, save Starbuck, to answer the query whether they were Communists, and if they were, whether they had communicated that fact to the President of the State University. Starbuck was required to answer whether he had ever advised, taught, or been a member of a group which taught or advocated the doctrine that the Government of the United States, or any

of its political subdivisions, should be overthrown by force, violence, or any unlawful means. All refused to comply. It is in this nonexistent frame of reference that the majority proceeds to act.

It is clear that the Feinberg Law, in which this Court found "no constitutional infirmity" in 1952, has been given its death blow today. Just as the majority here finds that there "can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion" there can also be no doubt that "the be-all and end-all" of New York's effort is here. And, regardless of its correctness, neither New York nor the several States that have followed the teaching of *Adler* v. *Board of Education*, 342 U. S. 485, for some 15 years, can ever put the pieces together again. No court has ever reached out so far to destroy so much with so little.

The section (§ 3021 of the Education Law) which authorizes the removal of superintendents, teachers, or employees in the public schools in any city or school district of New York for the utterance of any treasonable or seditious word or words is also struck down, even though it does not apply to appellants, as we shall discuss below.

Also declared unconstitutional are the subdivisions (1 (a), 1 (b) and 1 (c) of § 105 of the Civil Service Law) which prevent the appointment and authorize the discharge of any superintendent, principal, or teacher in any part of New York's public education establishment who wilfully advocates, advises, or teaches the doctrine that the Government of the United States, or of any State or any political subdivision thereof should be overthrown by force, violence, or any other unlawful means (1 (a)); or who prints, publishes, edits, issues, or sells any book, paper, document, or written or printed matter, in any form, containing such doctrine *and* "who advocates, advises, teaches, or embraces the duty, necessity or

propriety of adopting the doctrine contained therein" (1 (b)); or who organizes or helps to organize or becomes a member of any society or group which teaches or advocates such doctrine (1 (c)). This latter provision was amended in 1958, while still part of § 12–a of the Civil Service Law, to make membership in the Communist Party prima facie proof of disqualification. The language "advocate, advise, teach," etc., obviously springs from federal statutes, particularly the Smith Act, § 2 (a)(1), (2) and (3), 54 Stat. 671, which was approved by this Court in *Dennis* v. *United States*, 341 U. S. 494 (1951). State statutes of similar character and language have been approved by this Court. See *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716 (1951); *Beilan* v. *Board of Education*, 357 U. S. 399 (1958).

Lastly stricken is the subdivision (3 of § 105) which authorizes the discharge of any person in the civil service of the State or any civil division thereof who utters any treasonable or seditious word or commits any treasonable or seditious act, although this subdivision is not and never has been a part of the Feinberg Law and New York specifically disclaims its applicability to the appellants. In addition, how can the Court pass upon this law *as applied* when the State has never attempted to and now renounces its application to appellants?

II.

This Court has again and again, since at least 1951, approved procedures either identical or at the least similar to the ones the Court condemns today. In *Garner* v. *Board of Public Works of Los Angeles, supra*, we held that a public employer was not precluded, simply because it was an agency of the State, "from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service." 341 U. S., at 720. The oath there used practically the same lan-

guage as the Starbuck statement here and the affidavit reflects the same type of inquiry as was made in the old certificate condemned here. Then in 1952, in *Adler* v. *Board of Education, supra*, this Court passed upon the identical statute condemned here. It, too, was a declaratory judgment action—as in this case. However, there the issues were not so abstractly framed. Our late Brother Minton wrote for the Court:

> "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." At 493.

And again in 1958 the problem was before us in *Beilan* v. *Board of Education, supra*. There our late Brother Burton wrote for the Court:

> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher." 357 U. S., at 405.

And on the same day in *Lerner* v. *Casey*, 357 U. S. 468, our Brother HARLAN again upheld the severance of a public employee for his refusal to answer questions concerning his loyalty. And also on the same day my Brother BRENNAN himself cited *Garner* with approval in *Speiser* v. *Randall*, 357 U. S. 513 (1958).

Since that time the *Adler* line of cases has been cited again and again with approval: *Shelton* v. *Tucker*, 364

U. S. 479 (1960), in which both *Adler* and *Beilan* were quoted with approval, and *Garner* and *Lerner* were cited in a like manner; likewise in *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961), *Adler* was quoted twice with approval; and, in a related field where the employee was discharged for refusal to answer questions as to his loyalty after being ordered to do so, *Nelson* v. *Los Angeles County*, 362 U. S. 1 (1960), the Court cited with approval all of the cases which today it says have been rejected, *i. e.*, *Garner*, *Adler*, *Beilan* and *Lerner*. Later *Konigsberg* v. *State Bar*, 366 U. S. 36 (1961), likewise cited with approval both *Beilan* and *Garner*. And in our decision in *In re Anastaplo*, 366 U. S. 82 (1961), *Garner*, *Beilan* and *Lerner* were all referred to. Finally, only three Terms ago my Brother WHITE relied upon *Cramp*, which in turn cited *Adler* with approval twice. See *Baggett* v. *Bullitt*, 377 U. S. 360 (1964).

In view of this long list of decisions covering over 15 years of this Court's history, in which no opinion of this Court even questioned the validity of the *Adler* line of cases, it is strange to me that the Court now finds that the "constitutional doctrine which has emerged since . . . has rejected [*Adler*'s] major premise." With due respect, as I read them, our cases have done no such thing.

III.

The majority also finds that *Adler* did not pass upon § 3021 of the Education Law, nor subdivision 3 of § 105 of the Civil Service Law, nor upon the vagueness questions of subdivisions 1 (a), 1 (b) and 1 (c) of § 105. I will now discuss them.

1. Section 3021 is not applicable to these appellants. As Attorney General Lefkowitz of New York says on behalf of the State, the Board of Regents and the Civil Service Commission, this section by its own terms applies only to superintendents, teachers, and employees in the

"public schools, in any city or school district of the state . . . ." It does not apply to teachers in the State University at all.*

2. Likewise subdivision 3 of § 105 is also inapplicable. It was derived from § 23–a of the Civil Service Law. The latter provision was on the books at the time of the Feinberg Law as well as when *Adler* was decided. The Feinberg Law referred only to § 12–a of the Civil Service Law, not § 23–a. Section 12–a was later recodified as subdivisions 1 (a), (b) and (c) of § 105 of the Civil Service Law. Section 23–a (now § 105, subd. 3) deals only with the civil divisions of the civil service of the State. As the Attorney General tells us, the law before us has to do with the qualifications of college level personnel not covered by civil service. The Attorney General also advises that no superintendent, teacher, or employee of the educational system has ever been charged with violating § 105, subd. 3. The Court seems to me to be building straw men.

3. The majority also says that no challenge or vagueness points were passed upon in *Adler*. A careful examination of the briefs in that case casts considerable doubt on this conclusion. In the appellants' brief, point 3, in *Adler*, the question is stated in this language: "The statutes and the regulations issued thereunder violate the due process clause of the Fourteenth Amendment because of their vagueness." Certainly the word "subversive" is attacked as vague and the Court finds that it "has a

*The Court points to a stipulation of counsel that § 3022 incorporates § 3021 into the Feinberg Law. However, Attorney General Lefkowitz did not sign the stipulation itself, but in an addendum thereto, agreed only that it constituted the *record of fact*—not of law. His brief contends that § 3021 is not incorporated into the law. The legislature, of course, is the only body that could incorporate § 3021 into the Feinberg Law. It has not done so.

very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence." 342 U. S., at 496. Significantly this is the language of subdivisions 1 (a) and (b) which the majority now finds vague, as covering one "who merely advocates the doctrine in the abstract . . ." citing such criminal cases as *Herndon* v. *Lowry*, 301 U. S. 242 (1937), which was on our books long before the *Adler* line of cases. Also significant is the fact that the *Adler* opinion's last sentence is "We find no constitutional infirmity in § 12–a [now subdivisions 1 (a), 1 (b) and 1 (c) of § 105] of the Civil Service Law of New York or in the Feinberg Law which implemented it . . . ." At 496.

IV.

But even if *Adler* did not decide these questions I would be obliged to answer them in the same way. The only portion of the Feinberg Law which the majority says was not covered there and is applicable to appellants is § 105, subd. 1 (a), 1 (b) and 1 (c). These have to do with teachers who advocate, advise, or teach the doctrine of overthrow of our Government by force and violence, either orally or in writing. This was the identical conduct that was condemned in *Dennis* v. *United States, supra.* There the Court found the exact verbiage not to be unconstitutionally vague, and that finding was of course not affected by the decision of this Court in *Yates* v. *United States*, 354 U. S. 298. The majority makes much over the horribles that might arise from subdivision 1 (b) of § 105 which condemns the printing, publishing, selling, etc., of matter containing such doctrine. But the majority fails to state that this action is condemned only *when and if* the teacher also personally advocates, advises, teaches, etc., the necessity or propriety of adopting such doctrine. This places this subdivision on the same

footing as 1 (a). And the same is true of subdivision 1 (c) where a teacher organizes, helps to organize or becomes a member of an organization which teaches or advocates such doctrine, for scienter would also be a necessary ingredient under our opinion in *Garner, supra.* Moreover, membership is only prima facie evidence of disqualification and could be rebutted, leaving the burden of proof on the State. Furthermore, all of these procedures are protected by an adversary hearing with full judicial review.

In the light of these considerations the strained and unbelievable suppositions that the majority poses could hardly occur. As was said in *Dennis, supra,* "we are not convinced that because there may be borderline cases" the State should be prohibited the protections it seeks. At 516. Where there is doubt as to one's intent or the nature of his activities we cannot assume that the administrative boards will not give him full protection. Furthermore, the courts always sit to make certain that this is done.

The majority says that the Feinberg Law is bad because it has an "overbroad sweep." I regret to say—and I do so with deference—that the majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation. Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. The issue here is a very narrow one. It is not freedom of speech, freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party. It is simply this: May the State provide that one who, after a hearing with full judicial review, is found to have wilfully and deliberately advocated, advised, or taught that our Government should be overthrown by force or vio-

lence or other unlawful means; or to have wilfully and deliberately printed, published, etc., any book or paper that so advocated *and to have personally* advocated such doctrine himself; or to have wilfully and deliberately become a member of an organization that advocates such doctrine, is prima facie disqualified from teaching in its university? My answer, in keeping with all of our cases up until today, is "Yes"!

I dissent.

EXHIBIT 28

GILBERT *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 223. Argued February 15–16, 1967.—Decided June 12, 1967.

Petitioner was convicted of armed robbery and the murder of a police officer. There were separate guilt and penalty stages of the trial before the same jury, which rendered a guilty verdict and imposed the death penalty. Petitioner alleges constitutional errors in the admission of testimony of some of the witnesses that they had also identified him at a lineup, which occurred 16 days after his indictment and after appointment of counsel, who was not notified, and in in-court identifications of other witnesses present at that lineup; in the admission of handwriting exemplars taken from him after arrest; and in the admission of a co-defendant's out-of-court statements mentioning petitioner's part in the crimes, which statements were held to have been improperly admitted against the co-defendant on the latter's appeal. Additionally, he alleges violation of his Fourth Amendment rights by police seizure of photographs of him from his locked apartment after a warrantless entry, and the admission of testimony identifying him from these photographs. *Held:*

1. The taking of handwriting exemplars did not violate petitioner's constitutional rights. Pp. 265–267.

(a) The Fifth Amendment privilege against self-incrimination reaches compulsory communications, but a mere handwriting exemplar, in contrast with the content of what is written, is an identifying physical characteristic outside its protection. Pp. 266–267.

(b) The taking of the exemplars was not a "critical" stage of the criminal proceedings entitling petitioner to the assistance of counsel; there is minimal risk that the absence of counsel might derogate from his right to a fair trial. P. 267.

2. Petitioner's request for reconsideration of *Delli Paoli* v. *United States*, 352 U. S. 232 (where the Court held that appropriate instructions to the jury would suffice to prevent prejudice to a defendant from references to him in a co-defendant's statement) in connection with his co-defendant's statements, need not be considered in view of the California Supreme Court's holding rejecting the *Delli Paoli* rationale but finding that any error to petitioner by the admission of the statements was harmless. Pp. 267–268.

3. A closer examination of the record than was possible when certiorari was granted reveals that the facts with respect to the search and seizure claim are not sufficiently clear to permit resolution of that question, and certiorari on this issue is vacated as improvidently granted. P. 269.

4. The admission of the in-court identifications of petitioner without first determining that they were not tainted by the illegal lineup procedure but were of independent origin was constitutional error. *United States* v. *Wade, ante,* p. 218. Pp. 269–274.

(a) Since the record does not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source, petitioner is entitled only to a vacation of his conviction, pending proceedings in California courts allowing the State to establish that the in-court identifications had an independent source or that their introduction in evidence was harmless error. P. 272.

(b) With respect to testimony of witnesses that they identified petitioner at the lineup, which is a direct result of an illegal procedure, the State is not entitled to show that such testimony had an independent source but the California courts must, unless "able to declare a belief that it was harmless beyond a reasonable doubt," grant petitioner a new trial if such testimony was at the guilt stage, or grant appropriate relief if it was at the penalty stage. Pp. 272–274.

63 Cal. 2d 690, 408 P. 2d 365, vacated and remanded.

Luke McKissack argued the cause and filed briefs for petitioner.

Norman H. Sokolow, Deputy Attorney General of California, and *William E. James,* Assistant Attorney General, argued the cause for respondent. With them on the brief was *Thomas C. Lynch,* Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case was argued with *United States* v. *Wade, ante,* p. 218, and presents the same alleged constitutional error in the admission in evidence of in-court identifications there considered. In addition, petitioner alleges con-

stitutional errors in the admission in evidence of testimony of some of the witnesses that they also identified him at the lineup, in the admission of handwriting exemplars taken from him after his arrest, and in the admission of out-of-court statements by King, a co-defendant, mentioning petitioner's part in the crimes, which statements, on the co-defendant's appeal decided with petitioner's, were held to have been improperly admitted against the co-defendant. Finally, he alleges that his Fourth Amendment rights were violated by a police seizure of photographs of him from his locked apartment after entry without a search warrant, and the admission of testimony of witnesses that they identified him from those photographs within hours after the crime.

Petitioner was convicted in the Superior Court of California of the armed robbery of the Mutual Savings and Loan Association of Alhambra and the murder of a police officer who entered during the course of the robbery. There were separate guilt and penalty stages of the trial before the same jury, which rendered a guilty verdict and imposed the death penalty. The California Supreme Court affirmed, 63 Cal. 2d 690, 408 P. 2d 365. We granted certiorari, 384 U. S. 985, and set the case for argument with *Wade* and with *Stovall* v. *Denno*, *post*, p. 293. If our holding today in *Wade* is applied to this case, the issue whether admission of the in-court and lineup identifications is constitutional error which requires a new trial could be resolved on this record only after further proceedings in the California courts. We must therefore first determine whether petitioner's other contentions warrant any greater relief.

I.

The Handwriting Exemplars.

Petitioner was arrested in Philadelphia by an FBI agent and refused to answer questions about the Alham-

bra robbery without the advice of counsel. He later did answer questions of another agent about some Philadelphia robberies in which the robber used a handwritten note demanding that money be handed over to him, and during that interrogation gave the agent the handwriting exemplars. They were admitted in evidence at trial over objection that they were obtained in violation of petitioner's Fifth and Sixth Amendment rights. The California Supreme Court upheld admission of the exemplars on the sole ground that petitioner had waived any rights that he might have had not to furnish them. "[The agent] did not tell Gilbert that the exemplars would not be used in any other investigation. Thus, even if Gilbert believed that his exemplars would not be used in California, it does not appear that the authorities improperly induced such belief." 63 Cal. 2d, at 708, 408 P. 2d, at 376. The court did not, therefore, decide petitioner's constitutional claims.

We pass the question of waiver since we conclude that the taking of the exemplars violated none of petitioner's constitutional rights.

First. The taking of the exemplars did not violate petitioner's Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers," and not "compulsion which makes a suspect or accused the source of 'real or physical evidence' . . . ." *Schmerber* v. *California,* 384 U. S. 757, 763–764. One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is

written, like the voice or body itself, is an identifying physical characteristic outside its protection. *United States* v. *Wade, supra,* at 222–223. No claim is made that the content of the exemplars was testimonial or communicative matter. Cf. *Boyd* v. *United States,* 116 U. S. 616.

Second. The taking of the exemplars was not a "critical" stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. Cf. *United States* v. *Wade, supra.* If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, "the accused has the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary processes of cross-examination of the [State's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts." *United States* v. *Wade, supra,* at 227–228.

II.

Admission of Co-Defendant's Statements.

Petitioner contends that he was denied due process of law by the admission during the guilt stage of the trial of his accomplice's pretrial statements to the police which referred to petitioner 159 times in the course of reciting petitioner's role in the robbery and murder. The statements were inadmissible hearsay as to petitioner, and were held on King's aspect of this appeal to be improperly obtained from him and therefore to be inadmissible against him under California law. 63 Cal. 2d, at 699–701, 408 P. 2d, at 370–371.

Petitioner would have us reconsider *Delli Paoli* v. *United States*, 352 U. S. 232 (where the Court held that appropriate instructions to the jury would suffice to prevent prejudice to a defendant from the references to him in a co-defendant's statement), at least as applied to a case, as here, where the co-defendant gained a reversal because of the improper admission of the statements. We have no occasion to pass upon this contention. The California Supreme Court has rejected the *Delli Paoli* rationale, and relying at least in part on the reasoning of the *Delli Paoli* dissent, regards cautionary instructions as inadequate to cure prejudice. *People* v. *Aranda*, 63 Cal. 2d 518, 407 P. 2d 265. The California court applied *Aranda* in this case but held that any error as to Gilbert in the admission of King's statements was harmless. The harmless-error standard applied was that "there is no reasonable possibility that the error in admitting King's statements and testimony might have contributed to Gilbert's conviction," a standard derived by the court from our decision in *Fahy* v. *Connecticut*, 375 U. S. 85.[1] *Fahy* was the basis of our holding in *Chapman* v. *California*, 386 U. S. 18, and the standard applied by the California court satisfies the standard as defined in *Chapman*.

It may be that the California Supreme Court will review the application of its harmless-error standard to King's statements if on the remand the State presses harmless error also in the introduction of the in-court and lineup identifications. However, this at best implies an ultimate application of *Aranda* and only confirms that petitioner's argument for reconsideration of *Delli Paoli* need not be considered at this time.

[1] The California Supreme Court also held that ". . . the erroneous admission of King's statements at the trial on the issue of guilt was not prejudicial on the question of Gilbert's penalty," again citing *Fahy*, 63 Cal. 2d, at 702, 408 P. 2d, at 372.

III.

The Search-and-Seizure Claim.

The California Supreme Court rejected Gilbert's challenge to the admission of certain photographs taken from his apartment pursuant to a warrantless search. The court justified the entry into the apartment under the circumstances on the basis of so-called "hot pursuit" and "exigent circumstances" exceptions to the warrant requirement. We granted certiorari to consider the important question of the extent to which such exceptions may permit warrantless searches without violation of the Fourth Amendment. A closer examination of the record than was possible when certiorari was granted reveals that the facts do not appear with sufficient clarity to enable us to decide that question. See Appendix to this opinion; compare *Warden* v. *Hayden*, 387 U. S. 294. We therefore vacate certiorari on this issue as improvidently granted. *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 184.

IV.

The In-court and Lineup Identifications.

Since none of the petitioner's other contentions warrants relief, the issue becomes what relief is required by application to this case of the principles today announced in *United States* v. *Wade*, *supra*.

Three eyewitnesses to the Alhambra crimes who identified Gilbert at the guilt stage of the trial had observed him at a lineup conducted without notice to his counsel in a Los Angeles auditorium 16 days after his indictment and after appointment of counsel. The manager of the apartment house in which incriminating evidence was found, and in which Gilbert allegedly resided, identified Gilbert in the courtroom and also testified, in substance, to her prior lineup identification on examination by the

State. Eight witnesses who identified him in the courtroom at the penalty stage were not eyewitnesses to the Alhambra crimes but to other robberies allegedly committed by him. In addition to their in-court identifications, these witnesses also testified that they identified Gilbert at the same lineup.

The lineup was on a stage behind bright lights which prevented those in the line from seeing the audience. Upwards of 100 persons were in the audience, each an eyewitness to one of the several robberies charged to Gilbert. The record is otherwise virtually silent as to what occurred at the lineup.[2]

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[2] The record in *Gilbert* v. *United States*, 366 F. 2d 923, involving the federal prosecutions of Gilbert, apparently contains many more details of what occurred at the lineup. The opinion of the Court of Appeals for the Ninth Circuit states, 366 F. 2d, at 935:

"The lineup occurred on March 26, 1964, after Gilbert had been indicted and had obtained counsel. It was held in an auditorium used for that purpose by the Los Angeles police. Some ten to thirteen prisoners were placed on a lighted stage. The witnesses were assembled in a darkened portion of the room, facing the stage and separated from it by a screen. They could see the prisoners but could not be seen by them. State and federal officers were also present and one of them acted as 'moderator' of the proceedings.

"Each man in the lineup was identified by number, but not by name. Each man was required to step forward into a marked circle, to turn, presenting both profiles as well as a face and back view, to walk, to put on or take off certain articles of clothing. When a man's number was called and he was directed to step into the circle, he was asked certain questions: where he was picked up, whether he owned a car, whether, when arrested, he was armed, where he lived. Each was also asked to repeat certain phrases, both in a loud and in a soft voice, phrases that witnesses to the crimes had heard the robbers use: 'Freeze, this is a stickup; this is a holdup; empty your cash drawer; this is a heist; don't anybody move.'

"Either while the men were on the stage, or after they were taken from it, it is not clear which, the assembled witnesses were asked if there were any that they would like to see again, and told that if they had doubts, now was the time to resolve them. Several

At the guilt stage, after the first witness, a cashier of the savings and loan association, identified Gilbert in the courtroom, defense counsel moved, out of the presence of the jury, to strike her testimony on the ground that she identified Gilbert at the pretrial lineup conducted in the absence of counsel in violation of the Sixth Amendment made applicable to the States by the Fourteenth Amendment. *Gideon* v. *Wainwright,* 372 U. S. 335. He requested a hearing outside the presence of the jury to present evidence supporting his claim that her in-court identification was, and others to be elicited by the State from other eyewitnesses would be, "predicated at least in large part upon their identification or purported identification of Mr. Gilbert at the showup . . . ." The trial judge denied the motion as premature. Defense counsel then elicited the fact of the cashier's lineup identification on cross-examination and again moved to strike her identification testimony. Without passing on the merits of the Sixth Amendment claim, the trial judge denied the motion on the ground that, assuming a violation, it would not in any event entitle Gilbert to suppression of the in-court identification. Defense counsel thereafter elicited the fact of lineup identifications from two other eyewitnesses who on direct examination identified Gilbert in the courtroom. Defense counsel unsuccessfully objected at the penalty stage, to the testimony of the eight witnesses to the other robberies that they identified Gilbert at the lineup.

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gave the numbers of men they wanted to see, including Gilbert's. While the other prisoners were no longer present, Gilbert and 2 or 3 others were again put through a similar procedure. Some of the witnesses asked that a particular prisoner say a particular phrase, or walk a particular way. After the lineup, the witnesses talked to each other; it is not clear that they did so during the lineup. They did, however, in each other's presence, call out the numbers of men they could identify."

The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error. *United States* v. *Wade, supra.* We there held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup. However, as in *Wade,* the record does not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source. Gilbert is therefore entitled only to a vacation of his conviction pending the holding of such proceedings as the California Supreme Court may deem appropriate to afford the State the opportunity to establish that the in-court identifications had an independent source, or that their introduction in evidence was in any event harmless error.

Quite different considerations are involved as to the admission of the testimony of the manager of the apartment house at the guilt phase and of the eight witnesses at the penalty stage that they identified Gilbert at the lineup.[3] That testimony is the direct result of the illegal

[3] There is a split among the States concerning the admissibility of prior extrajudicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR 2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial. See 5 ALR 2d Later Case Service 1225–1228. That is the Cali-

lineup "come at by exploitation of [the primary] illegality." *Wong Sun* v. *United States*, 371 U. S. 471, 488. The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence. Cf. *Mapp* v. *Ohio*, 367 U. S. 643. That conclusion is buttressed by the consideration that the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and

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fornia rule. In *People* v. *Gould*, 54 Cal. 2d 621, 626, 354 P. 2d 865, 867, the Court said:

"Evidence of an extrajudicial identification is admissible, not only to corroborate an identification made at the trial (*People* v. *Slobodion*, 31 Cal. 2d 555, 560 [191 P. 2d 1]), but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached . . . evidence of an extrajudicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. . . . The failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination."

New York deals with the subject in a statute. See N. Y. Code Crim. Proc. § 393-b.

seriously aggravate whatever derogation exists of the accused's right to a fair trial. Therefore, unless the California Supreme Court is "able to declare a belief that it was harmless beyond a reasonable doubt," *Chapman* v. *California*, 386 U. S. 18, 24, Gilbert will be entitled on remand to a new trial or, if no prejudicial error is found on the guilt stage but only in the penalty stage, to whatever relief California law affords where the penalty stage must be set aside.

The judgment of the California Supreme Court and the conviction are vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE joins this opinion except for Part III, from which he dissents for the reasons expressed in the opinion of MR. JUSTICE DOUGLAS.

APPENDIX TO OPINION OF THE COURT.

Photographs of Gilbert introduced at the guilt stage of the trial had been viewed by eyewitnesses within hours after the robbery and murder. Officers had entered his apartment without a warrant and found them in an envelope on the top of a bedroom dresser. The envelope was of the kind customarily used in delivering developed prints, with the words "Marlboro Photo Studio" imprinted on it. The officers entered the apartment because of information given by an accomplice which led them to believe that one of the suspects might be inside the apartment. Assuming that the warrantless entry into the apartment was justified by the need immediately to search for the suspect, the issue remains whether the subsequent search was reasonably supported by those same exigent circumstances. If the envelope

were come upon in the course of a search for the suspect, the answer might be different from that where it is come upon, even though in plain view, in the course of a general, indiscriminate search of closets, dressers, etc., after it is known that the occupant is absent. Still different considerations may be presented where officers, pursuing the suspect, find that he is absent from the apartment but conduct a limited search for suspicious objects in plain view which might aid in the pursuit. The problem with the record in the present case is that it could reasonably support any of these factual conclusions upon which our constitutional analysis should rest, and the trial court made no findings on the scope of search. The California Supreme Court, which had no more substantial basis upon which to resolve the conflict than this Court, stated that the photos were come upon "while the officers were looking through the apartment for their suspect . . . ." As will appear, a contrary conclusion is equally reasonable.

(1) Agent Schlatter testified that immediately upon entering the apartment which he put at "approximately 1:05," the officers made a quick search for the occupant, which took at most a minute, and that the continued presence of the officers became "a matter of a stake-out under the assumption that the person or persons involved would come back." He testified that the officer who found the photographs, Agent Crowley, had entered the apartment with him. Agent Schlatter's testimony might support the California Supreme Court's view of the scope of search; (2) Agent Crowley testified that he arrived within five minutes *after* Agent Schlatter, "around 1:30, give or take a few minutes either way," that the apartment had already been searched for the suspects, and that he was instructed "to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person

without conducting a detailed search." Crowley's further testimony was that the search, pursuant to which the photos were found, was limited in this manner, and that he merely inspected objects in plain sight which would aid in identification. He stated that a detailed search for guns and money was not conducted until after a warrant had issued over three hours later. (3) Agent Townsend said he arrived at the apartment "sometime between perhaps 1:30 and 2:00," and that "well within an hour" he, Agent Crowley, another agent and a local officer conducted a detailed search of the bedroom. He stated that they "looked through the bedroom closet and dresser and I think . . . the headstand." A substantial sum of money was found in the dresser. Townsend could not "specifically say" whether Crowley was in the bedroom at the time the money was found. This testimony might support a finding that the officers were engaged in a general search of the bedroom at the time the photos were found.

The testimony of the agents concerning their time of arrival in the apartment is not inconsistent with any of the three possible conclusions as to the scope of search. Taking Townsend's testimony together with Crowley's, it can be concluded that the two arrived at about the same time. Agent Schlatter's testimony that Crowley arrived with him at 1:05, however, supports a conclusion that Crowley had begun his activities before Townsend arrived. Then there is the testimony of Agent Kiel, who did not enter the apartment, that he obtained the photos while talking with the landlady "approximately 1:25 to 1:30," about the same time that both Crowley and Townsend testified they arrived. In sum, the testimony concerning the timing of the events surrounding the search is both approximate and itself contradictory.

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

Petitioner was convicted of robbery and murder partially on the basis of handwriting samples he had given to the police while he was in custody without counsel and partially on evidence that he had been identified by eyewitnesses at a lineup identification ceremony held by California officers in a Los Angeles auditorium without notice to his counsel. The Court's opinion shows that the officers took Gilbert to the auditorium while he was a prisoner, formed a lineup of Gilbert and other persons, required each one to step forward, asked them certain questions, and required them to repeat certain phrases, while eyewitnesses to this and other crimes looked at them in efforts to identify them as the criminals. At his trial, Gilbert objected to the handwriting samples and to the identification testimony given by witnesses who saw him at the auditorium lineup on the ground that the admission of this evidence would violate his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. It is well-established now that the Fourteenth Amendment makes both the Self Incrimination Clause of the Fifth Amendment and the Right to Counsel Clause of the Sixth Amendment obligatory on the States. See, *e. g.*, *Malloy* v. *Hogan*, 378 U. S. 1; *Gideon* v. *Wainwright*, 372 U. S. 335.

I.

(a) Relying on *Schmerber* v. *California*, 384 U. S. 757, the Court rejects Gilbert's Fifth Amendment contention as to both the handwriting exemplars and the lineup identification. I dissent from that holding. For reasons set out in my separate opinion in *United State* v. *Wade*, *ante*, p. 243, as well as in my dissent to *Schmerber*, 384 U. S., at 773, I think that case wholly unjustifiably detracts from the protection against compelled self-incrimination

the Fifth Amendment was designed to afford. It rests on the ground that compelling a suspect to submit to or engage in conduct the sole purpose of which is to supply evidence against himself nonetheless does not compel him to be a witness against himself. Compelling a suspect or an accused to be "the source of 'real or physical evidence' . . . ," so says *Schmerber*, 384 U. S., at 764, is not compelling him to be a witness against himself. Such an artificial distinction between things that are in reality the same is in my judgment wholly out of line with the liberal construction which should always be given to the Bill of Rights. See *Boyd* v. *United States*, 116 U. S. 616.

(b) The Court rejects Gilbert's right-to-counsel contention in connection with the handwriting exemplars on the ground that the taking of the exemplars "was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel." In all reality, however, it was one of the most "critical" stages of the government proceedings that ended in Gilbert's conviction. As to both the State's case and Gilbert's defense, the handwriting exemplars were just as important as the lineup and perhaps more so, for handwriting analysis, being, as the Court notes, "scientific" and "systematized," *United States* v. *Wade*, *ante*, at 227, may carry much more weight with the jury than any kind of lineup identification. The Court, however, suggests that absence of counsel when handwriting exemplars are obtained will not impair the right of cross-examination at trial. But just as nothing said in our previous opinions "links the right to counsel only to protection of Fifth Amendment rights," *United States* v. *Wade*, *ante*, at 226, nothing has been said which justifies linking the right to counsel only to the protection of other Sixth Amendment rights. And there is nothing in the Constitution to justify considering the right to counsel as a second-

class, subsidiary right which attaches only when the Court deems other specific rights in jeopardy. The real basis for the Court's holding that the stage of obtaining handwriting exemplars is not "critical," is its statement that "there is minimal risk that the absence of counsel might derogate from his right to a fair trial." The Court considers the "right to a fair trial" to be the overriding "aim of the right to counsel," *United States* v. *Wade*, *ante*, at 226, and somehow believes that this Court has the power to balance away the constitutional guarantee of right to counsel when the Court believes it unnecessary to provide what the Court considers a "fair trial." But I think this Court lacks constitutional power thus to balance away a defendant's absolute right to counsel which the Sixth and Fourteenth Amendments guarantee him. The Framers did not declare in the Sixth Amendment that a defendant is entitled to a "fair trial," nor that he is entitled to counsel on the condition that this Court thinks there is more than a "minimal risk" that without a lawyer his trial will be "unfair." The Sixth Amendment settled that a trial without a lawyer is constitutionally unfair, unless the court-created balancing formula has somehow changed it. *Johnson* v. *Zerbst*, 304 U. S. 458, and *Gideon* v. *Wainwright*, 372 U. S. 335, I thought finally established the right of an accused to counsel without balancing of any kind.

The Court's holding here illustrates the danger to Bill of Rights guarantees in the use of words like a "fair trial" to take the place of the clearly specified safeguards of the Constitution. I think it far safer for constitutional rights for this Court to adhere to constitutional language like "the accused shall . . . have the Assistance of Counsel for his defence" instead of substituting the words not mentioned, "the accused shall have the assistance of counsel only if the Supreme Court thinks it necessary to assure a fair trial." In my judgment the guarantees

of the Constitution with its Bill of Rights provide the kind of "fair trial" the Framers sought to protect. Gilbert was entitled to have the "assistance of counsel" when he was forced to supply evidence for the Government to use against him at his trial. I would reverse the case for this reason also.

II.

I agree with the Court that Gilbert's case should not be reversed for state error in admitting the pretrial statements of an accomplice which referred to Gilbert. But instead of squarely rejecting petitioner's reliance on the dissent in *Delli Paoli* v. *United States*, 352 U. S. 232, 246, the Court avoids the issue by pointing to the fact that the California Supreme Court, even assuming the error to be a federal constitutional one, applied a harmless-error test which measures up to the one we subsequently enunciated in *Chapman* v. *California*, 386 U. S. 18. And the Court then goes on to suggest that the California Supreme Court may desire to reconsider whether that is so upon remand.

I think the Court should clearly indicate that neither *Delli Paoli* nor *Chapman* has any relevance here. *Delli Paoli* rested on the admissibility of evidence in federal, not state, courts. The introduction of evidence in state courts is exclusively governed by state law unless its introduction would violate some federal constitutional provision and there is no such federal provision here. See *Spencer* v. *Texas*, 385 U. S. 554. That being so, any error in admitting the accomplice's pretrial statements is only an error of state law, and *Chapman*, providing a federal constitutional harmless-error rule, has absolutely no relevance here. Instead of looking at the harmless-error test applied by the California Supreme Court in order to ascertain whether it comports with *Chapman*, I would make it clear that this Court is leaving to the

States their unbridled power to control their own state courts in the absence of conflicting federal constitutional provisions.

III.

One witness who identified Gilbert at the guilt stage of his trial and eight witnesses who identified him at the penalty stage testified on direct examination that they had identified him in the auditorium lineup. I agree with the Court that the admission of this testimony was constitutional error and that Gilbert is entitled to a new trial unless the state courts, applying *Chapman*, conclude that this error was harmless. However, these witnesses also identified Gilbert in the courtroom and two other witnesses at the guilt stage identified him solely in the courtroom. As to these, the Court holds that "[t]he admission of the in-court identifications without first determining that they were not tainted by the illegal lineup . . . was constitutional error." I dissent from this holding in this case and in *United States* v. *Wade*, *ante*, p. 243, for the reasons there given.

For the reasons here stated, I would vacate the judgment of the California Supreme Court and remand for consideration of whether the admission of the handwriting exemplars and the out-of-court lineup identification was harmless error.*

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

While I agree with the Court's opinion except for Part I,† I would reverse and remand for a new trial on

*The Court dismisses as improvidently granted the Fourth Amendment search-and-seizure question raised by Gilbert in this case. I dissent from this, because I would decide that question against Gilbert. However, since the Court refuses to decide that question, I see no reason for expressing my views at length.

† On that phase of the case I agree with MR. JUSTICE BLACK and MR. JUSTICE FORTAS.

the search and seizure point. The search of the petitioner's home is sought to be justified by the doctrine of "hot pursuit," even though the officers conducting the search knew that petitioner, the suspected criminal, was not at home.

At about 10:30 a. m. on January 3, 1964, a California bank was robbed by two armed men; a police officer was killed by one of the robbers. Another officer shot one of the robbers, Weaver, who was captured a few blocks from the scene of the crime. Weaver told the police that he had participated in the robbery and that a person known to him as "Skinny" Gilbert was his accomplice. He told the officers that Gilbert lived in Apartment 28 of "a Hawaiian sounding named apartment house" on Los Feliz Boulevard. This information was given to the Federal Bureau of Investigation and was broadcast to a field agent, Kiel, who was instructed to find the apartment. Kiel located the "Lanai," an apartment on Los Feliz Boulevard, at about 1 p. m., informed the radio control, and engaged the apartment manager in conversation. While they were talking, a man gave a key to the manager and told her that he was going to San Francisco for a few days. Agent Kiel learned from the manager that Flood, one of the two men who had rented Apartment 28 the previous day, was the man who had just turned in the key and left by the rear exit. The agent ran out into the alleyway but saw no one.

In the meantime, the federal officers learned from Weaver that Gilbert was registered under the name of Flood. They also learned that three men may have been involved in the robbery—the two who entered the bank and a third driving the getaway car. About 1:10 p. m., additional federal agents arrived at the apartment, in response to Agent Kiel's radio summons. Kiel told them that the resident of Apartment 28 was a Robert Flood who had just left. The agents obtained a key from the

manager, entered the apartment and searched for a person or a hiding place for a person. They found no one. But they did find an envelope containing pictures of petitioner; the pictures were seized and shown to bank employees for identification. The agents also found a notebook containing a diagram of the area surrounding the bank, a clip from an automatic pistol, and a bag containing rolls of coins bearing the marking of the robbed bank. On the basis of this information, a search warrant was issued, and the automatic clip, notebook, and coin rolls were seized. Petitioner was arrested in Pennsylvania on February 26. The items seized during the search of his apartment were introduced in evidence at his trial for murder.

The California Supreme Court justified the search on the ground that the police were in hot pursuit of the suspected bank robbers. The entry of the apartment was lawful. The subsequent search and seizure was lawful since the officers were trying to further identify suspects and to facilitate continued pursuit. 63 Cal. 2d 690, 408 P. 2d 365.

I have set forth the testimony relating to the search more fully in the Appendix to this opinion. For the reasons stated there, I cannot agree that "the facts do not appear with sufficient clarity to enable us to decide" the serious question presented.

Since the search and seizure took place without a warrant, it can stand only if it comes within one of the narrowly defined exceptions to the rule that a search and seizure must rest upon a validly executed search warrant. See, *e. g., United States* v. *Jeffers*, 342 U. S. 48, 51; *Jones* v. *United States*, 357 U. S. 493; *Rios* v. *United States*, 364 U. S. 253, 261; *Stoner* v. *California*, 376 U. S. 483, 486. One of these exceptions is that officers having probable cause to arrest may enter a dwelling to make the arrest and conduct a contemporaneous

search of the place of arrest "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody." *Agnello* v. *United States*, 269 U. S. 20, 30. This, of course, assumes that an arrest has been made, and that the search "is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." *Stoner* v. *California*, *supra*, at 486. In this case, the exemption is not applicable since the arrest was made many days after the search and at a location far removed from the search.

Here, the officers entered the apartment, searched for petitioner and did not find him. Nevertheless, they continued searching the apartment and seized the pictures; the inescapable conclusion is that they were searching for evidence linking petitioner to the bank robbery, not for the suspected robbers. The court below said that, having legally entered the apartment, the officers "could properly look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit." 63 Cal. 2d, at 707, 408 P. 2d, at 375.

Prior to this case, police could enter and search a house without a warrant only incidental to a valid arrest. If this judgment stands, the police can search a house for evidence, even though the suspect is not arrested. The purpose of the search is, in the words of the California Supreme Court, "limited to and incident to the purpose of the officers' entry"—that is, to apprehend the suspected criminal. Under that doctrine, the police are given license to search for any evidence linking the homeowner with the crime. Certainly such evidence is well calculated "to identify the suspects," and will "expedite the pursuit" since the police can then concentrate on the person whose home has been ransacked. *Ibid.*

The search and seizure in this case violates another limitation, which concededly the ill-starred decision in *Harris* v. *United States*, 331 U. S. 145, flouted, *viz.*, that a general search for evidence, even when the police are in "hot pursuit" or have a warrant of arrest, does not make constitutional a general search of a room or of a house (*United States* v. *Lefkowitz*, 285 U. S. 452, 463–464). If it did, then the police, acting without a search warrant, could search more extensively than when they have a warrant. For the warrant must, as prescribed by the Fourth Amendment, "particularly" describe the "things to be seized." As stated by the Court in *United States* v. *Lefkowitz*, *supra*, at 464:

> "The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

Indeed, if at the very start, there had been a search warrant authorizing the seizure of the automatic clip, notebook, and coin rolls, the envelope containing pictures of petitioner could not have been seized. "The requirement that warrants shall particularly describe the things

to be seized . . . prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U. S. 192, 196.

The modern police technique of ransacking houses, even to the point of seizing their entire contents as was done in *Kremen* v. *United States*, 353 U. S. 346, is a shocking departure from the philosophy of the Fourth Amendment. For the kind of search conducted here was indeed a general search. And if the Fourth Amendment was aimed at any particular target it was aimed at that. When we take that step, we resurrect one of the deepest-rooted complaints that gave rise to our Revolution. As the Court stated in *Boyd* v. *United States*, 116 U. S. 616, 625:

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'; since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' "

I would not allow the general search to reappear on the American scene.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

As the Court notes, there is some confusion in the record respecting the timing of events surrounding the search and the breadth of purpose with which the search was conducted. The confusion results from the testimony of the agents involved.

Agent Kiel testified that Agents Schlatter and Onsgaard arrived at the apartment at about 1:10 and entered the apartment a minute or two after their arrival. Kiel received the photographs from Agent Schlatter between 1:25 and 1:30.

Agent Schlatter testified that he, Agent Onsgaard and some local police arrived at the apartment about 1:05 and that Agent Crowley and one or two local police officers arrived in another car at the same time. Schlatter briefly talked to Kiel and the apartment manager and then entered the apartment. Upon entering he saw no one. He "made a very fast search of the apartment for a person or a hiding place of a person and . . . found none." This search took "a matter of seconds or a minute at the outside" and "[a]fter we had searched for [a] person or persons, and no one was there, it then became a matter of a stake-out under the assumption that the person or persons involved would come back." It seemed to Schlatter that "an agent had [the photograph] in his hand," when he first saw it, that it "was in the hands of an agent or an officer," and Schlatter had "a vague recollection that [the agent or officer told him he had found it] in the bedroom . . . ." There were a number of photographs. Schlatter took the photographs out to Kiel and instructed him to take one of them to the savings and loan association and see if anyone there could recognize the photograph. Schlatter testified that he was in the apartment for about 30 minutes after making the search and left other agents behind when he left.

Agent Crowley testified that he entered the apartment "around 1:30, give or take a few minutes either way" and that he would say that the other officers had been in the apartment less than five minutes before he entered. He believed that "the officers and the other agent who had been with [him] at the rear of the building when the first entry was made, entered with [him]." When Crowley entered the apartment it "had already been searched for people." He received "instructions . . . to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person without conducting a detailed search." In the bedroom, on the dresser, Crowley saw an envelope bearing the name "Marlboro Photo Studio"; it appeared to him to be an envelope containing photos and he could see that there was something inside. Crowley opened the envelope and saw several copies of photographs. He discussed the matter with "Onsgaard who was in charge in the building and he instructed [Crowley] to give it to another agent for him to utilize in pursuing the investigation, and [he was] reasonably certain that that agent was Mr. Schlatter." This was about 1:30 according to Crowley. In the course of his search which turned up the photographs, Crowley "turned over [items] to see what was on the reverse, such as business cards, sales slips from local stores, that sort of item which might have been folded and would appear to possibly contain information of value to pursuit." He relayed the information obtained in this manner to the man coordinating the operation. Crowley remained in the apartment until the next morning.

Agent Townsend testified that he arrived at the apartment "[s]ometime between perhaps 1:30 and 2:00." Within an hour of his arrival, he began a search. Townsend testified that he, Agent Crowley, another agent and a local officer "looked through the bedroom closet and

the dresser and I think the headstand." This was after it was known that no one, other than agents and police officers, was in the apartment. Townsend stated that the agents and officers were "[i]n and out of the bedroom," that he found money in the bedroom dresser about an hour after he arrived in the apartment, and that he could not "say specifically" whether Crowley was there at that time.

Thus, there is some conflict regarding the times at which the events took place and with respect to the nature of the searches conducted by the various officers. The way I read the record, however, it is not in such a state "that the facts do not appear with sufficient clarity to enable us to decide" the question presented. Crowley's testimony that he came upon the photographs while searching "for anything . . . that we could use to identify or continue the pursuit" stands uncontradicted, as does his testimony that the apartment had already been searched for a person prior to his search uncovering the photographs. Schlatter's testimony that the operation "became a matter of a stake-out" after the unsuccessful search for a person does not contradict Crowley's testimony. A search for identifying evidence is certainly compatible with a "stake-out." And Crowley best knew what he was doing when he discovered the photographs. Nor does Townsend's testimony that he and others, perhaps including Crowley, conducted a detailed search conflict with Crowley's testimony. First, the record indicates that the detailed search was conducted after the photographs had been found. According to the testimony of Kiel and Schlatter, Schlatter gave the photographs to Kiel at about 1:30; according to Townsend, he arrived sometime between 1:30 and 2. Second, even if the detailed search took place before Crowley found the photographs and Crowley participated in that search, that does not indicate that Crowley's search which turned

up the photographs was more limited than Crowley claimed. If anything, it would indicate that his search was more general than he stated. Finally, Townsend's testimony as to the general search does not conflict with Schlatter's testimony that the operation became a "stake-out" after the suspect was not found. As I have said, a "stake-out" does not preclude a detailed search for evidence. And, the record indicates that Schlatter was not in the apartment when Townsend and the others conducted the detailed search.

The way I read the record, the photographs were discovered in the course of a general search for evidence. But even if Crowley is not believed and his testimony relating to the nature of his search is thrown out and it is simply assumed that he came upon the envelope in the course of a search for the suspect, there was no reason to pry into the envelope and seize the pictures—other than to obtain evidence. An envelope would contain neither the suspect nor the weapon.

MR. JUSTICE WHITE, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, concurring in part and dissenting in part.

I concur in Parts I, II, and III of the Court's opinion, but for the reasons stated in my separate opinion in *United States* v. *Wade, ante,* p. 250, I dissent from Part IV of the Court's opinion and would therefore affirm the judgment of the Supreme Court of California.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I concur in the result—the vacation of the judgment of the California Supreme Court and the remand of the case—but I do not believe that it is adequate. I would reverse and remand for a new trial on the additional ground that petitioner was entitled by the Sixth and

Fourteenth Amendments to be advised that he had a right to counsel before and in connection with his response to the prosecutor's demand for a handwriting exemplar.

1. The giving of a handwriting exemplar is a "critical stage" of the proceeding, as my Brother BLACK states. It is a "critical stage" as much as is a lineup. See *United States* v. *Wade, ante,* p. 218. Depending upon circumstances, both may be inoffensive to the Constitution, totally fair to the accused, and entirely reliable for the administration of justice. On the other hand, each may be constitutionally offensive, totally unfair to the accused, and prejudicial to the ascertainment of truth. An accused whose handwriting exemplar is sought needs counsel: Is he to write "Your money or your life?" Is he to emulate the holdup note by using red ink, brown paper, large letters, etc.? Is the demanded handwriting exemplar, in effect, an inculpation—a confession? Cf. the eloquent arguments as to the need for counsel, in the Court's opinion in *United States* v. *Wade, supra.*

2. The Court today appears to hold that an accused may be compelled to give a handwriting exemplar. Cf. *Schmerber* v. *California,* 384 U. S. 757 (1966). Presumably, he may be punished if he adamantly refuses. Unlike blood, handwriting cannot be extracted by a doctor from an accused's veins while the accused is subjected to physical restraint, which *Schmerber* permits. So presumably, on the basis of the Court's decision, trial courts may hold an accused in contempt and keep him in jail—indefinitely—until he gives a handwriting exemplar.

This decision goes beyond *Schmerber.* Here the accused, in the absence of any warning that he has a right to counsel, is compelled to cooperate, not merely to submit; to engage in a volitional act, not merely to suffer the inevitable consequences of arrest and state custody; to take affirmative action which may not merely identify

him, but tie him directly to the crime. I dissented in *Schmerber*. For reasons stated in my separate opinion in *United States* v. *Wade*, *supra*, I regard the extension of *Schmerber* as impermissible.

In *Wade*, the accused, who is compelled to utter the words used by the criminal in the heat of his act, has at least the comfort of counsel—even if the Court denies that the accused may refuse to speak the words—because the compelled utterance occurs in the course of a lineup. In the present case, the Court deprives him of even this source of comfort and whatever protection counsel's ingenuity could provide in face of the Court's opinion. This is utterly insupportable, in my respectful opinion. This is not like fingerprinting, measuring, photographing—or even blood-taking. It is a process involving the use of discretion. It is capable of abuse. It is in the stream of inculpation. Cross-examination can play only a limited role in offsetting false inference or misleading coincidence from a "stacked" handwriting exemplar. The Court's reference to the efficacy of cross-examination in this situation is much more of a comfort to an appellate court than a source of solace to the defendant and his counsel.

3. I agree with the Court's condemnation of the lineup identifications here and the consequent in-court identifications, and I join in this part of its opinion. I would also reverse and remand for a new trial because of the use of the handwriting exemplars which were unconstitutionally obtained in the absence of advice to the accused as to the availability of counsel. I could not conclude that the violation of the privilege against self-incrimination implicit in the facts relating to the exemplars was waived in the absence of advice as to counsel. *In re Gault*, 387 U. S. 1, 41–42 (1967); *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

EXHIBIT 29

STOVALL *v.* DENNO, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 254. Argued February 16, 1967.—Decided June 12, 1967.

Petitioner was convicted and sentenced to death for murdering one Dr. Behrendt. He had been arrested the day after the murder and without being afforded time to retain counsel was taken by police officers, to one of whom he was handcuffed, to be viewed at the hospital by Mrs. Behrendt, who had been seriously wounded by her husband's assailant. After observing him and hearing him speak as directed by an officer, Mrs. Behrendt identified petitioner as the murderer. Mrs. Behrendt and the officers testified at petitioner's trial as to the hospital identification and she also made an in-court identification of the petitioner. Following affirmance of his conviction by the highest state court, petitioner sought habeas corpus in the District Court claiming that Mrs. Behrendt's identification testimony violated his Fifth, Sixth, and Fourteenth Amendment rights. The District Court after hearing argument on an unrelated claim dismissed the petition. The Court of Appeals, *en banc,* vacated a panel decision reversing the dismissal of the petition on constitutional grounds, and affirmed the District Court. *Held:*

1. The constitutional rule established in today's decisions in *United States* v. *Wade* and *Gilbert* v. *California, ante,* pp. 218, 263, has application only to cases involving confrontations for identification purposes conducted in the absence of counsel after this date. Cf. *Linkletter* v. *Walker,* 381 U. S. 618; *Tehan* v. *Shott,* 382 U. S. 406; *Johnson* v. *New Jersey,* 384 U. S. 719. Pp. 296–301.

2. Though the practice of showing suspects singly for purposes of identification has been widely condemned, a violation of due process of law in the conduct of a confrontation depends on the totality of the surrounding circumstances. There was no due process denial in the confrontation here since Mrs. Behrendt was the only person who could exonerate the suspect; she could not go to the police station for the usual lineup; and there was no way of knowing how long she would live. Pp. 301–302.

355 F. 2d 731, affirmed.

Leon B. Polsky argued the cause and filed briefs for petitioner.

William Cahn argued the cause and filed a brief for respondent.

H. Richard Uviller argued the cause and filed a brief for the New York State District Attorneys' Association, as *amicus curiae*, urging affirmance.

Louis J. Lefkowitz, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Barry Mahoney*, Assistant Attorney General, filed a brief for the Attorney General of New York, as *amicus curiae*, urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This federal habeas corpus proceeding attacks collaterally a state criminal conviction for the same alleged constitutional errors in the admission of allegedly tainted identification evidence that were before us on direct review of the convictions involved in *United States* v. *Wade*, *ante*, p. 218, and *Gilbert* v. *California*, *ante*, p. 263. This case therefore provides a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively. See *Linkletter* v. *Walker*, 381 U. S. 618; *Tehan* v. *Shott*, 382 U. S. 406; *Johnson* v. *New Jersey*, 384 U. S. 719.[1] A further question is whether in any event, on the facts of the particular con-

[1] Although respondent did not raise the bar of retroactivity, the Attorney General of the State of New York, as *amicus curiae*, extensively briefed the issue of retroactivity and petitioner, in his reply brief, addressed himself to this question. Compare *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3.

frontation involved in this case, petitioner was denied due process of law in violation of the Fourteenth Amendment. Cf. *Davis* v. *North Carolina*, 384 U. S. 737.

Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island, about midnight August 23, 1961. Dr. Behrendt's wife, also a physician, had followed her husband to the kitchen and jumped at the assailant. He knocked her to the floor and stabbed her 11 times. The police found a shirt on the kitchen floor and keys in a pocket which they traced to petitioner. They arrested him on the afternoon of August 24. An arraignment was promptly held but was postponed until petitioner could retain counsel.

Mrs. Behrendt was hospitalized for major surgery to save her life. The police, without affording petitioner time to retain counsel, arranged with her surgeon to permit them to bring petitioner to her hospital room about noon of August 25, the day after the surgery. Petitioner was handcuffed to one of five police officers who, with two members of the staff of the District Attorney, brought him to the hospital room. Petitioner was the only Negro in the room. Mrs. Behrendt identified him from her hospital bed after being asked by an officer whether he "was the man" and after petitioner repeated at the direction of an officer a "few words for voice identification." None of the witnesses could recall the words that were used. Mrs. Behrendt and the officers testified at the trial to her identification of the petitioner in the hospital room, and she also made an in-court identification of petitioner in the courtroom.

Petitioner was convicted and sentenced to death. The New York Court of Appeals affirmed without opinion. 13 N. Y. 2d 1094, 196 N. E. 2d 65. Petitioner *pro se* sought federal habeas corpus in the District Court for the Southern District of New York. He claimed that among other constitutional rights allegedly denied him

at his trial, the admission of Mrs. Behrendt's identification testimony violated his rights under the Fifth, Sixth, and Fourteenth Amendments because he had been compelled to submit to the hospital room confrontation without the help of counsel and under circumstances which unfairly focused the witness' attention on him as the man believed by the police to be the guilty person. The District Court dismissed the petition after hearing argument on an unrelated claim of an alleged invalid search and seizure. On appeal to the Court of Appeals for the Second Circuit a panel of that court initially reversed the dismissal after reaching the issue of the admissibility of Mrs. Behrendt's identification evidence and holding it inadmissible on the ground that the hospital room identification violated petitioner's constitutional right to the assistance of counsel. The Court of Appeals thereafter heard the case *en banc*, vacated the panel decision, and affirmed the District Court. 355 F. 2d 731. We granted certiorari, 384 U. S. 1000, and set the case for argument with *Wade* and *Gilbert*. We hold that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date. The rulings of *Wade* and *Gilbert* are therefore inapplicable in the present case. We think also that on the facts of this case petitioner was not deprived of due process of law in violation of the Fourteenth Amendment. The judgment of the Court of Appeals is, therefore, affirmed.

I.

Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. *Linkletter* v. *Walker, supra; Tehan* v. *Shott, supra; Johnson* v. *New Jersey, supra.* "These cases establish the principle that in criminal litigation concerning constitutional

claims, 'the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application'. . . ." *Johnson, supra,* 384 U. S., at 726–727. The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson, supra,* at 728.

Wade and *Gilbert* fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel. A conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* and *Gilbert* rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so.

It is true that the right to the assistance of counsel has been applied retroactively at stages of the prosecution where denial of the right must almost invariably deny a fair trial, for example, at the trial itself, *Gideon* v. *Wainwright,* 372 U. S. 335, or at some forms of arraignment, *Hamilton* v. *Alabama,* 368 U. S. 52, or on appeal, *Douglas* v. *California,* 372 U. S. 353. "The basic pur-

pose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *Shott, supra,* at 416. We have also retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. See for example *Jackson* v. *Denno,* 378 U. S. 368. Although the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson* v. *New Jersey, supra,* at 728–729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a "question of probabilities." 384 U. S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice.

We have outlined in *Wade* the dangers and unfairness inherent in confrontations for identification. The possibility of unfairness at that point is great, both because of the manner in which confrontations are frequently conducted, and because of the likelihood that the accused will often be precluded from reconstructing what occurred and thereby from obtaining a full hearing on the identification issue at trial. The presence of counsel will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. We have, therefore, concluded that the confrontation is a "critical stage," and that counsel is required at all confrontations. It must be recognized, however, that, unlike

cases in which counsel is absent at trial or on appeal, it may confidently be assumed that confrontations for identification can be and often have been conducted in the absence of counsel with scrupulous fairness and without prejudice to the accused at trial. Therefore, while we feel that the exclusionary rules set forth in *Wade* and *Gilbert* are justified by the need to assure the integrity and reliability of our system of justice, they undoubtedly will affect cases in which no unfairness will be present. Of course, we should also assume there have been injustices in the past which could have been averted by having counsel present at the confrontation for identification, just as there are injustices when counsel is absent at trial. But the certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application, especially in light of the strong countervailing interests outlined below, and because it remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law. See *Palmer v. Peyton*, 359 F. 2d 199 (C. A. 4th Cir. 1966).

The unusual force of the countervailing considerations strengthens our conclusion in favor of prospective application. The law enforcement officials of the Federal Government and of all 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification. Today's rulings were not foreshadowed in our cases; no court announced such a requirement until *Wade* was decided by the Court of Appeals for the Fifth Circuit, 358 F. 2d 557. The overwhelming majority of American courts have always treated the evidence ques-

tion not as one of admissibility but as one of credibility for the jury. Wall, Eye-Witness Identification in Criminal Cases 38. Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel. It is, therefore, very clear that retroactive application of *Wade* and *Gilbert* "would seriously disrupt the administration of our criminal laws." *Johnson* v. *New Jersey, supra,* at 731. In *Tehan* v. *Shott, supra,* we thought it persuasive against retroactive application of the no-comment rule of *Griffin* v. *California,* 380 U. S. 609, that such application would have a serious impact on the six States that allowed comment on an accused's failure to take the stand. We said, "To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration." 382 U. S., at 419. That impact is insignificant compared to the impact to be expected from retroactivity of the *Wade* and *Gilbert* rules. At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted to determine taint, if any, in identification evidence, and whether in any event the admission of the evidence was harmless error. Doubtless, too, inquiry would be handicapped by the unavailability of witnesses and dim memories. We conclude, therefore, that the *Wade* and *Gilbert* rules should not be made retroactive.

We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction

unsupportable.[2] We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies,[3] and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law,[4] militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue.[5] But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

II.

We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this

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[2] Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 22 Record of N. Y. C. B. A. 394, 408–411 (1967).

[3] Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907, 930–933 (1962).

[4] See Mishkin, Foreword, The Supreme Court 1964 Term, 79 Harv. L. Rev. 56, 60–61 (1965).

[5] See Mishkin, n. 4, *supra*, at 61, n. 23; Bender, The Retroactive Effect of an Overruling Constitutional Decision: *Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650, 675–678 (1962); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719, 764 (1966).

case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer* v. *Peyton*, 359 F. 2d 199 (C. A. 4th Cir. 1966). The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.[6] However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative. The Court of Appeals, *en banc*, stated, 355 F. 2d, at 735,

> "Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, 'He is not the man' could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room. Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question."

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS is of the view that the deprivation of the right to counsel in the setting of this case

[6] See Wall, Eye-Witness Identification in Criminal Cases 26–40; Paul, Identification of Accused Persons, 12 Austl. L. J. 42, 44 (1938);

should be given retroactive effect as it was in *Gideon* v. *Wainwright*, 372 U. S. 335, and in *Douglas* v. *California*, 372 U. S. 353. And see *Linkletter* v. *Walker*, 381 U. S. 618, 640 (dissenting opinion); *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (dissenting opinion).

MR. JUSTICE FORTAS would reverse and remand for a new trial on the ground that the State's reference at trial to the improper hospital identification violated petitioner's Fourteenth Amendment rights and was prejudicial. He would not reach the question of retroactivity of *Wade* and *Gilbert*.

MR. JUSTICE WHITE, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join.

For the reasons stated in my separate opinion in *United States* v. *Wade*, *ante*, p. 250, I perceive no constitutional error in the identification procedure to which the petitioner was subjected. I concur in the result and in that portion of the Court's opinion which limits application of the new Sixth Amendment rule.

MR. JUSTICE BLACK, dissenting.

In *United States* v. *Wade*, *ante*, p. 218, and *Gilbert* v. *California*, *ante*, p. 263, the Court holds that lineup identification testimony should be excluded if it was obtained by exhibiting an accused to identifying witnesses before trial in the absence of his counsel. I concurred in part in those holdings as to out-of-court lineup identification on the ground that the right to counsel is guaranteed in federal courts by the Sixth Amendment and in state courts by the Sixth and Fourteenth Amendments. The first question in this case is whether other defendants, already in prison on

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Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 479, 480–481; Frankfurter, The Case of Sacco and Vanzetti 31–32.

such unconstitutional evidence, shall be accorded the benefit of the rule. In this case the Court holds that the petitioner here, convicted on such unconstitutional evidence, must remain in prison, and that besides Wade and Gilbert, who are "chance beneficiaries," no one can invoke the rule except defendants exhibited in lineups in the future. I dissent from that holding. It keeps people serving sentences who were convicted through the use of unconstitutional evidence. This is sought to be justified on the ground that retroactive application of the holding in *Gilbert* and *Wade* would somehow work a "burden on the administration of justice" and would not serve the Court's purpose "to deter law enforcement authorities." It seems to me that to deny this petitioner and others like him the benefit of the new rule deprives them of a constitutional trial and perpetrates a rank discrimination against them. Once the Court determines what the Constitution says, I do not believe it has the power, by weighing "countervailing interests," to legislate a timetable by which the Constitution's provisions shall become effective. For reasons stated in my dissent in *Linkletter* v. *Walker,* 381 U. S. 618, 640, I would hold that the petitioner here and every other person in jail under convictions based on unconstitutional evidence should be given the advantage of today's newly announced constitutional rules.

The Court goes on, however, to hold that even though its new constitutional rule about the Sixth Amendment's right to counsel cannot help this petitioner, he is nevertheless entitled to a consideration of his claim, "independent of any right to counsel claim," that his identification by one of the victims of the robbery was made under circumstances so "unfair" that he was denied "due process of law" guaranteed by the Fourteenth Amendment. Although the Court finds petitioner's claim without merit, I dissent from its holding that a general

claim of "unfairness" at the lineup is "open to all persons to allege and prove." The term "due process of law" is a direct descendant of Magna Charta's promise of a trial according to the "law of the land" as it has been established by the lawmaking agency, constitutional or legislative. No one has ever been able to point to a word in our constitutional history that shows the Framers ever intended that the Due Process Clause of the Fifth or Fourteenth Amendment was designed to mean any more than that defendants charged with crimes should be entitled to a trial governed by the laws, constitutional and statutory, that are in existence at the time of the commission of the crime and the time of the trial. The concept of due process under which the Court purports to decide this question, however, is that this Court looks at "the totality of the circumstances" of a particular case to determine in its own judgment whether they comport with the Court's notions of decency, fairness, and fundamental justice, and, if so, declares they comport with the Constitution, and, if not, declares they are forbidden by the Constitution. See, *e. g., Rochin* v. *California*, 342 U. S. 165. Such a constitutional formula substitutes this Court's judgment of what is right for what the Constitution declares shall be the supreme law of the land. This due process notion proceeds as though our written Constitution, designed to grant limited powers to government, had neutralized its limitations by using the Due Process Clause to authorize this Court to override its written limiting language by substituting the Court's view of what powers the Framers should have granted government. Once again I dissent from any such view of the Constitution. Where accepted, its result is to make this Court not a Constitution-interpreter, but a day-to-day Constitution-maker.

But even if the Due Process Clause could possibly be construed as giving such latitudinarian powers to the

Court, I would still think the Court goes too far in holding that the courts can look at the particular circumstances of each identification lineup to determine at large whether they are too "suggestive and conducive to irreparable mistaken identification" to be constitutional. That result is to freeze as constitutional or as unconstitutional the circumstances of each case, giving the States and the Federal Government no permanent constitutional standards. It also transfers to this Court power to determine what the Constitution should say, instead of performance of its undoubted constitutional power to determine what the Constitution does say. And the result in this particular case is to put into a constitutional mould a rule of evidence which I think is plainly within the constitutional powers of the States in creating and enforcing their own criminal laws. I must say with all deference that for this Court to hold that the Due Process Clause gives it power to bar state introduction of lineup testimony on its notion of fairness, not because it violates some specific constitutional prohibition, is an arbitrary, wholly capricious action.

I would not affirm this case but would reverse and remand for consideration of whether the out-of-court lineup identification of petitioner was, under *Chapman* v. *California*, 386 U. S. 18, harmless error. If it was not, petitioner is entitled to a new trial because of a denial of the right to counsel guaranteed by the Sixth Amendment which the Fourteenth Amendment makes obligatory on the States.

EXHIBIT 30

SUPREME COURT OF THE UNITED STATES

No. 410.—OCTOBER TERM, 1967.

Gary Duncan, Appellant, v. State of Louisiana. } On Appeal From the Supreme Court of Louisiana.

[May 20, 1968.]

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law simple battery is a misdemeanor, punishable by two years' imprisonment and a $300 fine. Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed,[1] the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150. Appellant sought review in the Supreme Court of Louisiana,

[1] La. Const., Art. VII, § 41:

". . . All cases in which the punishment may not be at hard labor shall . . . be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

La. Rev. Stat. § 14:35 (1950):

"Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon.

"Whoever commits a simple battery shall be fined not more than three hundred dollars, or imprisoned for not more than two years, or both."

asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution. The Supreme Court, finding "no error of law in the ruling complained of," denied appellant a writ of certiorari.[2] Pursuant to 28 U. S. C. § 1257 (2) appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed. We noted probable jurisdiction,[3] and set the case for oral argument with No. 52, *Bloom* v. *Illinois, post,* p. —.

Appellant was 19 years of age when tried. While driving on Highway 23 in Plaquemines Parish on October 18, 1966, he saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. At trial the white boys and a white onlooker testified, as did appellant and his cousins. The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that just before getting in the car appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

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[2] 250 La. 253, 195 So. 2d 142 (1967).

[3] 389 U. S. 809 (1967).

I.

The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State;[4] the rights of speech, press, and religion covered by the First Amendment;[5] the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized;[6] the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination;[7] and the Sixth Amendment rights to counsel,[8] to a speedy[9] and public[10] trial, to confrontation of opposing witnesses,[11] and to compulsory process for obtaining witnesses.[12]

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those

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[4] *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).
[5] See, *e. g.*, *Fiske* v. *Kansas*, 274 U. S. 380 (1927).
[6] See *Mapp* v. *Ohio*, 367 U. S. 643 (1961).
[7] *Malloy* v. *Hogan*, 378 U. S. 1 (1964).
[8] *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).
[9] *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967).
[10] *In re Oliver*, 333 U. S. 257 (1948).
[11] *Pointer* v. *Texas*, 380 U. S. 400 (1965).
[12] *Washington* v. *Texas*, 388 U. S. 14 (1967).

"'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *Powell* v. *Alabama,* 287 U. S. 45, 67 (1932);[13] whether it is "basic in our system of jurisprudence," *In re Oliver,* 333 U. S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon* v. *Wainwright,* 372 U. S. 335, 343–344 (1963); *Malloy* v. *Hogan,* 378 U. S. 1, 6 (1964); *Pointer* v. *Texas,* 380 U. S. 400, 403 (1965). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.[14] Since we consider the appeal be-

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[13] Quoting from *Hebert* v. *Louisiana,* 272 U. S. 312, 316 (1926).

[14] In one sense recent cases applying provisions of the first eight amendments to the States represent a new approach to the "incorporation" debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. For example, *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937), stated: "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty . . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing con-

fore us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

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temporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. It is this sort of inquiry that can justify the conclusions that state courts must exclude evidence seized in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); that state prosecutors may not comment on a defendant's failure to testify, *Griffin* v. *California*, 380 U. S. 609 (1965); and that criminal punishment may not be imposed for the status of narcotics addiction, *Robinson* v. *California*, 370 U. S. 660 (1962). Of immediate relevance for this case are the Court's holdings that the States must comply with certain provisions of the Sixth Amendment, specifically that the States may not refuse a speedy trial, confrontation of witnesses, and the assistance, at state expense if necessary, of counsel. See cases cited in nn. 8–12, *supra*. Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.

When the inquiry is approached in this way the question whether the States can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that States might abolish jury trial. See, *e. g.*, *Maxwell* v. *Dow*, 176 U. S. 581 (1900). A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. Instead, every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict. In every State, including Louisiana, the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.

The history of trial by jury in criminal cases has been frequently told.[15] It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.[16] Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century Blackstone could write:

> "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the perogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unani-

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[15] *E. g.*, W. Forsyth, History of Trial by Jury (1852); J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898); W. S. Holdsworth, History of English Law (3d ed. 1922).

[16] *E. g.*, 4 W. Blackstone, Commentaries on the Laws of England 349 (Cooley ed. 1899). Historians no longer accept this pedigree. See, *e. g.*, 1 F. Pollock & F. M. Maitland, The History of English Law Before the Time of Edward I, at 173, n. 3 (2d ed. 1909).

> mous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion." [17]

Jury trial came to America with English colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765—resolutions deemed by their authors to state "the most essential rights and liberties of the colonists" [18]—was the declaration:

> "That trial by jury is the inherent and invaluable right of every British subject in these colonies."

The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared:

> "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." [19]

The Declaration of Independence stated solemn objections to the King making "judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries," to his "depriving us, in many cases, of the benefits of trial by jury," and to his "transporting us beyond the seas to be tried for pretended offenses." The Constitution itself, in Art. III, § 2, commanded:

> "The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held

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[17] *Id.*, at 349–350.

[18] R. Perry, ed., Sources of Our Liberties 270 (1959).

[19] *Id.*, at 288.

> in the State where the said Crimes shall have been committed."

Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment which, among other things, provided:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." [20]

The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court. For example, the Court has said:

> "Those who emigrated to this country from England brought with them this great privilege 'as their

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[20] Among the proposed amendments adopted by the House of Representatives in 1789 and submitted to the Senate was Article Fourteen:

"No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."

The Senate deleted this article in adopting the amendments which became the Bill of Rights. Journal of the First Session of the Senate 72 (1820); 1 Annals of Congress 76 (1834); Brennan, The Bill of Rights and the States, in E. Cahn, The Great Rights 69 (1963); E. Dumbauld, The Bill of Rights 46, 215 (1957). This relatively clear indication that the framers of the Sixth Amendment did not intend its jury trial requirement to bind the States is, of course, of little relevance to interpreting the Due Process Clause

> birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' " [21]

Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime.[22]

We are aware of prior cases in this Court in which the prevailing opinion contains statements contrary to our holding today that the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction. Louisiana relies especially on *Maxwell* v. *Dow*, 176 U. S. 581 (1900); *Palko* v. *Connecticut*, 302 U. S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934). None of these cases, however, dealt with a State which had purported to dispense entirely with a jury trial in serious criminal cases. *Maxwell* held that

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of the Fourteenth Amendment, adopted specifically to place limitations upon the States. Cf. *Fiske* v. *Kansas*, 274 U. S. 380 (1927); *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925).

[21] *Thompson* v. *Utah*, 170 U. S. 343, 349–350 (1898), quoting 2 J. Story, Commentaries on the Constitution of the United States § 1779. See also *Irvin* v. *Dowd*, 366 U. S. 717, 721–722 (1961); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 16 (1955); *Ex parte Milligan*, 4 Wall. 2, 122–123 (1866); *People* v. *Garbutt*, 17 Mich. 9, 27 (1868).

[22] Proposed Maryland Constitution, Art. 1, § 1.07 (defeated at referendum May 14, 1968); Michigan Constitution, Art. 1, § 14; Proposed New York Constitution, Art. 1, § 7b (defeated at referendum Nov. 7, 1967).

no provision of the Bill of Rights applied to the States—a position long since repudiated—and that the Due Process Clause of the Fourteenth Amendment did not prevent a State from trying a defendant for a noncapital offense with fewer than 12 men on the jury. It did not deal with a case in which no jury at all had been provided. In neither *Palko* nor *Snyder* was jury trial actually at issue, although both cases contain important dicta asserting that the right to jury trial is not essential to ordered liberty and may be dispensed with by the States regardless of the Sixth and Fourteenth Amendments. These observations, though weighty and respectable, are nevertheless dicta, unsupported by holdings in this Court that a State may refuse a defendant's demand for a jury trial when he is charged with a serious crime. Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* took no note of past or current developments regarding jury trials, did not consider its purposes and functions, attempted no inquiry into how well it was performing its job, and did not discuss possible distinctions between civil and criminal cases. In *Malloy* v. *Hogan*, *supra*, the Court rejected *Palko*'s discussion of the self-incrimination clause. Respectfully, we reject the prior dicta regarding jury trial in criminal cases.

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.[23]

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[23] "The [jury trial] clause was clearly intended to protect the accused from oppression by the Government . . . ." *Singer* v. *United States*, 380 U. S. 24, 31 (1965).

". . . The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Of course jury trial has "its weaknesses and the potential for misuse," *Singer* v. *United States*, 380 U. S. 24, 35 (1965). We are aware of the long debate, especially in this century, among those who write about the admin-

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leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." P. Devlin, Trial by Jury 164 (1956).

istration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings.[24] Although the debate has been intense, with powerful voices on either side, most of the controversy has centered on the jury in civil cases. Indeed, some of the severest critics of civil juries acknowledge that the arguments for criminal juries are much stronger.[25] In addition, at the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.[26]

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for

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[24] A thorough summary of the arguments that have been made for and against jury trial and an extensive bibliography of the relevant literature is available at Hearings on Recording of Jury Deliberations before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., pp. 63–81 (1955). A more selective bibliography appears at H. Kalven, Jr. & H. Zeisel, The American Jury 4, n. 2 (1966).

[25] *E. g.*, J. Frank, Courts on Trial 145 (1949); H. Sidgwick, The Elements of Politics 498 (4th ed. 1919).

[26] Kalven & Zeisel, n. 23, *supra*.

serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial [27] and prosecuting petty crimes without extending a right to jury trial.[28] However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court.[29] Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.[30]

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[27] See *Patton* v. *United States*, 281 U. S. 276 (1930).

[28] See Part II, *infra*.

[29] Kalven & Zeisel, n. 23, *supra*, c. 2.

[30] Louisiana also asserts that if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the federal courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. In particular, Louisiana objects to application of the decisions of this Court interpreting the Sixth Amendment as guaranteeing a 12-man jury in serious criminal cases, *Thompson* v. *Utah*, 170 U. S. 343 (1898); as requiring a unanimous verdict before guilt can be found, *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900); and as barring procedures by which crimes subject to the Sixth Amendment jury trial provision are tried in the first instance without a jury but at the first appellate stage by *de novo* trial with a jury, *Callan* v. *Wilson*, 127 U. S. 540, 557 (1888). It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. In addition, most of the

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Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision [51] and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses, *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966). But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia* v.

States have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four States in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However 10 States authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a *de novo* trial before a jury in a different court. The statutory provisions are listed in the briefs filed in this case.

[51] *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966); *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937); *Schick* v. *United States,* 195 U. S. 65 (1904); *Natal* v. *Louisiana,* 139 U. S. 621 (1891); see *Callan* v. *Wilson,* 127 U. S. 540 (1888). See generally Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926); Kaye, Petty Offenders Have No Peers!, 26 U. Chi. L. Rev. 245 (1959).

Clawans, 300 U. S. 617 (1937). The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments," 300 U. S., at 628, of the crime in question. In *Clawans* the defendant was jailed for 60 days, but it was the 90-day authorized punishment on which the Court focused in determining that the offense was not one for which the Constitution assured trial by jury. In the case before us the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for two years and a fine. The question, then is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury.

We think not. So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. These same considerations compel the same result under the Fourteenth Amendment. Of course the boundaries of the petty offense category have always been ill defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious

infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia* v. *Clawans, supra,* to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine.[32] In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail.[33] Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule.[34] We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold

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[32] 18 U. S. C. § 1.

[33] Indeed, there appear to be only two instances, aside from the Louisiana scheme, in which a State denies jury trial for a crime punishable by imprisonment for longer than six months. New Jersey's disorderly conduct offense, N. J. Stat. Ann. § 2A:169–4 (1953), carries a one-year maximum sentence but no jury trial. The denial of jury trial was upheld by a 4–3 vote against state constitutional attack in *State* v. *Maier,* 13 N. J. 235, 99 A. 2d 21 (1953). New York State provides a jury within New York City only for offenses bearing a maximum sentence greater than one year. See *People* v. *Sanabria,* 42 Misc. 2d 464, 249 N. Y. S. 2d 66 (Sup. Ct. 1964).

[34] Frankfurter & Corcoran, n. 31, *supra.* In the instant case Louisiana has not argued that a penalty of two years imprisonment is sufficiently short to qualify as a "petty offense," but only that the penalty actually imposed on Duncan, imprisonment for 60 days, is within the petty offense category.

that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense.[35] Consequently, appellant was entitled to a jury trial and it was error to deny it.

The judgment below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

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[35] It is argued that *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), interpreted the Sixth Amendment as meaning that to the extent that the length of punishment is a relevant criterion in distinguishing between serious crimes and petty offenses, the critical factor is not the length of the sentence authorized but the length of the penalty actually imposed. In our view that case does not reach the situation where a legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question. *Cheff* involved criminal contempt, an offense applied to a wide range of conduct including conduct not so serious as to require jury trial absent a long sentence. In addition criminal contempt is unique in that legislative bodies frequently authorize punishment without stating the extent of the penalty which can be imposed. The contempt statute under which *Cheff* was prosecuted, 18 U. S. C. § 401, treated the extent of punishment as a matter to be determined by the forum court. It is therefore understandable that this Court in *Cheff* seized upon the penalty actually imposed as the best evidence of the seriousness of the offense for which *Cheff* was tried.

SUPREME COURT OF THE UNITED STATES

No. 410.—October Term, 1967.

Gary Duncan, Appellant, v. State of Louisiana. } On Appeal From the Supreme Court of Louisiana.

[May 20, 1968.]

Mr. Justice Black, with whom Mr. Justice Douglas joins, concurring.

The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also guaranteed by the Fourteenth Amendment to defendants tried in state courts. With this holding I agree for reasons given by the Court. I also agree because of reasons given in my dissent in *Adamson* v. *California,* 332 U. S. 46, 68. In that dissent, at 332 U. S. 90, I took the position, contrary to the holding in *Twining* v. *New Jersey,* 211 U. S. 78, that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States. This Court in *Palko* v. *Connecticut,* 302 U. S. 319, 323, decided in 1937, although saying "there is no such general rule," went on to add that the Fourteenth Amendment may make it unlawful for a State to abridge by its statutes the

> " 'freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . or the free exercise of religion . . . or the right of peaceable assembly . . . or the right of one accused of crime to the benefit of counsel . . . .' In these and other situations immunities that are valid as against the federal government by force of the specific pledges

> of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the States." *Id.*, 302 U. S., at 324, 325.

And the *Palko* opinion went on to explain, at 302 U. S. 326, that certain Bill of Rights' provisions were made applicable to the States by bringing them "within the Fourteenth Amendment by a process of absorption." Thus *Twining* v. *New Jersey, supra,* refused to hold that any one of the Bill of Rights' provisions was made applicable to the States by the Fourteenth Amendment, but *Palko,* which must be read as overruling *Twining* on this point, concluded that the Bill of Rights' Amendments that are "implicit in the concept of ordered liberty" are "absorbed" by the Fourteenth as protections against state invasion. In this situation I said in *Adamson* v. *California,* 332 U. S., at 89, that while "I would extend to all the people of the nation the complete protection of the Bill of Rights," that "[i]f the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process." See *Gideon* v. *Wainwright,* 372 U. S. 335. And I am very happy to support this selective process through which our Court has since the *Adamson* case held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government. Among these are the right to trial by jury decided today, the right against compelled self-incrimination, the right to counsel, the right to compulsory process for witnesses, the right to confront witnesses, the right to a speedy and public trial, and the right to be free from unreasonable searches and seizures.

All of these holdings making Bill of Rights' provisions applicable as such to the States mark, of course,

a departure from the *Twining* doctrine holding that none of those provisions were enforceable as such against the States. The dissent in this case, however, makes a spirited and forceful defense of that now discredited doctrine. I do not believe that it is necessary for me to repeat the historical and logical reasons for my challenge to the *Twining* holding contained in my *Adamson* dissent and Appendix to it. What I wrote there in 1947 was the product of years of study and research. My appraisal of the legislative history followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions, and proposed constitutional amendments. My Brother HARLAN's objections to my *Adamson* dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the Stanford Law Review. 2 Stan. L. Rev. 5 (1949). I have read and studied this article extensively, including the historical references, but am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent. Professor Fairman's "history" relies very heavily on what was *not* said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what *was* said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that mem-

bers of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my *Adamson* dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight Amendments of the Constitution (The Bill of Rights) applicable to the States.

In addition to the adoption of Professor Fairman's "history," the dissent states that "the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that 'The rights heretofore guaranteed against federal intrusion by the first eight amendments are henceforth guaranteed against State intrusion as well.'" Dissenting opinion, n. 9. In response to this I can say only that the words "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seems to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.[1] What more precious "privilege" of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights? I suggest that any reading of "privileges or immunities of citizens of the United States" which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless. Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, certainly read the words this way. Although I have cited his speech at length in my *Adamson* dissent

[1] My view has been and is that the Fourteenth Amendment, *as a whole*, makes the Bill of Rights applicable to the States. This would certainly include the language of the Privileges and Immunities Clause, as well as the Due Process Clause.

appendix, I believe it would be worthwhile to reproduce a part of it here.

"Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution [the Senator had just read from the old opinion of *Corfield* v. *Coryell,* 4 Washington's Circuit Ct. Reports 371, 6 Fed. Cases 546 (E. D. Penna. 1823)]. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search on seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

"Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaran-

> tied by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation.
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> ". . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect those great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. (1865), 2765.

From this I conclude, contrary to my Brother HARLAN, that if anything, it is "exceedingly peculiar" to read the Fourteenth Amendment differently from the way I do.

While I do not wish at this time to discuss at length my disagreement with Brother HARLAN's forthright and frank restatement of the now discredited *Twining* doctrine,[2] I do want to point out what appears to me to be the basic difference between us. His view, as was indeed the view of *Twining*, is that "due process is an evolving concept" and therefore that it entails a "gradual process of judicial inclusion and exclusion" to ascertain those "immutable principles of free government which no member of the Union may disregard." Thus the Due Process Clause is treated as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an "immutable principle[s] of free government" or "is implicit in the concept of ordered liberty," or whether certain conduct "shocks the judge's conscience" or runs counter to some other similar, unde-

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[2] For a more thorough exposition of my views against this approach to the Due Process Clause, see my concurring opinion in *Rochin* v. *California*, 342 U. S. 165, 174.

fined and undefinable standard. Thus due process, according to my Brother HARLAN, is to be a word with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. If due process means this, the Fourteenth Amendment, in my opinion, might as well have been written that "no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government." It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.

Another tenet of the *Twining* doctrine as restated by my Brother HARLAN is that "due process of law requires only fundamental fairness." But the "fundamental fairness" test is one on a par with that of shocking the conscience of the Court. Each of such tests depends entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase "due process of law" suggests that constitutional controls are to depend on any particular judge's sense of values. The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land.*" (Emphasis added.) [3] As early as 1354 the words "due process of law" were used in an English statute interpreting Magna Carta,[4] and by the end of the 14th cen-

[3] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 Howard 272, 276.

[4] 28 Edw. 3, c. 3 (1354).

tury "due process of law" and "law of the land" were interchangeable. Thus the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chaper 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws. There is not one word of legal history that justifies making the term "due process of law" mean a guarantee of a trial free from laws and conduct which the courts deem at the time to be "arbitrary," "unreasonable," "unfair," or "contrary to civilized standards." The due process of law standard for a trial is one tried in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.

Finally I want to add that I am not bothered by the argument that applying the Bill of Rights to the States, "according to the same standards that protect those rights against federal encroachment,"[5] interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments. I have never believed that under the guise of federalism the States should be able to experiment with the pro-

[5] See *Malloy* v. *Hogan*, 378 U. S. 1, 10; *Pointer* v. *Texas*, 380 U. S. 400, 406; *Miranda* v. *Arizona*, 384 U. S. 436, 464.

tections afforded our citizens through the Bill of Rights. As Justice Goldberg said so wisely in his concurring opinion in *Pointer* v. *Texas,* 380 U. S. 400:

> ". . . to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism." 380 U. S., at 414.

It seem to me totally inconsistent to advocate on the one hand, the power of this Court to strike down any state law or practice which it finds "unreasonable" or "unfair," and on the other hand urge that the States be given maximum power to develop their own laws and procedures. Yet the due process approach of my Brothers HARLAN and FORTAS (see other concurring opinion) does just that since in effect it restricts the States to practices which a majority of this Court is willing to approve on a case-by-case basis. No one is more concerned than I that the States be allowed to use the full scope of their powers as their citizens see fit. And that is why I have continually fought against the expansion of this Court's authority over the States through the use of a broad, general interpretation of due process that permits judges to strike down state laws they do not like.

In closing I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than

complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.

SUPREME COURT OF THE UNITED STATES

Nos. 410 and 52.—October Term, 1967.

410	Gary Duncan, Appellant, *v.* State of Louisiana.	On Appeal From the Supreme Court of Louisiana.
52	S. Edward Bloom, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[May 20, 1968.]

Mr. Justice Fortas, concurring.

I join the judgments and opinions of the Court in these cases because I agree that the Due Process Clause of the Fourteenth Amendment requires that the States accord the right to jury trial in prosecutions for offenses that are not petty. A powerful reason for reaching this conclusion is that the Sixth Amendment to the Constitution guarantees the right to jury trial in federal prosecutions for such offenses. It is, of course, logical and reasonable that in seeking, from time to time, the content of "due process of law," we should look to and be guided by the great Bill of Rights in our Constitution. Considerations of the practice of the forum States, of the States generally, and of the history and office of jury trials are also relevant to our task. I believe, as my Brother White's opinion for the Court in *Duncan* v. *Louisiana* persuasively argues, that the right to jury trial in major prosecutions, state as well as federal, is so fundamental to the protection of justice and liberty that "due process of law" cannot be accorded without it.

It is the progression of history, and especially the deepening realization of the substance and procedures that justice and the demands of human dignity require,

which has caused this Court to invest the command of "due process of law" with increasingly greater substance. The majority lists outstanding stations in this progression, *ante,* p. 3. This Court has not been alone in its progressive recognition of the content of the great phrase which my Brother WHITE describes as "spacious language" and Learned Hand called a "majestic generality." The Congress, state courts, and state legislatures have moved forward with the advancing conception of human rights in according procedural as well as substantive rights to individuals accused of conflict with the criminal laws.*

But although I agree with the decision of the Court, I cannot agree with the implication, see n. 30, *ante,* that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that "due process" requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States.

I would make these points clear today. Neither logic nor history nor the intent of the draftsmen of the Four-

*See, *e. g.,* Bail Reform Act of 1966, Pub. L. 89-465, 18 U. S. C. § 3141 *et seq.;* Criminal Justice Act of 1964, Pub. L. 88-455, 18 U. S. C. § 3006A; Jury Selection and Service Act of 1968, Pub. L. 90, —, 36 U. S. L. W. 85; *Sehowgurow* v. *State,* 240 Md. 121 (1964); Note, The Proposed Penal Law of New York, 64 Col. L. Rev. 1469 (1964).

teenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied. The draftsmen of the Fourteenth Amendment intended what they said, not more or less: that no State shall deprive any person of life, liberty, or property without due process of law. It is ultimately the duty of this Court to interpret, to ascribe specific meaning to this phrase. There is no reason whatever for us to conclude that, in so doing, we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. To take this course, in my judgment, would be not only unnecessary but mischievous because it would inflict a serious blow upon the principle of federalism. The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, the Constitution's command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith.

This Court has heretofore held that various provisions of the Bill of Rights such as the freedom of speech and religion guarantees of the First Amendment, the prohibition of unreasonable searches and seizures in the Fourth Amendment, the privilege against self-incrimination of

the Fifth Amendment, and the right to counsel and to confrontation under the Sixth Amendment "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those rights against federal encroachment." *Malloy* v. *Hogan*, 378 U. S. 1, 10 (1964); *Pointer* v. *Texas*, 380 U. S. 400, 406 (1965); *Miranda* v. *Arizona*, 384 U. S. 436, 464 (1966). I need not quarrel with the specific conclusion in those specific instances. But unless one adheres slavishly to the incorporation theory, body and substance, the same conclusion need not be superimposed upon the jury trial right. I respectfully but urgently suggest that it should not be. Jury trial is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State. While we may believe (and I do believe) that the right of jury trial is fundamental, it does not follow that the particulars of according that right must be uniform. We should be ready to welcome state variations which do not impair—indeed, which may advance—the theory and purpose of trial by jury.

SUPREME COURT OF THE UNITED STATES

No. 410.—October Term, 1967.

Gary Duncan, Appellant, v. State of Louisiana. | On Appeal From the Supreme Court of Louisiana.

[May 20, 1968.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

Every American jurisdiction provides for trial by jury in criminal cases. The question before us is not whether jury trial is an ancient institution, which it is; nor whether it plays a significant role in the administration of criminal justice, which it does; nor whether it will endure, which it shall. The question in this case is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone. In my view, the answer to that question, mandated alike by our constitutional history and by the longer history of trial by jury, is clearly "no."

The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances. In exercising this responsibility, each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old; and it does not impose on the States the rules than may be in force in the federal courts except where such rules are also found to be essential to basic fairness.

The Court's approach to this case is an uneasy and illogical compromise among the views of various Justices on how the Due Process Clause should be interpreted. The Court does not say that those who framed the Fourteenth Amendment intended to make the Sixth Amendment applicable to the States. And the Court concedes that it finds nothing unfair about the procedure by which the present appellant was tried. Nevertheless, the Court reverses his conviction: it holds, for some reason not apparent to me, that the Due Process Clause incorporates the particular clause of the Sixth Amendment that requires trial by jury in federal criminal cases—including, as I read its opinion, the sometimes trivial accompanying baggage of judicial interpretation in federal contexts. I have raised my voice many times before against the Court's continuing undiscriminating insistence upon fastening on the States federal notions of criminal justice,[1] and I must do so again in this instance. With all respect, the Court's approach and its reading of history are altogether topsy-turvy.

I.

I believe I am correct in saying that every member of the Court for at least the last 135 years has agreed that our Founders did not consider the requirements of the Bill of Rights so fundamental that they should operate directly against the States.[2] They were wont to believe rather that the security of liberty in America rested primarily upon the dispersion of governmental

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[1] See, *e. g.*, my opinions in *Mapp* v. *Ohio*, 367 U. S. 643, 672 (dissenting); *Ker* v. *California*, 374 U. S. 23, 44 (concurring); *Malloy* v. *Hogan*, 378 U. S. 1, 14 (dissenting); *Pointer* v. *Texas*, 380 U. S. 400, 408 (concurring); *Griffin* v. *California*, 380 U. S. 609, 615 (concurring); *Klopfer* v. *North Carolina*, 386 U. S. 213, 226 (concurring).

[2] *Barron* v. *Baltimore*, 7 Pet. 243 (1833), held that the first eight Amendments restricted only federal action.

power across a federal system.[3] The Bill of Rights was considered unnecessary by some[4] but insisted upon by others in order to curb the possibility of abuse of power by the strong central government they were creating.[5]

The Civil War Amendments dramatically altered the relation of the Federal Government to the States. The first section of the Fourteenth Amendment imposes highly significant restrictions on state action. But the restrictions are couched in very broad and general terms: citizenship, privileges and immunities; due process of law; equal protecttion of the laws. Consequently, for 100 years this Court has been engaged in the difficult process Professor Jaffe has well called "the search for intermediate premises."[6] The question has been, "Where does the Court properly look to find the specific rules that define and give content to such terms as 'life, liberty, or property' and 'due process of law'?"

A few members of the Court have taken the position that the intention of those who drafted the first section of the Fourteenth Amendment was simply, and exclusively, to make the provisions of the first eight amendments applicable to state action.[7] This view has never been

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[3] The *locus classicus* for this viewpoint is The Federalist No. 51 (Madison).

[4] The Bill of Rights was opposed by Hamilton and other proponents of a strong central government. See The Federalist No. 84; see generally Rossiter, 1787: The Grand Convention 284, 302–303.

[5] In *Barron* v. *Baltimore, supra,* at 250, Chief Justice Marshall said, "These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments."

[6] Jaffe, Was Brandeis an Activist? The Search for Intermediate Premises, 80 Harv. L. Rev. 986 (1967).

[7] See *Adamson* v. *California,* 332 U. S. 56, 71 (dissenting opinion of BLACK, J.); *O'Neil* v. *Vermont,* 144 U. S. 323, 366, 370 (dissenting opinion of Harlan, J.) (1892); Black, Due Process of Law, Second Carpentier Lecture delivered at Columbia University Law School on March 21, 1968.

accepted by this Court. In my view, often expressed elsewhere,[8] the first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight amendments. The overwhelming historical evidence marshalled by Professor Fairman demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were "incorporating" the Bill of Rights[9] and

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[8] In addition to the opinions cited in n. 2, *supra*, see, *e. g.*, my opinions in *Poe* v. *Ullman*, 367 U. S. 497, 522, at 539–545 (dissenting), and *Griswold* v. *Connecticut*, 381 U. S. 479, 499 (concurring).

[9] Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949). Professor Fairman was not content to rest upon the overwhelming fact that the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that "The rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as well." He therefore sifted the mountain of material comprising the debates and committee reports relating to the Amendment in both Houses of Congress and in the state legislatures that passed upon it. He found that in the immense corpus of comments on the purpose and effects of the proposed amendment, and on its virtues and defects, there is almost no evidence whatever for "incorporation." The first eight amendments are so much as mentioned by only two members of Congress, one of whom effectively demonstrated (a) that he did not understand *Barron* v. *Baltimore*, 7 Pet. 243, and therefore did not understand the question of incorporation, and (b) that he was not himself understood by his colleagues. One state legislative committee report, rejected by the legislature as a whole, found § I of the Fourteenth Amendment superfluous because it duplicated the Bill of Rights: the committee obviously did not understand *Barron* v. *Baltimore* either. That is all Professor Fairman could find, in hundreds of pages of legislative discussion prior to passage of the Amendment, that even suggests incorporation.

To this negative evidence the judicial history of the Amendment could be added. For example, it proved possible for a court whose

the very breadth and generality of the Amendment's provisions suggests that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of "liberty" and "due process of law" but that the increasing experience and evolving conscience of the American people would add new "intermediate premises." In short, neither history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law.

Although I therefore fundamentally disagree with the total incorporation view of the Fourteenth Amendment, it seems to me that such a position does at least have the virtue, lacking in the Court's selective incorporation approach, of internal consistency: we look to the Bill of Rights, word for word, clause for clause, precedent for precedent because, it is said, the men who wrote the Amendment wanted it that way. For those who do not accept this "history," a different source of "intermediate premises" must be found. The Bill of Rights is not necessarily irrelevant to the search for guidance in interpreting the Fourteenth Amendment, but the reason for and the nature of its relevance must be articulated.

Apart from the approach taken by the absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words "liberty" and "due process of law" and attempt to define them in a way that accords with American traditions and

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members had lived through Reconstruction to reiterate the doctrine of *Barron* v. *Baltimore*, that the Bill of Rights did not apply to the States, without so much as questioning whether the Fourteenth Amendment had any effect on the continued validity of that principle. *E. g*, *Walker* v. *Sauvinet*, 92 U. S. 90; see generally Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan. L. Rev. 140 (1949).

our system of government. This approach, involving a much more discriminating process of adjudication than does "incorporation," is, albeit difficult, the one that was followed throughout the Nineteenth and most of the present century. It entails a "gradual process of judicial inclusion and exclusion," [10] seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those "immutable principles of free government which no member of the Union may disregard." [11] Due process was not restricted to rules fixed in the past, for that "would be to deny every quality of the law but its age, and to render it incapable of progess or improvement." [12] Nor did it impose nationwide uniformty in details, for

> "[t]he Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of the line there may be a right of trial by jury, and on the other side there may be no such right. Each State prescribes its own modes of judicial proceeding." [13]

Through this gradual process, this Court sought to define "liberty" by isolating freedoms that Americans of the past and of the present considered more important than any suggested countervailing public objective. The Court also, by interpretation of the phrase "due process of law," enforced the Constitution's guarantee that no State may imprison an individual except by fair and impartial procedures.

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[10] *Davidson* v. *New Orleans,* 96 U. S. 97, 104.

[11] *Holden* v. *Hardy,* 166 U. S. 366, 389.

[12] *Hurtado* v. *California,* 110 U. S. 516, 529.

[13] *Missouri* v. *Lewis,* 101 U. S. 22, 31.

The relationship of the Bill of Rights to this "gradual process" seems to me to be twofold. In the first place it has long been clear that the Due Process Clause imposes some restrictions on state action that parallel Bill of Rights restrictions on federal action. Second, and more important than this accidental overlap, is the fact that the Bill of Rights is evidence, at various points, of the content Americans find in the term "liberty" and of American standards of fundamental fairness.

An example, both of the phenomenon of parallelism and the use of the first eight amendments as evidence of a historic commitment, is found in the partial definition of "liberty" offered by Mr. Justice Holmes, dissenting in *Gitlow* v. *New York,* 268 U. S. 652:

> "The general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States." *Id.,* at 672.

As another example, Mr. Justice Frankfurter, speaking for the Court in *Wolf* v. *Colorado,* 338 U. S. 25, at 27, recognized that

> "[t]he security of one's own privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

The Court has also found among the procedural requirements of "due process of law" certain rules paralleling requirements of the first eight amendments. For

example, in *Powell* v. *Alabama,* 287 U. S. 45, the Court ruled that a State could not deny counsel to an accused in a capital case:

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . . is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, *although* it be specifically dealt with in another part of the federal Constitution." *Id.,* at 67. (Emphasis added.)

Later, the right to counsel was extended to all felony cases.[14] The Court has also ruled, for example, that "due process" means a speedy process, so that liberty will not be long restricted prior to an adjudication, and evidence of fact will not become stale; [15] that in a system committed to the resolution of issues of fact by adversary proceedings the right to confront opposing witnesses must be guaranteed; [16] and that if issues of fact are tried to a jury, fairness demands a jury impartially selected.[17] That these requirements are fundamental to procedural fairness hardly needs redemonstration.

In all of these instances, the right guaranteed against the States by the Fourteenth Amendment was one that had also been guaranteed against the Federal Government by one of the first eight amendments. The logically critical thing, however, was not that the rights had

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[14] *Gideon* v. *Wainwright,* 372 U. S. 335. The right to counsel was found in the Fourteenth Amendment because, the Court held, it *was* essential to a fair trial. See 372 U. S., at 342–345.

[15] *Klopfer* v. *North Carolina,* 386 U. S. 213.

[16] *Pointer* v. *Texas,* 380 U. S. 400.

[17] *Irvin* v. *Dowd,* 366 U. S. 717.

been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental. This was perhaps best explained by Mr. Justice Cardozo, speaking for a Court that included Chief Justice Hughes and Justices Brandeis and Stone, in *Palko* v. *Connecticut,* 302 U. S. 319:

> "If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed." *Id.,* at 326.

Referring to *Powell* v. *Alabama, supra,* Mr. Justice Cardozo continued:

> "The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence, the benefit of counsel was essential to the substance of a hearing." *Id.,* at 327.

Mr. Justice Cardozo then went on to explain that the Fourteenth Amendment did not impose on each State every rule of procedure that some other State, or the federal courts, thought desirable, but only those rules critical to liberty:

> "[t]he line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even

> so, they are not of the very essence of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of *our people* as to be ranked as fundamental.' . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Id.*, at 325. (Emphasis added).

Today's Court still remains unwilling to accept the total incorporationists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally unfair. Consequently, the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in" rather than "out." [18]

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[18] The same illogical way of dealing with a Fourteenth Amendment problem was employed in *Malloy* v. *Hogan*, 378 U. S. 1, which held that the Due Process Clause guaranteed the protection of the Self-Incrimination Clause of the Fifth Amendment against state action. I disagreed at that time both with the way the question was framed and with the result the Court reached. See my dissenting opinion, *id.*, at 14. I consider myself bound by the Court's holding in *Malloy* with respect to self-incrimination. See my concurring opinion in *Griffin* v. *California*, 380 U. S. 609, 615. I do not think that *Malloy* held, nor would I consider myself bound by a holding, that every question arising under the Due Procses Clause shall be settled by an arbitrary decision whether a clause in the Bill of Rights is "in" or "out."

The Court has justified neither its starting place nor its conclusion. If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty.

Examples abound. I should suppose it obviously fundamental to fairness that a "jury" means an "impartial jury." [19] I should think it equally obvious that the rule, imposed long ago in the federal courts, that "jury" means "jury of exactly twelve," [20] is not fundamental to anything: there is no significance except to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts,[21] although unanimity has not been found essential

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[19] The Court has so held in, *e. g., Irvin* v. *Dowd,* 366 U. S. 717. Compare *Dennis* v. *United States,* 339 U. S. 162.

[20] *E. g., Rassmussen* v. *United States,* 197 U. S. 516.

[21] *E. g., Andres* v. *United States,* 333 U. S. 740. With respect to the common-law number and unanimity requirements, the Court suggests that these present no problem because "our decisions interpreting the Sixth Amendment are always subject to reconsideration . . . ." *Ante,* p. —, n. 30. These examples illustrate a major danger of the "incorporation" approach—that provisions of the Bill of Rights may be watered down in the needless pursuit of uniformity. Cf. my concurring opinion in *Ker* v. *California,* 374 U. S. 23, 44. MR. JUSTICE WHITE alluded to this problem in his dissenting opinion in *Malloy* v. *Hogan, supra,* at p. 38.

to liberty in Britain, where the requirement has been abandoned.[22]

One further example is directly relevant here. The co-existence of a requirement of jury trial in federal criminal cases and a historic and universally recognized exception for "petty crimes" has compelled this Court, on occasion, to decide whether a particular crime is petty, or is included within the guarantee.[23] Individual cases have been decided without great conviction and without reference to a guiding principle. The Court today holds, for no discernible reason, that if and when the line is drawn its exact location will be a matter of such fundamental importance that it will be uniformly imposed on the States. This Court is compelled to decide such obscure borderline questions in the course of administering federal law. This does not mean that its decisions are demonstrably sounder than those that would be reached by state courts and legislatures, let alone that they are of such importance that fairness demands their imposition throughout the Nation.

Even if I could agree that the question before us is whether Sixth Amendment jury trial is totally "in" or totally "out," I can find in the Court's opinion no real reasons for concluding that it should be "in." The basis for differentiating among clauses in the Bill of Rights cannot be that only some clauses are in the Bill of Rights, or that only some are old and much praised, or that only some have played an important role in the development of federal law. These things are true of all. The Court says that some clauses are more "fundamental" than others, but it turns out to be using this word in a sense

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[22] Criminal Justice Act of 1967, § 13.

[23] *E. g., Callan* v. *Wilson,* 127 U. S. 540; *District of Columbia* v. *Clawans,* 300 U. S. 617; *District of Columbia* v. *Colts,* 282 U. S. 63.

that would have astonished Mr. Justice Cardozo and which, in addition, is of no help. The word does not mean "analytically critical to procedural fairness" for no real analysis of the role of the jury in making procedures fair is even attempted. Instead, the word turns out to mean "old," "much praised," and "found in the Bill of Rights." The definition of "fundamental" thus turns out to be circular.

II.

Since, as I see it, the Court has not even come to grips with the issues in this case, it is necessary to start from the beginning. When a criminal defendant contends that his state conviction lacked "due process of law," the question before this Court, in my view, is whether he was denied any element of fundamental procedural fairness. Believing, as I do, that due process is an evolving concept and that old principles are subject to re-evaluation in light of later experience, I think it appropriate to deal on its merits with the question whether Louisiana denied appellant due process of law when it tried him for simple assault without a jury.

The obvious starting place is the fact that this Court has, in the past, *held* that trial by jury is not a requisite of criminal due process. In the leading case, *Maxwell* v. *Dow*, 176 U. S. 581, Mr. Justice Peckham wrote as follows for the Court: [24]

> Trial by jury has never been affirmed to be a necessary requisite of due process of law. . . . The

[24] The precise issue in *Maxwell* was whether a jury of eight rather than 12 jurors could be employed in criminal prosecutions in Utah. The Court held that this was permissible because the Fourteenth Amendment did not require the States to provide trial by jury at all. The Court seems to think this was dictum. As a technical matter, however, a statement that is critical to the chain of reasoning by which a result is in fact reached does not become dictum simply because a later court can imagine a totally different

> right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. . . . [T]he State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections." *Id.*, at 603–605.

In *Hawaii* v. *Mankichi*, 190 U. S. 203, the question was whether the Territory of Hawaii could continue its pre-annexation procedure of permitting conviction by non-unanimous juries. The Congressional Resolutuion of Annexation had provided that municipal legislation of Hawaii that was not contrary to the United States Constitution could remain in force. The Court interpreted the resolution to mean only that those requirements of the Constitution that were "fundamental" would be binding in the Territory. After concluding that a municipal statute allowing a conviction of treason on circumstantial evidence *would* violate a "fundamental" guarantee of the Constitution, the Court continued:

> "We would even go farther, and say that most, if not all, the privileges and immunities in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our

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way of deciding the case. See *Jordan* v. *Massachusetts*, 225 U. S. 167, 176, citing *Maxwell* for the proposition that "the requirement of due process does not deprive a State of the power to dispense with jury trial altogether."

> decision of this case upon the ground that the two rights alleged to be violated in this case [Sixth Amendment jury trial and grand jury indictment] are not fundamental in their nature but concern merely a method of procedure which sixty years of practice has shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well-being." *Id.*, at 217–218.

Numerous other cases in this Court have assumed that jury trial is not fundamental to ordered liberty.[25]

Although it is of course open to this Court to re-examine these decisions, I can see no reason why they should now be overturned. It can hardly be said that time has altered the question, or brought significant new evidence to bear upon it. The virtues and defects of the jury system have been hotly debated for a long time,[26] and are hotly debated today, without significant change in the lines of argument.[27]

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[25] *E. g., Irvin* v. *Dowd,* 366 U. S. 717, 721; *Fay* v. *New York,* 332 U. S. 261, 288; *Palko* v. *Connecticut, supra,* at 325; *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; *Brown* v. *New Jersey,* 175 U. S. 172, 175; *Missouri* v. *Lewis, supra,* at 31.

[26] *E. g.,* Deady, Trial by Jury, 17 Am. L. Rev. 398, 399–400 (1883):

"Still in these days of progress and experiment, when everything is on trial at the bar of human reason or conceit, it is quite the fashion to speak of jury trial as something that has outlived its usefulness. Intelligent and well-meaning people often sneer at it as an awkward and useless impediment to the speedy and correct administration of justice, and a convenient loop-hole for the escape of powerful and popular rogues. Considering the kind of jury trials we sometimes have in the United States, it must be admitted that this criticism is not without foundation."

[27] See generally Kalven, Memorandum Regarding Jury System, printed in Hearings on Recording of Jury Deliberations before the Subcommittee to Investigate the Administration of the Internal

The argument that jury trial is not a requisite of due process is quite simple. The central proposition of *Palko, supra,* a proposition to which I would adhere, is that "due process of law" requires only that criminal trials be fundamentally fair. As stated above, apart from the theory that it was historically intended as a mere shorthand for the Bill of Rights, I do not see what else "due process of law" can intelligibly be thought to mean. If due process of law requires only fundamental fairness,[28] then the inquiry in each case must be whether a state trial process was a fair one. The Court has held, properly I think, that in an adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel and to cross-examine opposing witnesses. But it simply has not been demonstrated, nor, I think, can it be demonstrated, that trial by jury is the only fair means of resolving issues of fact.

The jury is of course not without virtues. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law.[29] It eases the burden on judges

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Security Act of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., pp. 63–81. In particular,

"the debate has been going on for a long time (at least since 1780) and the arguments which were advanced pro and con haven't changed much in the interim. Nor, contrary to my first impression, does there seem to be any particular period in which the debate grows hotter or colder. It has always been a hot debate." *Id.*, at 63.

[28] See, *e. g., Snyder* v. *Massachusetts,* 291 U. S. 97, 107–108 (Cardozo, J.):

"So far as the Fourteenth Amendment is concerned, the presence of a defendant [at trial] is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

[29] The point is made by, among others, Tocqueville. 1 Democracy in America 285 (Reeve tr.).

by enabling them to share a part of their sometimes awesome responsibility.[30] A jury may, at times, afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey their oaths).[31] And the jury may, or may not, contribute desirably to the willingness of the general public to accept criminal judgments as just.[32]

It can hardly be gainsaid, however, that the principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.[33]

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[30] The argument is developed by Curtis, The Trial Judge and the Jury, 5 Vand. L. Rev. 150 (1952). For example,

"Juries relieve the judge of the embarrassment of making the necessary exceptions. They do this, it is true, by violating their oaths, but this, I think, is better than tempting the judge to violate his oath of office." *Id.*, at 157.

[31] See generally, G. Williams, The Proof of Guilt 257–263; W. Forsyth, History of Trial by Jury 261.

[32] See J. Stephen, A General View of the Criminal Law of England 208–209.

[33] See, *e. g.*, Sunderland, The Inefficiency of the American Jury, 13 Mich. L. Rev. 302, 305:

"But times have changed, and the government itself is now under the absolute control of the people. The judges, if appointed, are selected by the agents of the people, and if elected are selected by the people directly. The need for the jury as a political weapon of defense has been steadily diminishing for a hundred years, until now the jury must find some other justification for its continuance."

The jury system can also be said to have some inherent defects, which are multiplied by the emergence of the criminal law from the relative simplicity that existed when the jury system was devised.[34] It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves,[35] but also contributing to delay in the machinery of justice.[36] Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex.[37] And it is argued by some that trial by jury, far from increasing public respect for law, impairs it: the average man, it is said, reacts favorably neither to the notion that matters he knows to be complex are being decided by other average men,[38] nor to the way the jury system distorts the process of adjudication.[39]

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[34] See, *e. g.*, Sunderland, *op. cit. supra*, at 303:

"Life was simple when the jury system was young, but with the steadily growing complexity of society and social practices, the facts which enter into legal controversies have become much more complex."

[35] Compare Green, Jury Injustice, 20 Jurid. Rev. 132, 133.

[36] Cf. Lummus, Civil Juries and the Law's Delay, 12 B. U. L. Rev. 487.

[37] See, *e. g.*, McWhorter, Abolish the Jury, 57 Am. L. Rev. 42. Statistics on this point are difficult to accumulate for the reason that the only way to measure jury performance is to compare the result reached by a jury with the result the judge would have reached in the same case. While judge-jury comparisons have many values, it is impossible to obtain a statistical comparison of accuracy in this manner. See generally H. Kalven and H. Zeisel, The American Jury, *passim*.

[38] *E. g.*, Boston, Some Practical Remedies for Existing Defects in the Administration of Justice, 61 U. Pa. L. Rev. 1, 16:

"There is not one important personal or property interest, outside of a Court of justice, which any of us would willingly commit to the first twelve men that come along the street . . . ."

[39] *E. g.*, McWhorter, *op. cit. supra*, at 46:

"It is the jury system that consumes time at the public expense in gallery playing and sensational and theatrical exhibitions before

That trial by jury is not the only fair way of adjudicating criminal guilt is well attested by the fact that it is not the prevailing way, either in England or in this country. For England, one expert makes the following estimates. Parliament generally provides that new statutory offenses, unless they are of "considerable gravity" shall be tried to judges; consequently, summary offenses now outnumber offenses for which jury trial is afforded by more than six to one. Then, within the latter category, 84% of all cases are in fact tried to the court. Over all, "the ratio of defendants actually tried by jury becomes in some years little more than 1 per cent." [40]

In the United States, where it has not been as generally assumed that jury waiver is permissible,[41] the statistics are only slightly less revealing. Two experts have estimated that, of all prosecutions for crimes triable to a jury, 75% are settled by guilty plea and 40% of the remainder are tried to the court.[42] In one State, Maryland, which has always provided for waiver, the rate of court trial appears in some years to have reached 90%.[43] The Court recognizes the force of these statistics in stating,

> "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be

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the jury, whereby the public interest and the dignity of the law are swallowed up in a morbid, partisan or emotional personal interest in the parties immediately concerned."

[40] Williams, *supra*, at 302.

[41] For example, in the federal courts the right of the defendant to waive a jury was in doubt as recently as 1930, when it was established in *Patton* v. *United States*, 281 U. S. 276. It was settled in New York only in 1957, *People* v. *Carroll*, 7 Misc. 2d 581, aff'd, 3 N. Y. 2d 686.

[42] Kalven and Zeisel, *supra*, at 12–32.

[43] See Oppenheim, Waiver of Trial by Jury in Criminal Cases, 25 Mich. L. Rev. 695, 728.

> as fairly treated by a judge alone as he would be by a jury." *Ante*, p. 13.

I agree. I therefore see no reason why this Court should reverse the conviction of appellant, absent any suggestion that his particular trial was in fact unfair, or compel the State of Louisiana to afford jury trial in an as yet unbounded category of cases that can, without unfairness, be tried to a court.

Indeed, even if I were persuaded that trial by jury is a fundamental right in some criminal cases, I could see nothing fundamental in the rule, not yet formulated by the Court that places the prosecution of appellant for simple battery within the category of "jury crimes" rather than "petty crimes." Trial by jury is ancient, it is true. Almost equally ancient, however, is the discovery that, because of it,

> "the King's most loving Subjects are much travailed and otherwise encumbered in coming and keeping of the said six Weeks Sessions, to their Costs, Charges, Unquietness." [44]

As a result, through the long course of British and American history, summary procedures have been used in a varying category of lesser crimes as a flexible response to the burden jury trial would otherwise impose.

The use of summary procedures has long been widespread. British procedure in 1776 exempted from the requirement of jury trial

> "[v]iolations of the laws relating to liquor, trade and manufacture, labor, smuggling, traffic on the highway, the Sabbath, 'cheats,' gambling, swearing, small thefts, *assaults*, offenses to property, servants and seamen, vagabondage . . . . [and] at least a hundred more . . . ." (Emphasis added.)[45]

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[44] 37 Hen. VIII, c. 7.

[45] Franfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917,

Penalties for such offenses included heavy fines (with imprisonment until they were paid), whippings, and imprisonment at hard labor.[46]

Nor had the Colonies a cleaner slate, although practices varied greatly from place to place with conditions. In Massachusetts, crimes punishable by whipping (up to 10 strokes), the stocks (up to three hours), the ducking stool, and fines and imprisonment were triable to magistrates.[47] The decision of a magistrate could, in theory, be appealed to a jury, but a stiff recognizance made exercise of this right quite rare.[48] New York was somewhat harsher. For example, "anyone adjudged by two magistrates to be an idle, disorderly or vagrant person might be transported whence he came, and on reappearance be whipped from constable to constable with 31 lashes by each." [49] Anyone committing a criminal offense "under the degree of Grand Larceny" and unable to furnish bail within 48 hours could be summarily tried by three justices.[50] With local variations, examples could be multiplied.

The point is not that many offenses that English-speaking communities have, at one time or another, regarded as triable without a jury are more serious, and carry more serious penalties, than the one involved here. The point is rather that until today few people would have thought the exact location of the line mattered very much. There is no obvious reason why a jury trial is a requisite of fundamental fairness when the charge is robbery, and not a requisite of fairness when the same

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928. The source of the authors' information is Burn, Justice of the Peace (1776).

[46] Frankfurter and Corcoran, *supra*, at 930–934.

[47] See, *id.*, at 938–942.

[48] *Ibid.*

[49] Frankfurter and Corcoran, *supra*, at 945. They refer to the Vagrancy Act of 1721, 2 Col. L. (N. Y.) 56.

[50] Frankfurter and Corcoran, *supra*, at 945.

defendant, for the same actions, is charged with assault and petit theft.[51] The reason for the historic exception for relatively minor crimes is the obvious one: the burden of jury trial was thought to outweigh its marginal advantages. Exactly why the States should not be allowed to make continuing adjustments, based on the state of their criminal dockets and the difficulty of summoning jurors, simply escapes me.

In sum, there is a wide range of views on the desirability of trial by jury, and on the ways to make it most effective when it is used; there is also considerable variation from State to State in local conditions such as the size of the criminal caseload, the ease or difficulty of summoning jurors, and other trial conditions bearing on fairness. We have before us, therefore, an almost perfect example of a situation in which the celebrated dictum of Mr. Justice Brandeis should be invoked. It is, he said,

> "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . ." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280, 311 (dissenting opinion).

This Court, other courts, and the political process are available to correct any experiments in criminal procedure that prove fundamentally unfair to defendants. That is not what is being done today: instead, and quite without reason, the Court has chosen to impose upon every State one means of trying criminal cases; it is a

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[51] The example is taken from Day, Petty Magistrates' Courts in Connecticut, 17 J. Crim. L. and Crimin., 343, 346–347, cited in Kalven and Zeisel, *supra*, at 17. The point is that the "huge proportion" of criminal charges for which jury trial has not been available in America, Puttkamer, Administration of Criminal Law 87–88, is increased by the judicious action of weary prosecutors.

good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise.

I would affirm the judgment of the Supreme Court of Louisiana.

EXHIBIT 31

SUPREME COURT OF THE UNITED STATES

No. 52.—OCTOBER TERM, 1967.

S. Edward Bloom, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[May 20, 1968.]

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner was convicted in an Illinois state court of criminal contempt and sentenced to imprisonment for 24 months for willfully petitioning to admit to probate a will falsely prepared and executed after the death of the putative testator. Petitioner made a timely demand for jury trial which was refused. Since in *Duncan* v. *Louisiana, ante,* p. —, the Constitution was held to guarantee the right to jury trial in serious criminal cases in state courts, we must now decide whether it also guarantees the right to jury trial for a criminal contempt punished by a two-year prison term.

I.

Whether federal and state courts may try criminal contempt cases without a jury has been a recurring question in this Court. Article III, § 2, of the Constitution provides that "[t]he Trial of all Crimes, except in cases of Impeachment, shall be by Jury . . . ." The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The Fifth and Fourteenth Amendments forbid both the Federal Government and the States from depriving any person of "life, liberty or property, without due process of law." Notwithstanding these provisions, until *United States* v. *Barnett,* 376 U. S. 681, rehearing denied, 377 U. S.

973 (1964), the Court consistently upheld the constitutional power of the state and federal courts to punish any criminal contempt without a jury trial. *Eilenbecker* v. *District Court of Plymouth County,* 134 U. S. 31, 36–39 (1890); *I. C. C.* v. *Brimson,* 154 U. S. 447, 488–489 (1894); *In re Debs,* 158 U. S. 564, 594–596 (1895); *Gompers* v. *United States,* 233 U. S. 604, 610–611 (1914); *Green* v. *United States,* 356 U. S. 165, 183–187 (1958).[1] These cases construed the Due Process Clause and the otherwise inclusive language of Article III and the Sixth Amendment as permitting summary trials in contempt cases because at common law contempt was tried without a jury and because the power of courts to punish for contempt without the intervention of any other agency was considered essential to the proper and effective functioning of the courts and to the administration of justice.

United States v. *Barnett, supra,* signaled a possible change of view. The Court of Appeals for the Fifth Circuit certified to this Court the question whether there was a right to jury trial in an impending contempt proceeding. Following prior cases, a five-man majority held that there was no constitutional right to jury trial in all contempt cases. Criminal contempt, intrinsically

[1] Many more cases have supported the rule that courts may punish criminal contempt summarily, or accepted that rule without question. See cases collected in *Green* v. *United States,* 356 U. S. 165, 191, n. 2 (1958) (concurring opinion); *United States* v. *Barnett,* 376 U. S. 681, 694, n. 12 (1964). The list of the Justices of this Court who have apparently subscribed to this view is long. See *Green* v. *United States, supra,* at 192.

The argument that the power to punish contempt was an inherent power of the courts not subject to regulation by Congress was rejected in *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.,* 266 U. S. 42, 65–67 (1924), which upheld the maximum sentence and jury trial provisions of the Clayton Act. Cf. Laremore, Constitutional Regulation of Contempt of Court, 13 Harv. L. Rev. 80 (1900).

and aside from the particular penalty imposed, was not deemed a serious offense requiring the protection of the constitutional guarantees of the right to jury trial. However, the Court put aside as not raised in the certification or firmly settled by prior cases, the issue whether a severe punishment would itself trigger the right to jury trial and indicated, without explication, that some members of the Court were of the view that the Constitution limited the punishment which could be imposed where the contempt was tried without a jury. 376 U. S., at 694–695 and n. 12.

Two years later, in *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), which involved a prison term of six months for contempt of a federal court, the Court rejected the claim that the Constitution guaranteed a right to jury trial in all criminal contempt cases. Contempt did not "of itself" warrant treatment as other than a petty offense; the six-month's punishment imposed permitted dealing with the case as a prosecution for "a petty offense, which under our decisions does not require a jury trial." 384 U. S. 373, 379–380 (1966). See *Callan* v. *Wilson*, 127 U. S. 540 (1888); *Schick* v. *United States*, 195 U. S. 65 (1904); *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937). It was not necessary in *Cheff* to consider whether the constitutional guarantees of the right to jury trial applied to a prosecution for a serious contempt. Now, however, because of our holding in *Duncan* v. *Louisiana*, *ante*, p. ——, that the right to jury trial extends to the States, and because of Bloom's demand for a jury in this case, we must once again confront the broad rule that all criminal contempts can be constitutionally tried without a jury. *Barnett* presaged a re-examination of this doctrine at some later time; that time has now arrived.

In proceeding with this task, we are acutely aware of the responsibility we assume in entertaining challenges

to a constitutional principle which is firmly entrenched and which has behind it weighty and ancient authority. Our deliberations have convinced us, however, that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial. We accept the judgment of *Barnett* and *Cheff* that criminal contempt is a petty offense unless the punishment makes it a serious one; but in our view, dispensing with the jury in the trial of contempts subjected to severe punishment represents an unacceptable construction of the Constitution, ". . . an unconstitutional assumption of powers by the [courts] which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 533 (1928) (Holmes, J., dissenting). The rule of our prior cases has strong, though sharply challenged, historical support; [2] but neither this circumstance nor the considera-

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[2] Blackstone's description of the common-law practice in contempt cases appears in 4 Commentaries on the Laws of England 286–288:

"The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves; for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.

. . . . . .

"If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party

tions of necessity and efficiency normally offered in defense of the established rule, justify denying a jury trial in serious criminal contempt cases. The Constitu-

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or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant instances of contempt, the attachment issues in the first instance; as it also does if no sufficient cause be shown to discharge; and thereupon the court confirms and makes absolute the original rule." And, see *id.*, at 280. A similar account is contained in 2 Hawkins, A Treatise of the Pleas of the Crown 4, 141 (2d ed. 1724).

Of course, "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. . . . undoubtedly the framers of the Constitution were familiar with it." *Schick* v. *United States*, 195 U. S. 65, 69 (1904).

Blackstone, however, was acutely aware that this practice was a significant departure from ordinary principles: "It cannot have escaped the attention of the reader that this method of making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance . . . ." 4 Blackstone, *supra*, at 287.

The unalloyed doctrine that by "immemorial usage" all criminal contempts could be tried summarily seems to derive from Mr. Justice (later Chief Justice) Wilmot's undelivered opinion in *The King* v. *Almon* (1765), first brought to public light by the posthumous publication of his papers, Wilmot, Notes 243 (1802), reprinted in 97 Eng. Rep. 94. Wilmot's opinion appears to have been the source of Blackstone's view, but did not become an authoritative part of the law of England until *Rex* v. *Clement*, 4 Barn. & Ald. 218, 233, 106 Eng. Rep. 918, 923 (K. B. 1821). Cf. *Roach* v. *Garvan*, 2 Atkyns 469, 26 Eng. Rep. 683 (Ch. 1742). See 8 Howell, State Trials 14, 22–23, 49–59 (1816), and the subsequent civil action, *Burdett* v. *Abbot*, 14 East 1, 138, 104 Eng. Rep. 501, 554 (K. B. 1811); 4 Taunt. 401, 128 Eng. Rep. 384 (Ex. 1812); 5 Dow 165, 202, 3 Eng. Rep. 1289, 1302 (H. L. 1817). The historical authenticity of this view has been vigorously challenged, initially by Solly-Flood, The Story of Prince Henry of Monmouth and Chief-Justice Gascoign, 3 Transactions of the Royal Historical Society (N. S.) 47, 61–64, 147–150 (1886). This led to the massive reappraisal of the contempt power undertaken by Sir John Fox: *The King* v. *Almon*, 24 L. Q. Rev. 184, 266 (1908); The Summary Process to Punish Contempt, 25 L. Q.

tion guarantees the right to jury trial in state court prosecutions for contempt just as it does for other crimes.

Rev. 238, 354 (1909); Eccentricities of the Law of Contempt of Court, 36 L. Q. Rev. 394 (1920); The Nature of Contempt of Court, 37 L. Q. Rev. 191 (1921); The Practice in Contempt of Court Cases, 38 L. Q. Rev. 185 (1922); The Writ of Attachment, 40 L. Q. Rev. 43 (1924); J. Fox, The History of Contempt of Court (1927). On contempt generally, see R. Goldfarb, The Contempt Power (1963).

Learned writers have interpreted Fox's work as showing that until the late 17th or early 18th centuries, apart from the extraordinary proceedings of the Star Chamber, English courts neither had, nor claimed, power to punish contempts, whether in or out of court, by summary process. Frankfurter & Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1042–1052 (1924). Cf. Oswald's Contempt of Court 3, n. (*g*) (Robertson ed. 1910). Fox's own appraisal of the evidence, however, seems to have been that prior to the 18th century there probably was no valid basis for summary punishment of a libel on the court by a stranger to the proceedings, but that summary punishment for contempts outside the court consisting in resistance to a lawful process or order of the court, or contumacious behavior by an officer of the court, was probably permissible. J. Fox, The History of Contempt of Court 4, 49–50, 98–100, 108–110, 208–209 (1927); Fox, The Summary Process to Punish Contempt, 25 L. Q. Rev. 238, 244–246 (1909). Although jury trials had been provided in some instances of contempt in the face of the court, Fox does not seem to have questioned that such contempts could be punished summarily. J. Fox, The History of Contempt of Court 50 (1927).

We do not find the history of criminal contempt sufficiently simple or unambiguous to rest rejection of our prior decisions entirely on historical grounds, particularly since the Court has been aware of Solly-Flood's and Fox's work for many years. See *Gompers* v. *United States*, 233 U. S. 604, 611 (1914); *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66–67 (1924); *Green* v. *United States*, 356 U. S. 165, 185, n. 18 (1958). In any event, the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution. Cf. *Thompson* v. *Utah*, 170 U. S. 343, 350 (1898).

II.

Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes:

> "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." *Gompers* v. *United States*, 233 U. S. 604, 610 (1914).[3]

Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates.

Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution

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[3] See also *New Orleans* v. *The Steamship Co.*, 20 Wall. 387, 392 (1874) ("[c]ontempt of court is a specific criminal offense"); *O'Neal* v. *United States*, 190 U. S. 36, 38 (1903) (an adjudication for contempt is "in effect a judgment in a criminal case"); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 336 (1904) (that criminal contempt proceedings are "criminal in their nature has been constantly affirmed"); *Michaelson* v. *United States ex rel. Chicago, St. P., M. & O. R. Co.*, 266 U. S. 42, 66 (1924) ("[t]he fundamental characteristics of both [crimes and criminal contempts] are the same"); *Green* v. *United States*, 356 U. S. 165, 201 (1958) (dissenting opinion) ("criminal contempt is manifestly a crime by every relevant test of reason or history"). The Court also held in *Bessette*, *supra*, at 335, that criminal contempt "cannot be considered an infamous crime."

apply. We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.

The court has long recognized the potential for abuse in exercising the summary power to imprison for contempt—it is an "arbitrary" power which is "liable to abuse." *Ex parte Terry,* 128 U. S. 289, 313 (1888). "[I]ts exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions." *Cooke* v. *United States,* 267 U. S. 517, 539 (1925).[4]

These apprehensions about the unbridled power to punish summarily for contempt are reflected in the march of events in both Congress and the courts since our Constitution was adopted. The federal courts were established by the Judiciary Act of 1789; § 17 of the Act provided that those courts "shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ." 1 Stat. 83. See *Anderson* v.

[4] "That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir." *Sacher* v. *United States,* 343 U. S. 1, 12 (1952). See also *Ex parte Hudgings,* 249 U. S. 378 (1919); *Nye* v. *United States,* 313 U. S. 33 (1941); *Cammer* v. *United States,* 350 U. S. 399 (1956).

Dunn, 6 Wheat. 204, 227–228 (1821). This open-ended authority to deal with contempt, limited only as to mode of punishment, proved unsatisfactory to Congress. Abuses under the 1789 Act culminated in the unsuccessful impeachment proceedings against James Peck, a federal district judge who had imprisoned and disbarred one Lawless for publishing a criticism of one of Peck's opinions in a case which was on appeal. The result was drastic curtailment of the contempt power in the Act of 1831, 4 Stat. 487. *Ex parte Robinson,* 19 Wall. 505, 510–511 (1874); *In re Savin,* 131 U. S. 267, 275–276 (1889). That Act limited the contempt power to misbehavior in the presence of the court or so near thereto as to obstruct justice; misbehavior of court officers in their official transactions; and disobedience or resistance to the lawful writ, process, order, or decree of the court.[5] This major revision of the contempt power in the federal sphere, which "narrowly confined" and "substantially curtailed" the authority to punish contempt summarily, *Nye* v. *United States,* 313 U. S. 33, 47–48 (1941), has continued to the present day as the basis for the general

[5] Section 1 of the Act of 1831 stated:

"That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." Fox concluded that the 1831 Act was in accord with the general common law of England. See Fox, The History of Contempt of Court 208 (1927). Section 2 of the Act provided for prosecution by the regular criminal procedures of those guilty of obstruction of justice. See generally, Nelles & King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 525 (1928).

power to punish criminal contempt.[6] 62 Stat. 701, 18 U. S. C. § 401.

The courts also proved sensitive to the potential for abuse which resides in the summary power to punish contempt. Before the 19th century was out, a distinction had been carefully drawn between contempts occurring within the view of the court, for which a hearing and formal presentation of evidence were dispensed with, and all other contempts where more normal adversary procedures were required. *Ex parte Terry,* 128 U. S. 289 (1888); *Ex parte Savin,* 131 U. S. 267 (1889). Later,

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[6] At a later date, when passing the Clayton Act, Congress focused its attention on conduct which was not only criminally contemptuous but which also constituted other crimes under federal or state law. Contempts of this nature, unless committed in the presence of the court or so near thereto as to obstruct justice, or unless they involved disobedience to a court writ, process, order, or decree in a case brought by the United States, were required to be tried to a jury, and the possible punishment was limited to six months, fine of $1,000, or both. 38 Stat. 738, 18 U. S. C. § 402. Circumscription of the contempt power was carried further in the Norris-LaGuardia Act, which extended the right to jury trial to contempt cases arising out of injunctions issued in labor disputes. 47 Stat. 72, 18 U. S. C. § 3692. The Civil Rights Act of 1957, 71 Stat. 638, 42 U. S. C. § 1995, provides a right to a *de novo* trial by jury to all criminal contemnors convicted in cases arising under the Act who are fined in excess of $300 or sentenced to imprisonment for more than 45 days, exception being made for contempts committed in the presence of the court or so near thereto as to obstruct justice, and misbehavior, misconduct, or disobedience of any officer of the court. The Civil Rights Act of 1964, 78 Stat. 268, 42 U. S. C. § 2000h, provides a right to jury trial in all proceedings for criminal contempt arising under the Act, and limits punishment to a fine of $1,000 or imprisonment for six months. Again exception is made for contempts committed in the presence of the court, or so near thereto as to obstruct justice, and for the misbehavior, misconduct, or disobedience of court officers. Proof of criminal *mens reas* is specifically required. See Goldfarb & Kurzman, Civil Rights V. Civil Liberties: The Jury Trial Issue, 12 U. C. L. A. L. Rev. 486, 496–506 (1965).

the Court could say "it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444 (1911). See *Michaelson* v. *United States*, 266 U. S. 42, 66 (1924). Chief Justice Taft speaking for a unanimous Court in *Cooke* v. *United States*, 267 U. S. 517, 537 (1925), said:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed."

Cf. *Blackmer* v. *United States*, 284 U. S. 421, 440 (1932). It has also been recognized that the defendant in criminal contempt proceedings is entitled to a public trial before an unbiased judge, *In re Oliver*, 333 U. S. 257 (1948); *Offutt* v. *United States*, 348 U. S. 11 (1954); see *Ungar* v. *Sarafite*, 376 U. S. 575 (1964); but cf. *Levine* v. *United States*, 362 U. S. 610 (1960).[7] In the federal system many of the procedural protections available to criminal contemnors are set forth in Fed. Rules Crim. Proc. 42.

Judicial concern has not been limited to procedure. In *Toledo Newspaper Co.* v. *United States*, 247 U. S.

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[7] It has also been held that a defendant in criminal contempt proceedings is eligible for executive pardon, *Ex parte Grossman*, 267 U. S. 87 (1925), and entitled to the protection of the statute of limitations, *Gompers* v. *United States*, 233 U. S. 604, 611–613 (1914); *Pendergast* v. *United States*, 317 U. S. 412 (1943).

402 (1918), the Court endorsed a broad construction of the language of the Act of 1831 permitting summary trial of contempts "so near [to the court] as to obstruct the administration of justice." It required only that the conduct have a "tendency to prevent and obstruct the discharge of judicial duty . . . ." *Id.*, at 419. See *Craig* v. *Hecht*, 263 U. S. 255, 277 (1923). This view proved aberrational and was overruled in *Nye* v. *United States*, 313 U. S. 33, 47–52 (1941), which narrowly limited the conduct proscribed by the 1831 Act to "misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business." *Id.*, at 52. Cf. *Toledo Newspaper Co.* v. *United States*, *supra*, at 422 (Holmes, J., dissenting). The congressional purpose to fence in the power of the federal courts to punish contempt summarily was further implemented in *Cammer* v. *United States*, 350 U. S. 399, 407–408 (1956). A lawyer, the Court held, "is not the kind of 'officer' who can be summarily tried for contempt under 18 U. S. C. § 401 (2)." In another development, the First Amendment was invoked to ban punishment for a broad category of arguably contemptuous out-of-court conduct. *Bridges* v. *California*, 314 U. S. 252 (1941); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Craig* v. *Harney*, 331 U. S. 367 (1947). Finally, over the years in the federal system there has been a recurring necessity to set aside punishments for criminal contempt as either unauthorized by statute or too harsh. *E. g.*, *Ex parte Robinson*, 19 Wall. 505 (1874); *United States* v. *United Mine Workers*, 330 U. S. 258 (1947); *Yates* v. *United States*, 355 U. S. 66 (1957).[8]

[8] Limitations on the maximum penalties for criminal contempt are common in the States. According to Note, Constitutional Law: The Supreme Court Constructs a Limited Right to Trial by Jury for Federal Criminal Contemnors, 1967 Duke L. J. 622, 654, n. 84, in 26 States the maximum penalty that can be imposed in the absence of a

This course of events demonstrates the unwisdom of vesting the judiciary with completely untrammeled power to punish contempt, and makes clear the need for effective safeguards against that power's abuse. Prosecutions for contempt play a significant role in the proper functioning of our judicial system; but despite the important values which the contempt power protects, courts and legislatures have gradually eroded the power of judges to try contempts of their own authority. In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases. Our experience teaches that convictions for criminal contempt, not infrequently resulting in extremely serious penalties, see *United States* v. *Barnett*, *supra*, at 751, are indistinguishable from those obtained under ordinary criminal laws. If the right to jury trial

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jury trial is six months or less, in three States a jury trial must be provided upon demand of the defendant, in three other States the maximum penalty cannot exceed one year (this group of States includes Illinois, however, which, as the present case demonstrates, has no such limitation), in 15 States there is either no limitation upon the maximum penalty which may be imposed, or else that maximum exceeds one year, and finally, in three States, while there are statutes relating to particular kinds of contempt, there are no general contempt provisions. Independent examination suggests that the available materials concerning the law of contempt in some States are such that precise computation is difficult. It is clear, however, that punishment for contempt is limited to one year or less in over half the States.

Most other Western countries seem to be highly restrictive of the latitude given judges to try their own contempts without a jury. See Jann, Contempt of Court in Western Germany, 8 Am. U. L. Rev. 34 (1959); Bigelow, Contempt of Court, 1 Crim. L. Q. 475 (1959); Pekelis, Legal Techniques and Political Ideologies: A Comparative Study, 41 Mich. L. Rev. 665 (1943). By contrast, there was no right of appeal against a conviction for criminal contempt in England until the Administration of Justice Act, 1960, 8 and 9 Eliz. 2, c. 65. See Harnon, Civil and Criminal Contempts of Court, 25 Mod. L. Rev. 179 (1962).

is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases.

III.

Nor are there compelling reasons for a contrary result. As we read the earlier cases in this Court upholding the power to try contempts without a jury, it was not doubted that the summary power was subject to abuse or that the right to jury trial would be an effective check. Rather, it seems to have been thought that summary power was necessary to preserve the dignity, independence, and effectiveness of the judicial process—"To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." *In re Debs*, 158 U. S. 565, 595 (1895). It is at this point that we do not agree: in our judgment, when serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the court.

We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.

We place little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily and are not persuaded that the additional time and expense possibly involved in submitting serious contempts to juries will seriously handicap

the effective functioning of the courts. We do not deny that serious punishment must sometimes be imposed for contempt, but we reject the contention that such punishment must be imposed without the right to jury trial. The goals of dispatch, economy, and efficiency are important, but they are amply served by preserving the power to commit for civil contempt and by recognizing that many contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution. When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power. In isolated instances recalcitrant or irrational juries may acquit rather than apply the law to the case before them. Our system has wrestled with this problem for hundreds of years, however, and important safeguards have been devised to minimize miscarriages of justice through the malfunctioning of the jury system. Perhaps to some extent we sacrifice efficiency, expedition, and low cost, but the choice in favor of jury trial has been made, and retained, in the Constitution. We see no sound reason in logic or policy not to apply it in the area of criminal contempt.

Some special mention of contempts in the presence of the judge is warranted. Rule 42 (a) of the Federal Rules of Criminal Procedure provides that "[a] criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." This rule reflects the common-law rule which is widely if not uniformly followed in the States. Although Rule 42 (a) is based in part on the premise that it is not necessary specially to present the facts of a contempt which occurred in the very presence of the judge, it also rests on the need to maintain order and a deliberative atmosphere in the courtroom. The power of a judge to quell disturbance cannot attend upon the

impaneling of a jury. There is, therefore, a strong temptation to make exception to the rule we establish today for disorders in the courtroom. We are convinced, however, that no such special rule is needed. It is old law that the guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty offenses. Only today we have reaffirmed that position. *Duncan* v. *Louisiana, ante,* at ——. By deciding to treat criminal contempt like other crimes insofar as the right to jury trial is concerned, we similarly place it under the rule that petty crimes need not be tried to a jury.

IV.

Petitioner Bloom was held in contempt of court for filing a spurious will for probate. At his trial it was established that the putative testator died on July 6, 1964, and that after that date Pauline Owens, a practical nurse for the decedent, engaged Bloom to draw and execute a will in the decedent's name. The will was dated June 21, 1964. Bloom knew the will was false when he presented it for admission in the Probate Division of the Circuit Court of Cook County. The State's Attorney of that county filed a complaint charging Bloom with contempt of court. At trial petitioner's timely motion for a jury trial was denied. Petitioner was found guilty of criminal contempt and sentenced to imprisonment for 24 months. On direct appeal to the Illinois Supreme Court, his conviction was affirmed. That court held that neither state law nor the Federal Constitution provided a right to jury trial in criminal contempt proceedings. 35 Ill. 2d 255, 220 N. E. 2d 475 (1966). We granted certiorari, 386 U. S. 1003 (1967).

Petitioner Bloom contends that the conduct for which he was convicted of criminal contempt constituted the crime of forgery under 38 Ill. Rev. Stat. § 17–3. Defendants tried under that statute enjoy a right to jury trial

and face a possible sentence of one to 14 years, a fine not to exceed $1,000, or both. Petitioner was not tried under this statute, but rather was convicted of criminal contempt. Under Illinois law no maximum punishment is provided for convictions for criminal contempt. *People* v. *Stollar,* 31 Ill. 2d 154, 201 N. E. 2d 97 (1964). In *Duncan* we have said that we need not settle "the exact location of the line between petty offenses and serious crimes" but that "a crime punishable by two years in prison is . . . a serious crime and not a petty offense." *Ante,* at ——. Bloom was sentenced to imprisonment for two years. Our analysis of *Barnett, supra,* and *Cheff* v. *Schnackenberg, supra,* makes it clear that criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved. Under the rule in *Cheff,* when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense. See, *ante,* p. ——, n. 35. Under this rule it is clear that Bloom was entitled to the right to trial by jury, and it was constitutional error to deny him that right. Accordingly, we reverse and remand for proceedings not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1967.

S. Edward Bloom, Petitioner, *v.* State of Illinois.	On Writ of Certiorari to the Supreme Court of Illinois.

[May 20, 1968.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

I dissent for the reasons expressed in my dissenting opinion in *Duncan* v. *Louisiana, ante,* p. —, and in my concurring and dissenting opinion in *Cheff* v. *Schnackenberg,* 384 U. S. 373, 380. See also *United States* v. *Barnett,* 376 U. S. 681; *Green* v. *United States,* 356 U. S. 165.

This case completes a remarkable circle. In *Duncan, ante,* the Court imposed on the States a rule of procedure that was neither shown to be fundamental to procedural fairness nor held to be part of the originally understood content of the Fourteenth Amendment. The sole justification was that the rule was found in the Bill of Rights. The Court now, without stating any additional reasons, imposes on the States a related rule that, as recently as *Cheff* v. *Schnackenberg, supra,* the Court declined to find in the Bill of Rights. That the words of Mr. Justice Holmes,* inveighing against a century of "unconstitutional assumption of [state] powers by the courts of the United States" in derogation of the central premise of our Constitution, should be invoked to support the Court's action here can only be put down to the vagaries of the times.

B. & W. Taxi Co. v. *B. & Y. Taxi Co.,* 276 U. S. 518, 532, at 533 (dissenting opinion, quoted *ante,* p. 4).

EXHIBIT 32

Mr. JUSTICE FRANKFURTER, concurring.

In joining the Court's opinion I deem it appropriate to add a few observations. Law is a social organism, and evolution operates in the sociological domain no less than in the biological. The vitality and therefore validity of law is not arrested by the circumstances of its origin. What Magna Carta has become is very different indeed from the immediate objects of the barons at Runnymede. The fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions. Moreover, the most authoritative student of the history of contempt of court has impressively shown that "from the reign of Edward I it was established that the Court had power to punish summarily contempt committed * * * in the actual view of the Court," Fox, History of Contempt of Court, 49–52.

Whatever the conflicting views of scholars in construing more or less dubious manuscripts of the Fourteenth Century, what is indisputable is that from the foundation of the United States the constitutionality of the power to punish for contempt without the intervention of a jury has no been doubted. The First Judiciary Act conferred such a power on the federal courts in the very act of their establishment, 1 Stat. 73, 83, and of the Judiciary Committee of eight that reported the bill to the Senate, five members including the chairman, Senator, later to be Chief Justice, Ellsworth, had been delegates to the Constitutional Convention. In the First Congress itself no less than nineteen members, including Madison who contemporaneously introduced the Bill of Rights, had been delegates to the Convention. And when an abuse under this power manifested itself, and led Congress to define more explicitly the summary power vested in the courts, it did not remotely deny the existence of the power bnt merely defined the conditions for its exercise more clearly, in an Act "declaratory of the law concerning contempts of court." Act of Mar. 2, 1831, 4 Stat. 487. Although the judge who had misused the power was impeached, and Congress defined the power more clearly, neither the proponents of the reform nor Congress in its corrective legislation suggested that the established law be changed by making the jury part of the procedure for the punishment of criminal contempt. This is more significant in that such a proposal had only recently been put before Congress as part of the draft penal code of Edward Livingston of Louisiana.

Nor has the constitutionality of the power been doubted by this Court throughout its existence. In at least two score cases in this Court, not to mention the vast mass of decisions in the lower federal courts, the power to punish summarily has been accepted without question. It is revelant to call the roll of the Justices, not including those now sitting, who thus sustained the exercise of this power:

Washington	Gray	Pitney
Marshall	Blatchford	McReynolds
Johnson	L. Q. C. Lamar	Brandeis
Livingston	Fuller	Clarke
Todd	Brewer	Taft
Story	Brown	Sutherland
Duval	Shiras	Butler
Clifford	H. E. Jackson	Sanford
Swayne	White	Stone
Miller	Peckham	Roberts
Davis	McKenna	Cardozo
Field	Holmes	Reed
Strong	Day	Murphy
Bradley	Moody	R. H. Jackson
Hunt	Lurton	Rutledge
Waite	Hughes	Vinson
Harlan	Van Devanter	Minton[3]
Matthews	J. R. Lamar	

[3] Beginning with *Ex parte Robinson*, 19 Wall. 505, and *In re Chiles*, 22 Wall. 157, this list includes every Justice who sat on the Court since 1874, with the exception of Mr. Justice Woods (1881–1887), and Mr. Justice Byrnes (1941–1942).

To be sure, it is never too late for this Court to correct a misconception in an occasional decision, even on a rare occasion to change a rule of law that may have long persisted but also have long been questioned and only fluctuatingly applied. To say that everybody on the Court has been wrong for 150 years and that that which has been deemed part of the bone and sinew of the law should now be extirpated is quite another thing. Decision-making is not a mechanical process, but neither is this Court an originating lawmaker. The admonition of Mr. Justice Brandeis that we are not a third branch of the Legislature should never be disregarded. Congress has seen fit from time to time to qualify the power of summary punishment for contempt that it gave the federal courts in 1789 by requiring in explicitly defined situations that a jury be associated with the court in determining whether there has been a contempt. See, *e.g.*, 18 U.S.C. § 3691; Civil Rights Act of 1957, 71 Stat. 634, 638, 42 U.S.C.A. § 1995. It is for Congress to extend this participation of the jury, whenever it sees fit to do so, to other instances of the exercise of the power to punish for contempt. It is not for this Court to fashion a wholly novel constitutional doctrine that would require such participation whatever Congress may think on the matter, and in the teeth of an unbroken legislative and judicial history from the foundation of the Nation.

EXHIBIT 33

MIRANDA V. ARIZONA: A DECISION BASED ON EXCESSIVE AND VISIONARY SOLICITUDE FOR THE ACCUSED

(Remarks of Senator Sam Ervin, Jr. (Democrat, North Carolina), to the National Association of Railroad Trial Counsel at White Sulpbur Springs, W. Va., on Aug. 22, 1966.)

In its recent five-to-four decision in *Miranda* v. *Arizona*, 384 U.S. 436, the Supreme Court reversed State Court convictions for kidnapping, rape, and robbery, and a Federal Court conviction for robbery on the ground that they were based upon voluntary confessions made by the accused while they were being questioned by law enforcement officers who had them in custody. As a result of the decision, some self-confessed criminals may go free.

While none of the convictions was for murder, the decision calls to mind Daniel Webster's aphorism: "Every unpunished murder takes away something from the security of every man's life."

I wish to make some observations concerning the majority decision in the *Miranda Case*, and its impact upon constitutional government and the capacity of our society to protect its law-abiding members from those who commit murder, rape, robbery, and otber crimes.

In so doing, I sball exercise a right vouchsafed to all Americans by these words of the late Chief Justice Harlan F. Stone:

"Where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of tbeir action, and fearless comment upon it."

The Constitution of the United States makes these fundamental principles as clear as the noonday sun in a cloudless sky:

1. The power to amend the Constitution of the United States, which is the power to change its meaning, belongs to Congress and tbe States, and not to the Supreme Court.

2. The legislative power of tbe United States, which is the power to prescribe rules of conduct for the people of the United States, belongs to Congress, and not to the Supreme Court.

3. The Supreme Court has no power in respect to the Constitution and laws of the United States except the power to interpret them, whicb is merely the power to ascertain and give effect to their meaning.

4. The power to amend their Constitutions belongs to the respective States and their people, and not to the Supreme Court.

5. The legislative power of the States, which is the power to prescribe rules of conduct for their people, belongs to the law-making bodies of the respective States, and not to tbe Supreme Court.

6. The Supreme Court has no power in respect to the Constitution and laws of the States except to interpret them for the purpose of determining whether they conflict with the Constitution of tbe United States.

Moreover, there is not a syllable in the phraseology of the Constitution of the United States which is not in accord with these self-evident truths:

1. The laws relating to crime and criminal procedure were made to protect society from those who commit murder, rape, robbery, and other offenses, and not to free self-confessed criminals.

2. The most convincing evidence of the guilt of the accused in a criminal case is his own voluntary confession that he committed the crime with which he stands charged.

My love for the law disables me to pay homage to deviations from constitutional principles and self-evident truths, even when Supreme Court justices are responsible for the deviations. As a consequence, it constrains me to say that the majority decision in the *Miranda Case* is incompatible with the six constitutional principles which have been enumerated, and the two self-evident truths which have been stated.

I disgress momentarily to point out onr country's present plight in respect to crime.

Crime is rampant and rising in our land. Since 1960, the volume of crime in the United States has risen 46 percent while the population has grown only 8 percent. The tragedy implicit in these figures is heightened by the FBI study of offenders, which reveals that over 48 percent of them repeat their offenses within two years after being released upon a prior charge.

I state in epitome the statistics relating to crimes committed in the United States dnring 1965. Serious crimes: 2,780,000, an increase of 6 percent over 1964. Murders: 9,850, an increase of 6 percent over 1964. Forcible rapes: 22,470, an increase of 9 percent over 1964. Robberies: 118,920, an increase of 6 percent over 1964. Aggravated assaults: 206,700, an increase of 6 percent over 1964. Burglaries: 1,173,200, an increase of 6 percent over 1964. Grand larcenies: 762,-400, an increase of 8 percent over 1964. Automobile tbefts: 486,600, an increase of 5 percent over 1964.

This catalog of crime justifies certain conclusions concerning the hour. It is no time for judges to allow an excessive and visionary solicitude for the accused to blind their eyes to the reality that the victims of crime and society itself are as much entitled to justice as the accused. It is likewise no time for judges to let an excessive and visionary solicitude for the accused prompt them to usurp and exercise power they do not possess and invent new rules to turn loose upon society self-confessed criminals.

The *Miranda Case* is the latest step in the journey which some Supreme Court Justices began in *McNabb* v. *U.S.*, 318 U.S. 332, and *Mallory* v. *U.S.*, 354 U.S. 449, and continued in *Escobedo* v. *Illinois*, 378 U.S. 478.

The dissent of Jnstice White in the *Escobcdo Casc* may reveal the purpose of the journey. He said:

"The decision is thus another major step in the direction of the goal which the court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of a crime, whether involuntarily made or not."

The rulings in the *McNabb* and *Mallory Cases* are not based upon constitutional grounds. In those cases, the court seized upon a rule of criminal procedure applicable solely to arresting officers, converted it into a rule of evidence, and held that the rule as thus converted barred voluntary confessions made hy the accused during a period of unnecessary delay between arrest and arraignment. Hence, the rulings in the *McNabb* and *Mallory Cases* can be nullified by a simple congressional enactment.

It is otherwise, however, with respect to the rulings in the *Escobedo* and *Miramda Cases*. It will reqnire either some judicial repentance or a constitutional amendment to protect the American people from the consequences of these rulings.

The *Escobedo Case* illustrates the truth that hard cases are the quicksands of sound law. In it, the court considers the provision of the Sixth Amendment, which specifies that "in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense," and holds by a five-to-four vote that the right to have tbe assistance of counsel for one's defense established hy it antedates the beginning of a criminal prosecution, and arises

whenever a law enforcement officer begins to suspect that a person in his custody might be the perpetrator of an unsolved crime which he is investigating.

The decision of the majority in the *Miranda Case* stamps with approval the *Escobedo Case's* ruling in respect to the Sixth Amendment right to have the assistance of counsel for one's defense. After so doing, the majority opinion proceeds to hold that no matter how spontaneous it may be, and no matter how intelligent or versed in law its maker may be, no voluntary confession made by a suspect in custody while being questioned by a Federal or State law enforcement officer investigating an unsolved crime can be admitted in evidence in any Federal or State Court, unless the law enforcement officer strictly observes the newly invented requirements which are laid down in the *Miranda Case*, and which did not even exist until the majority opinion in that case was written. The majority decision undertakes to justify this holding by asserting that these requirements are implicit in the Fifth Amendment privilege against self-incrimination.

According to these newly invented requirements, the suspect in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation."

The requirements provide, moreover, that even if the specified warnings are given, no subsequent voluntary confession of the suspect can be received in evidence in any court unless his attorney is present when it is made or unless he waives the rights enumerated in the warning before making it. And the requirements further prescribe that the suspect can waive such rights only by expressly saying that he "is willing to make a statement and does not want an attorney." And even in that event the voluntary confession is inadmissable unless it "closely" follows the express waiver.

The majority decisions in the *Escobedo* and *Miranda Cases* in respect to the Sixth Amendment right to have the assistance of counsel for one's defense are repugnant to the words of the Constitution and all prior cases constrning them. Accordiug to the words of the Constitution, the Sixth Amendment right to have the assistance of counsel for one's defense does not exist except in a criminal prosecution, and hence cannot possibly arise until a criminal prosecution is commenced. A criminal prosecution is a prosecution in a court of justice in the name of government against an individual charged with crime and involves a determination of his guilt or innocence. This being true, the informal questioning of a suspect in custody by a law enforcement officer cannot be rightly equated with a criminal prosecution.

While Congress and State Legislatures may enact statutes applicable in their respective jurisdictions which enlarge the right of an individual to have the assistance of counsel, the Supreme Court is powerless to add to or take from the scope of the constitutional right to have the assistance of counsel as such right is defined in the Sixth Amendment. Accordingly, the majority decisions in the *Escobedo* and *Miranda Cases* represent an attempt to change the meaning of the Sixth Amendment.

The Supreme Court virtually confesses this to be so in the subsequent case of *Johnson* v. *New Jersey*, hy refusing to apply the ruling in the *Escobedo Case* to cases antedating it.

The majority decision in the *Miranda Case* does even more violence to the Fifth Amendment privilege against self-incrimination.

This constitutional provision had its origin in a rule of evidence which arose in England out of ahhorrence for the notorious Court of Star Chamber, which actually forced men to be witnesses against themselves on the trial of criminal charges against them. It has been incorporated into the constitutions of virtnally every state in the Union.

It seems approprate to note that the *Miranda Case* has nothing to do with involuntary confessions. Involuntary confessions have been inadmissible in criminal cases in Federal and State courts since the founding of the Republic. It is needless to inquire why this is so. It seems appropriate to observe, however, that involuntary confessions are barred from evidence in criminal cases in state courts not only by their own laws, but also by the due process clause of the Fourteenth Amendment.

The majority decision in the *Miranda Case* is without support in any prior decision. Moreover, it is in actual conflict with a number of prior decisions which expressly reject arguments of counsel for accused that requirements similar to those invented in the *Miranda Case* ought to bar the admission of voluntary confessions. The majority decision in the *Miranda Case* lacks validity for these three reasons:

1. The language of the Fifth Amendment privilege against self-incrimination is inapplicable to voluntary confessions.

2. The precedents and the writings of legal scholars are to the effect that the privilege against self-incrimination has no relation to voluntary confessions.

3. The history of the privilege against self-incrimination shows that it has nothing to do with voluntary confessions.

The dissenting opinions of Justices Clark, Harlan, Stewart, and White in the *Miranda Case* elaborate these reasons with convincing force. Consequently, I will forego detailed discussion of them and content myself with making some brief comments upon the first of them.

The Fifth Amendment privilege against self-incrimination is expressed in these words: "No person shall be compelled in any criminal case to be a witness against himself."

These words apply only to compelled or forced testimony. For this reason, they cannot be rightly applied to any voluntary confession made under any circumstances because voluntary confessions are voluntarily made. Besides, the constitutional privilege against self-incrimination belongs only to a witness, i.e., one who gives evidence in a cause before a court or other tribunal. Moreover, the privilege attaches itself only to a witness in a specified cause, i.e., a criminal case or its equivalent. Manifestly, the interrogation of a suspect in custody by a law enforcement officer investigating an unsolved crime does not make the suspect a witness before a court or tribunal in a criminal case.

While the Congress and State Legislatures may enact statutes applicable within their respective jurisdictions which establish conditions precedent to the admissibility of voluntary confessions similar to those delineated in the majority opinion in the *Miranda Case*, the Supreme Court cannot rightly do so because it is not authorized by the Constitution to change the privilege against self-incrimination as such privilege is defined in the Fifth Amendment.

Consequently, the majority decision in the *Miranda Case* represents an attempt to amend the Constitution of the United States and the constitutions of the states, and to make laws for the United States and the states. The majority opinion really admits this to be true by speaking of the newly created requirements as "the principles announced today" and "the system of warning we delineate today."

The Supreme Court corroborated this admission of the majority in the *Miranda Case* by subsequently holding in the *Johnson Case* that the newly invented requirements, allegedly based upon a constitutional provision dating back to June 15, 1790, have no application whatever to cases begun prior to June 22, 1964.

When one reads and ponders the majority opinion in the *Miranda Case*, he is impelled to the abiding conviction that its rationale is as follows: That despite any protestations to the contrary, the Supreme Court Justices who join in the majority opinion believe that a substantial percent of all law enforcement officers, who investigate unsolved crimes and interrogate suspects in custody, resort to undue pressure or trickery to obtain confessions from the suspects; that in consequence, suspects in custody need protection from the law enforcement officers

who interrogate them; and that the most efficacious way to give suspects in custody the needed protection is to impose upon law enforcement officers conditions precedent to interrogation which will prevent or substantially deter the suspects from making any confession, or from even making any statements asserting their innocence.

I submit that this rationale is unjust to the thousands of dedicated and honorable law enforcement officers who seek to protect the lives, the bodies, the habitations, and the other property of our people in all areas of our land from criminal depredations. All of us should remember that each year scores of law enforcement officers die in the performance of their duty in order that we might live.

To be sure some law enforcement officers abuse their authority. Some judges do likewise—especially when they attempt to amend constitutions and make laws rather than to interpret them. Hamstringing all law enforcement officers because some of them err is about on a par with padlocking all courtrooms because some judges err.

Despite some intimations in the majority opinion that confessions constitute unreliable testimony, there is no proof that they are more unreliable than other testimony which is daily received without complaint in our courts. I assert without fear of successful contradiction that experience in the administration of justice makes this plain: The rule which excludes from evidence in criminal cases involuntary confessions, irrespective of whether they be true or false, is the only practical and reasonable way in which courts can deal with this problem.

No person can be convicted of crime in any court, Federal or State, unless the prosecution proves these two things beyond a reasonable doubt:

1. That a crime has been actually committed.
2. That the accused was the perpetrator of such crime.

The prosecution must prove the first of these things, which the law calls the *corpus delicti*, by independent evidence. It is permissible to use a voluntary confession of the accused only as evidence that he was the perpetrator of the crime established beyond a reasonable doubt by other testimony.

I repeat what I have said before: The most convincing evidence of the guilt of the accused in a criminal case is his own voluntary confession that he committed the crime with which he stands charged.

The trial judge, who sees the witnesses and observes their demeanor upon the stand, ordinarily has little difficulty in determining whether a confession offered in evidence was voluntarily or involuntarily made.

When I had the privilege of serving as an Associate Justice of the Supreme Court of North Carolina, I had occasion to describe the simple procedure by which the trial judge determines this question.

I take the liberty of quoting from an opinion which I wrote at that time in *State* v. *Rogers*, 233 N.C. 390, 64 S.E.2d 572, 28 A.L.R.2d 1104:

"When the admissibility of a confession is challenged on the ground that it was induced by improper means, the trial judge is required to determine the

question of fact whether it was or was not voluntary before he permits it to go to the jury. In making this preliminary inquiry, the judge should afford both the prosecution and the defense a reasonable opportunity to present evidence in the absence of the jury showing the circumstances under which the confession was made. When the trial court finds upon a consideration of all the testimony offered on the preliminary inquiry that the confession was voluntarily made, his finding is not subject to review, if it is supported by any competent evidence."

The rule which prevails in most jurisdictions that the finding of the trial judge on this question is not subject to review if it is supported by any competent evidence is exceedingly wise. He has an opportunity to see the witnesses and judge their credibility. This opportunity is denied to an appellate court which is compelled to act upon the basis of printed testimony. When the testimony of the witnesses is reduced to cold type, it is not easy to distinguish the testimony of an Ananias from that of a George Washington.

Justice Harlan appraised the majority decision in the *Miranda Case* aright when he declared in his dissenting opinion that "the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large."

It has always been recognized in our country that the questioning of suspects in custody by law enforcement officers investigating unsolved crimes constitutes a legitimate instrument of law enforcement. By the judicious use of this instrument of law enforcement untold thousands of innocent suspects have been annually freed without trial, and untold thousands of guilty suspects, who would have otherwise gone unwhipped of justice, have been annually brought to judgment.

The drastic limitations, which the majority opinion in the *Miranda Case* places upon the interrogation process, are well designed to induce suspects in custody to remain silent when law enforcement officers undertake to question them concerning unsolved crimes and thus destroy the effectiveness of the interrogation process itself.

As the inevitable consequence of these drastic limitations, the number of innocent suspects freed without trial will diminish, the detention of innocent suspects will be prolonged, and the number of criminal trials will be multiplied.

Moreover, multitudes of guilty suspects will escape conviction and punishment, and be turned loose upon society to repeat their crimes simply because many crimes cannot be solved without confessions. This is particularly true of burglaries, grand larcenies, and automobile thefts, which are frequently committed in secret, and of forcible rapes, which are frequently committed under such circumstances that the victim cannot identify her assailant. Like observations are true of many felony-murders, robberies, and aggravated assaults.

The country ought not to suffer these harmful consequences. As a member of the United States Senate, I shall try to do something to avert them. I will ask the Congress to submit to the States a proposed constitutional amendment which will provide that in the absence of congressional or State legislation to the contrary, the sole test of the admissibility of confessions in criminal cases shall be

whether or not they were voluntarily made, and that the Supreme Court cannot reverse the ruling of a trial judge admitting a confession as voluntarily made, if such ruling is supported by any competent evidence.

I may not succeed in my purpose because the submission of a proposed constitutional amendment to the States requires the vote of two-thirds of both Houses of Cougress, and because many Senators and Congressmen seem to believe that judicial aberrations are sacrosanct and ought to be as unalterable as the laws of tbe Medes and the Persians.

I shall nevertheless try because I know these things to be true: Enough has been done for those who murder and rape and rob. It is time to do sometbing for those who do not wish to be murdered or raped or robbed.

EXHIBIT 34

HARPER ET AL. *v.* VIRGINIA BOARD OF ELECTIONS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 48. Argued January 25–26, 1966.—Decided March 24, 1966.*

Appellants, Virginia residents, brought this action to have Virginia's poll tax declared unconstitutional. The three-judge District Court dismissed the complaint on the basis of *Breedlove* v. *Suttles*, 302 U. S. 277. *Held:* A State's conditioning of the right to vote on the payment of a fee or tax violates the Equal Protection Clause of the Fourteenth Amendment. *Breedlove* v. *Suttles, supra, pro tanto* overruled. Pp. 665–670.

(a) Once the franchise is granted to the electorate, lines which determine who may vote may not be drawn so as to cause invidious discrimination. Pp. 665–667.

(b) Fee payments or wealth, like race, creed, or color, are unrelated to the citizen's ability to participate intelligently in the electoral process. Pp. 666–668.

(c) The interest of the State, when it comes to voting registration, is limited to the fixing of standards related to the applicant's qualifications as a voter. P. 668.

(d) Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. P. 668.

(e) Classifications which might impinge on fundamental rights and liberties—such as the franchise—must be closely scrutinized. P. 670.

240 F. Supp. 270, reversed.

Allison W. Brown, Jr., argued the cause for appellants in No. 48. With him on the brief were *Lawrence Speiser* and *Philip Schwartz*.

Robert L. Segar and *J. A. Jordan, Jr.*, argued the cause for appellant in No. 655. With them on the brief were *Max Dean* and *Len W. Holt*.

*Together with No. 655, *Butts* v. *Harrison, Governor of Virginia, et al.*, also on appeal from the same court.

George D. Gibson argued the cause for appellees in both cases. With him on the briefs were *Robert Y. Button*, Attorney General of Virginia, *Richard N. Harris*, Assistant Attorney General, and *Joseph C. Carter, Jr.*

Solicitor General Marshall argued the cause for the United States, as *amicus curiae* in No. 48, by special leave of Court, urging reversal. With him on the brief were *Attorney General Katzenbach, Assistant Attorney General Doar, Ralph S. Spritzer, David Rubin, James L. Kelley* and *Richard A. Posner.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These are suits by Virginia residents to have declared unconstitutional Virginia's poll tax.[1] The three-judge

[1] Section 173 of Virginia's Constitution directs the General Assembly to levy an annual poll tax not exceeding $1.50 on every resident of the State 21 years of age and over (with exceptions not relevant here). One dollar of the tax is to be used by state officials "exclusively in aid of the public free schools" and the remainder is to be returned to the counties for general purposes. Section 18 of the Constitution includes payment of poll taxes as a precondition for voting. Section 20 provides that a person must "personally" pay all state poll taxes for the three years preceding the year in which he applies for registration. By § 21 the poll tax must be paid at least six months prior to the election in which the voter seeks to vote. Since the time for election of state officials varies (Va. Code §§ 24–136, 24–160—24–168; *id.*, at § 24–22), the six months' deadline will vary, election from election. The poll tax is often assessed along with the personal property tax. Those who do not pay a personal property tax are not assessed for a poll tax, it being their responsibility to take the initiative and request to be assessed. Va. Code § 58–1163. Enforcement of poll taxes takes the form of disenfranchisement of those who do not pay, § 22 of the Virginia Constitution providing that collection of delinquent poll taxes for a particular year may not be enforced by legal proceedings until the tax for that year has become three years delinquent.

District Court, feeling bound by our decision in *Breedlove* v. *Suttles*, 302 U. S. 277, dismissed the complaint. See 240 F. Supp. 270. The cases came here on appeal and we noted probable jurisdiction. 380 U. S. 930, 382 U. S. 806.

While the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution (*United States* v. *Classic*, 313 U. S. 299, 314–315), the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee. Cf. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113.[2] We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. That is to say, the right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Lassiter* v. *Northampton Election Board*, 360 U. S. 45, 51. We were speaking there of a state literacy test which we sustained, warning that the result would be different if a literacy test, fair on its face, were used to discriminate

[2] Judge Thornberry, speaking for the three-judge court which recently declared the Texas poll tax unconstitutional, said: "If the State of Texas placed a tax on the right to speak at the rate of one dollar and seventy-five cents per year, no court would hesitate to strike it down as a blatant infringement of the freedom of speech. Yet the poll tax as enforced in Texas is a tax on the equally important right to vote." 252 F. Supp. 234, 254 (decided February 9, 1966).

against a class.[3] *Id.*, at 53. But the *Lassiter* case does not govern the result here, because, unlike a poll tax, the "ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot." *Id.*, at 51.

We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.[4] Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate. Thus without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot (see *Pope* v. *Williams*, 193 U. S. 621), we

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[3] We recently held in *Louisiana* v. *United States*, 380 U. S. 145, that a literacy test which gave voting registrars "a virtually uncontrolled discretion as to who should vote and who should not" (*id.*, at 150) had been used to deter Negroes from voting and accordingly we struck it down. While the "Virginia poll tax was born of a desire to disenfranchise the Negro" (*Harman* v. *Forssenius*, 380 U. S. 528, 543), we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end.

[4] Only a handful of States today condition the franchise on the payment of a poll tax. Alabama (Ala. Const., §§ 178, 194, and Amendments 96 and 207; Ala. Code Tit. 17, § 12) and Texas (Tex. Const., Art. 6, § 2; Vernon's Ann. Stat., Election Code, Arts. 5.02, 5.09) each impose a poll tax of $1.50. Mississippi (Miss. Const., §§ 241, 243; Miss. Code §§ 3130, 3160, 3235) has a poll tax of $2. Vermont has recently eliminated the requirement that poll taxes be paid in order to vote. Act of Feb. 23, 1966, amending Vt. Stat. Ann. Tit. 24, § 701.

As already noted, note 2, *supra*, the Texas poll tax was recently declared unconstitutional by a three-judge United States District Court. *United States* v. *Texas*, 252 F. Supp. 234 (decided February 9, 1966). Likewise, the Alabama tax. *United States* v. *Alabama*, 252 F. Supp. 95 (decided March 3, 1966).

held in *Carrington* v. *Rash*, 380 U. S. 89, that a State may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services. "By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.*, at 96. And see *Louisiana* v. *United States*, 380 U. S. 145. Previously we had said that neither homesite nor occupation "affords a permissible basis for distinguishing between qualified voters within the State." *Gray* v. *Sanders*, 372 U. S. 368, 380. We think the same must be true of requirements of wealth or affluence or payment of a fee.

Long ago in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370, the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Recently in *Reynolds* v. *Sims*, 377 U. S. 533, 561–562, we said, "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." There we were considering charges that voters in one part of the State had greater representation per person in the State Legislature than voters in another part of the State. We concluded:

> "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people.' The Equal Protection Clause

demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." *Id.*, at 568.

We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license,[5] it can demand from all an equal poll tax for voting. But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race (*Korematsu* v. *United States*, 323 U. S. 214, 216), are traditionally disfavored. See *Edwards* v. *California*, 314 U. S. 160, 184–185 (Jackson, J., concurring); *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination (*Skinner* v. *Oklahoma*, 316 U. S. 535, 541) that runs afoul of the Equal Protection Clause. Levy "by the poll," as stated in

[5] Maine has a poll tax (Maine Rev. Stat. Ann. Tit. 36, § 1381) which is not made a condition of voting; instead, its payment is a condition of obtaining a motor vehicle license (Maine Rev. Stat. Ann. Tit. 29, § 108) or a motor vehicle operator's license. *Id.*, § 584.

Breedlove v. *Suttles, supra,* at 281, is an old familiar form of taxation; and we say nothing to impair its validity so long as it is not made a condition to the exercise of the franchise. *Breedlove* v. *Suttles* sanctioned its use as "a prerequisite of voting." *Id.*, at 283. To that extent the *Breedlove* case is overruled.

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner* v. *New York,* 198 U. S. 45, 75). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy* v. *Hogan,* 378 U. S. 1, 5–6. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy* v. *Ferguson,* 163 U. S. 537. Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear.[6] When, in 1954—more than a half-century later—we repudiated the "separate-but-equal" doctrine of *Plessy*

[6] *E. g.*, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 U. S., at 551.

as respects public education [7] we stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written." *Brown* v. *Board of Education*, 347 U. S. 483, 492.

In a recent searching re-examination of the Equal Protection Clause, we held, as already noted, that "the opportunity for equal participation by all voters in the election of state legislators" is required.[8] *Reynolds* v. *Sims*, *supra*, at 566. We decline to qualify that principle by sustaining this poll tax. Our conclusion, like that in *Reynolds* v. *Sims*, is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires.

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. See, *e. g.*, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541; *Reynolds* v. *Sims*, 377 U. S. 533, 561–562; *Carrington* v. *Rash*, *supra*; *Baxstrom* v. *Herold*, *ante*, p. 107; *Cox* v. *Louisiana*, 379 U. S. 536, 580–581 (BLACK, J., concurring).

Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.

Reversed.

MR. JUSTICE BLACK, dissenting.

In *Breedlove* v. *Suttles*, 302 U. S. 277, decided December 6, 1937, a few weeks after I took my seat as a member

[7] Segregated public transportation, approved in *Plessy* v. *Ferguson*, *supra*, was held unconstitutional in *Gayle* v. *Browder*, 352 U. S. 903 (per curiam).

[8] Only MR. JUSTICE HARLAN dissented, while MR. JUSTICE CLARK and MR. JUSTICE STEWART each concurred on separate grounds.

of this Court, we unanimously upheld the right of the State of Georgia to make payment of its state poll tax a prerequisite to voting in state elections. We rejected at that time contentions that the state law violated the Equal Protection Clause of the Fourteenth Amendment because it put an unequal burden on different groups of people according to their age, sex, and ability to pay. In rejecting the contention that the law violated the Equal Protection Clause the Court noted at p. 281:

> "While possible by statutory declaration to levy a poll tax upon every inhabitant of whatsoever sex, age or condition, collection from all would be impossible for always there are many too poor to pay."

Believing at that time that the Court had properly respected the limitation of its power under the Equal Protection Clause and was right in rejecting the equal protection argument, I joined the Court's judgment and opinion. Later, May 28, 1951, I joined the Court's judgment in *Butler* v. *Thompson*, 341 U. S. 937, upholding, over the dissent of MR. JUSTICE DOUGLAS, the Virginia state poll tax law challenged here against the same equal protection challenges. Since the *Breedlove* and *Butler* cases were decided the Federal Constitution has not been amended in the only way it could constitutionally have been, that is, as provided in Article V [1] of the

[1] Article V of the Constitution provides:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner

Constitution. I would adhere to the holding of those cases. The Court, however, overrules *Breedlove* in part, but its opinion reveals that it does so not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy. From this action I dissent.

It should be pointed out at once that the Court's decision is to no extent based on a finding that the Virginia law as written or as applied is being used as a device or mechanism to deny Negro citizens of Virginia the right to vote on account of their color. Apparently the Court agrees with the District Court below and with my Brothers HARLAN and STEWART that this record would not support any finding that the Virginia poll tax law the Court invalidates has any such effect. If the record could support a finding that the law as written or applied has such an effect, the law would of course be unconstitutional as a violation of the Fourteenth and Fifteenth Amendments and also 42 U. S. C. § 1971 (a). This follows from our holding in *Schnell* v. *Davis*, 336 U. S. 933, affirming 81 F. Supp. 872 (D. C. S. D. Ala.); *Gomillion* v. *Lightfoot*, 364 U. S. 339; *United States* v. *Mississippi*, 380 U. S. 128; *Louisiana* v. *United States*, 380 U. S. 145. What the Court does hold is that the Equal Protection Clause necessarily bars all States from making payment of a state tax, any tax, a prerequisite to voting.

(1) I think the interpretation that this Court gave the Equal Protection Clause in *Breedlove* was correct. The mere fact that a law results in treating some groups differently from others does not, of course, automatically amount to a violation of the Equal Protection Clause.

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affect the first and fourth clauses in the Ninth Section of the First Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

To bar a State from drawing any distinctions in the application of its laws would practically paralyze the regulatory power of legislative bodies. Consequently "The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula." *Kotch* v. *River Port Pilot Comm'rs,* 330 U. S. 552, 556. Voting laws are no exception to this principle. All voting laws treat some persons differently from others in some respects. Some bar a person from voting who is under 21 years of age; others bar those under 18. Some bar convicted felons or the insane, and some have attached a freehold or other property qualification for voting. The *Breedlove* case upheld a poll tax which was imposed on men but was not equally imposed on women and minors, and the Court today does not overrule that part of *Breedlove* which approved those discriminatory provisions. And in *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, this Court held that state laws which disqualified the illiterate from voting did not violate the Equal Protection Clause. From these cases and all the others decided by this Court interpreting the Equal Protection Clause it is clear that some discriminatory voting qualifications can be imposed without violating the Equal Protection Clause.

A study of our cases shows that this Court has refused to use the general language of the Equal Protection Clause as though it provided a handy instrument to strike down state laws which the Court feels are based on bad governmental policy. The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not "irrational," "irrelevant," "unreasonable," "arbitrary," or "in-

vidious." [2] These vague and indefinite terms do not, of course, provide a precise formula or an automatic mechanism for deciding cases arising under the Equal Protection Clause. The restrictive connotations of these terms, however (which in other contexts have been used to expand the Court's power inordinately, see, *e. g.*, cases cited at pp. 728–732 in *Ferguson* v. *Skrupa*, 372 U. S. 726), are a plain recognition of the fact that under a proper interpretation of the Equal Protection Clause States are to have the broadest kind of leeway in areas where they have a general constitutional competence to act.[3] In view of the purpose of the terms to restrain the courts from a wholesale invalidation of state laws under the Equal Protection Clause it would be difficult to say that the poll tax requirement is "irrational" or "arbitrary" or works "invidious discriminations." State poll tax legislation can "reasonably," "rationally" and without an "invidious" or evil purpose to injure anyone be found to rest on a number of state policies including (1) the State's desire to collect its revenue, and (2) its belief that voters who pay a poll tax will be interested in furthering the State's welfare when they vote. Certainly it is rational to believe that people may be more likely to pay taxes if payment is a prerequisite to voting. And if history can be a factor in determining the "rationality" of discrimination in a state law (which we held it could in *Kotch* v. *River Port Pilot Comm'rs, supra*), then whatever may be our personal opinion, history is

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[2] See, *e. g.*, *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522; *Goesaert* v. *Cleary*, 335 U. S. 464; *Skinner* v. *Oklahoma*, 316 U. S. 535; *Minnesota* v. *Probate Court*, 309 U. S. 270; *Smith* v. *Cahoon*, 283 U. S. 553; *Watson* v. *Maryland*, 218 U. S. 173.

[3] "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 584 (Stone, J.).

on the side of "rationality" of the State's poll tax policy. Property qualifications existed in the Colonies and were continued by many States after the Constitution was adopted. Although I join the Court in disliking the policy of the poll tax, this is not in my judgment a justifiable reason for holding this poll tax law unconstitutional. Such a holding on my part would, in my judgment, be an exercise of power which the Constitution does not confer upon me.[4]

(2) Another reason for my dissent from the Court's judgment and opinion is that it seems to be using the old "natural-law-due-process formula"[5] to justify striking down state laws as violations of the Equal Protection Clause. I have heretofore had many occasions to express my strong belief that there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of

[4] The opinion of the Court, in footnote two, quotes language from a federal district court's opinion which implies that since a tax on speech would not be constitutionally allowed a tax which is a prerequisite to voting likewise cannot be allowed. But a tax or any other regulation which burdens and actually abridges the right to speak would, in my judgment, be a flagrant violation of the First Amendment's prohibition against abridgments of the freedom of speech which prohibition is made applicable to the States by the Fourteenth Amendment. Cf. *Murdock* v. *Pennsylvania*, 319 U. S. 105. There is no comparable specific constitutional provision absolutely barring the States from abridging the right to vote. Consequently States have from the beginning and do now qualify the right to vote because of age, prior felony convictions, illiteracy, and various other reasons. Of course the First and Fourteenth Amendments forbid any State from abridging a person's right to speak because he is under 21 years of age, has been convicted of a felony, or is illiterate.

[5] See my dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 90.

the Court at any given time believes are needed to meet present-day problems.[6] Nor is there in my opinion any more constitutional support for this Court to use the Equal Protection Clause, as it has today, to write into the Constitution its notions of what it thinks is good governmental policy. If basic changes as to the respective powers of the state and national governments are needed, I prefer to let those changes be made by amendment as Article V of the Constitution provides. For a majority of this Court to undertake that task, whether purporting to do so under the Due Process or the Equal Protection Clause amounts, in my judgment, to an exercise of power the Constitution makers with foresight and wisdom refused to give the Judicial Branch of the Government. I have in no way departed from the view I expressed in *Adamson* v. *California*, 332 U. S. 46, 90, decided June 23, 1947, that the "natural-law-due-process formula" under which courts make the Constitution mean what they think it should at a given time "has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."

The Court denies that it is using the "natural-law-due-process formula." It says that its invalidation of the Virginia law "is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires." I find no statement in the Court's opinion, however, which advances even a plausible argument as to why the alleged discriminations which might possibly be effected by Virginia's poll tax law are "irrational," "unreasonable," "arbitrary," or "invid-

[6] See for illustration my dissenting opinion in *Griswold* v. *Connecticut*, 381 U. S. 479, 507, and cases cited therein.

ious" or have no relevance to a legitimate policy which the State wishes to adopt. The Court gives no reason at all to discredit the long-standing beliefs that making the payment of a tax a prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government. The Court's failure to give any reasons to show that these purposes of the poll tax are "irrational," "unreasonable," "arbitrary," or "invidious" is a pretty clear indication to me that none exist. I can only conclude that the primary, controlling, predominant, if not the exclusive reason for declaring the Virginia law unconstitutional is the Court's deep-seated hostility and antagonism, which I share, to making payment of a tax a prerequisite to voting.

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be "shackled to the political theory of a particular era," and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society.[1]

[1] In *Brown* v. *Board of Education*, 347 U. S. 483, the Court today purports to find precedent for using the Equal Protection Clause to keep the Constitution up to date. I did not vote to hold segregation in public schools unconstitutional on any such theory. I thought when *Brown* was written, and I think now, that Mr. Justice Harlan was correct in 1896 when he dissented from *Plessy* v. *Ferguson*, 163 U. S. 537, which held that it was not a discrimination prohibited by the Equal Protection Clause for state law to segregate white and colored people in public facilities, there railroad cars. I did not join the opinion of the Court in *Brown* on any theory that segregation where practiced in the public schools denied equal protection in

It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided. Moreover, when a "political theory" embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.

The people have not found it impossible to amend their Constitution to meet new conditions. The Equal Protection Clause itself is the product of the people's desire to use their constitutional power to amend the Constitution to meet new problems. Moreover, the people, in §5 of the Fourteenth Amendment, designated the

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1954 but did not similarly deny it in 1868 when the Fourteenth Amendment was adopted. In my judgment the holding in *Brown* against racial discrimination was compelled by the purpose of the Framers of the Thirteenth, Fourteenth and Fifteenth Amendments completely to outlaw discrimination against people because of their race or color. See the *Slaughter-House Cases*, 16 Wall. 36, 71–72; *Nixon* v. *Herndon*, 273 U. S. 536, 541.

Nor does *Malloy* v. *Hogan*, 378 U. S. 1, stand as precedent for the amendatory power which the Court exercises today. The Court in *Malloy* did not read into the Constitution its own notions of wise criminal procedure, but instead followed the doctrine of *Palko* v. *Connecticut*, 302 U. S. 319, and made the Fifth Amendment's unequivocal protection against self-incrimination applicable to the States. I joined the opinion of the Court in *Malloy* on the basis of my dissent in *Adamson* v. *California*, *supra*, in which I stated, at p. 89:

"If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process."

governmental tribunal they wanted to provide additional rules to enforce the guarantees of that Amendment. The branch of Government they chose was not the Judicial Branch but the Legislative. I have no doubt at all that Congress has the power under § 5 to pass legislation to abolish the poll tax in order to protect the citizens of this country if it believes that the poll tax is being used as a device to deny voters equal protection of the laws. See my concurring and dissenting opinion in *South Carolina* v. *Katzenbach, ante,* p. 355. But this legislative power which was granted to Congress by § 5 of the Fourteenth Amendment is limited to Congress.[8] This Court had occasion to discuss this very subject in *Ex parte Virginia,* 100 U. S. 339, 345–346. There this Court said, referring to the fifth section of the Amendment:

> "All of the amendments derive much of their force from this latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. *It is the power of Congress which has been enlarged.* Congress is authorized *to enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is ap-

[8] But § 1 of the Fourteenth Amendment itself outlaws any state law which either as written or as applied discriminates against voters on account of race. Such a law can never be rational. "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right [to vote] set up in this case." *Nixon* v. *Herndon,* 273 U. S. 536, 541 (Holmes, J.).

> propriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." (Emphasis partially supplied.)

Thus § 5 of the Fourteenth Amendment in accordance with our constitutional structure of government authorizes the Congress to pass definitive legislation to protect Fourteenth Amendment rights which it has done many times, *e. g.*, 42 U. S. C. § 1971 (a). For Congress to do this fits in precisely with the division of powers originally entrusted to the three branches of government—Executive, Legislative, and Judicial. But for us to undertake in the guise of constitutional interpretation to decide the constitutional policy question of this case amounts, in my judgment, to a plain exercise of power which the Constitution has denied us but has specifically granted to Congress. I cannot join in holding that the Virginia state poll tax law violates the Equal Protection Clause.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

The final demise of state poll taxes, already totally proscribed by the Twenty-Fourth Amendment with respect to federal elections and abolished by the States themselves in all but four States with respect to state elections,[1] is perhaps in itself not of great moment. But the fact that the *coup de grace* has been administered by this Court instead of being left to the affected States or to the federal political process[2] should be a matter

[1] Alabama, Mississippi, Texas, and Virginia.

[2] In the Senate hearings leading to the passage of the Voting Rights Act of 1965, some doubt was expressed whether state poll taxes

of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government.

I do not propose to retread ground covered in my dissents in *Reynolds* v. *Sims*, 377 U. S. 533, 589, and *Carrington* v. *Rash*, 380 U. S. 89, 97, and will proceed on the premise that the Equal Protection Clause of the Fourteenth Amendment now reaches both state apportionment (*Reynolds*) and voter-qualification (*Carrington*) cases. My disagreement with the present decision is that in holding the Virginia poll tax violative of the Equal Protection Clause the Court has departed from long-established standards governing the application of that clause.

The Equal Protection Clause prevents States from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances. The test evolved by this Court for determining whether an asserted justifying classification exists is whether such a classification can be deemed to be founded on some rational and otherwise constitutionally permissible state policy. See, *e. g.*, *Powell* v. *Pennsylvania*, 127 U. S. 678; *Barrett* v. *Indiana*, 229 U. S. 26; *Walters* v. *City of St. Louis*, 347 U. S. 231; *Baxstrom* v. *Herold*, *ante*, p. 107. This standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilections of its

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could be validly abolished through the exercise of Congress' legislative power under § 5 of the Fourteenth Amendment. See Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 194–197 (1965). I intimate no view on that question.

own members, and until recently it has been followed in all kinds of "equal protection" cases.[3]

Reynolds v. *Sims*, *supra*, among its other breaks with the past, also marked a departure from these traditional and wise principles. Unless its "one man, one vote" thesis of state legislative apportionment is to be attributed to the unsupportable proposition that "Equal Protection" simply means indiscriminate equality, it seems inescapable that what *Reynolds* really reflected was but this Court's own views of how modern American representative government should be run. For it can hardly be thought that no other method of apportionment may be considered rational. See the dissenting opinion of

[3] I think the somewhat different application of the Equal Protection Clause to racial discrimination cases finds justification in the fact that insofar as that clause may embody a particular value in addition to rationality, the historical origins of the Civil War Amendments might attribute to racial equality this special status. See, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Shelley* v. *Kraemer*, 334 U. S. 1; *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410; *Brown* v. *Board of Education*, 347 U. S. 483; *Evans* v. *Newton*, 382 U. S. 296; cf. *Korematsu* v. *United States*, 323 U. S. 214, 216. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 33 (1959).

A similar characterization of indigency as a "neutral fact," irrelevant or suspect for purposes of legislative classification, has never been accepted by this Court. See *Edwards* v. *California*, 314 U. S. 160, 184–185 (Jackson, J., concurring). *Griffin* v. *Illinois*, 351 U. S. 12, requiring free trial transcripts for indigent appellants, and *Douglas* v. *California*, 372 U. S. 353, requiring the appointment of counsel for such appellants, cannot fairly be so interpreted for although reference was made indiscriminately to both equal protection and due process the analysis was cast primarily in terms of the latter.

More explicit attempts to infuse "Equal Protection" with specific values have been unavailing. See, *e. g.*, *Patsone* v. *Pennsylvania*, 232 U. S. 138 (alienage); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (sex); *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 564 (Rutledge, J., dissenting) (consanguinity).

STEWART, J., in *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 744, and my own dissenting opinion in *Reynolds* v. *Sims*, *supra*, at pp. 615–624.

Following *Reynolds* the Court in *Carrington* v. *Rash*, 380 U. S. 89, applied the traditional equal protection standard in striking down a Texas statute disqualifying as voters in state elections certain members of the Armed Forces of the United States.[4] But today in holding unconstitutional state poll taxes and property qualifications for voting and *pro tanto* overruling *Breedlove* v. *Suttles*, 302 U. S. 277, and *Butler* v. *Thompson*, 341 U. S. 937, the Court reverts to the highly subjective judicial approach manifested by *Reynolds*. In substance the Court's analysis of the equal protection issue goes no further than to say that the electoral franchise is "precious" and "fundamental," *ante*, p. 670, and to conclude that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor," *ante*, p. 668. These are of course captivating phrases, but they are wholly inadequate to satisfy the standard governing adjudication of the equal protection issue: Is there a rational basis for Virginia's poll tax as a voting qualification? I think the answer to that question is undoubtedly "yes." [5]

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[4] So far as presently relevant, my dissent in that case rested not on disagreement with the equal protection standards employed by the Court but only on disagreement with their application in that instance. 380 U. S., at 99–101.

[5] I have no doubt that poll taxes that deny the right to vote on the basis of race or color violate the Fifteenth Amendment and can be struck down by this Court. That question is presented to us in *Butts* v. *Harrison*, No. 655, the companion case decided today. The Virginia poll tax is on its face applicable to all citizens, and there was no allegation that it was discriminatorily enforced. The District Court explicitly found "no racial discrimination . . . in its application as a condition to voting." 240 F. Supp. 270, 271. Appellant in *Butts*, *supra*, argued first, that the Virginia Constitu-

Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one.[6] Over the years these and other restrictions were gradually lifted, primarily because popular theories of political representation had changed.[7] Often restrictions were lifted only after wide public debate. The issue of woman suffrage, for example, raised questions of family relationships, of participation in public affairs, of the very nature of the type of society in which Americans wished to live; eventually a consensus was reached, which culminated in the Nineteenth Amendment no more than 45 years ago.

Similarly with property qualifications, it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability. Most of the early Colonies had them; many of the States have had them during much of their histories; [8] and, whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that pay-

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tional Convention of 1902, which framed the poll-tax provision, was guided by a desire to reduce Negro suffrage, and second, that because of the generally lower economic standard of Negroes as contrasted with whites in Virginia the tax does in fact operate as a significant obstacle to voting by Negroes. The Court does not deal with this Fifteenth Amendment argument, and it suffices for me to say that on the record here I do not believe that the factors alluded to are sufficient to invalidate this $1.50 tax whether under the Fourteenth or Fifteenth Amendment.

[6] See generally Ogden, The Poll Tax in the South 2 (1958); 1 Thorpe, A Constitutional History of the American People, 1776–1850, at 92–98 (1898); Williamson, American Suffrage From Property to Democracy, 1760–1860, cc. 1–4 (1960).

[7] See Porter, A History of Suffrage in the United States 77–111 (1918); Thorpe, *op. cit. supra*, at 97, 401; Williamson, *op. cit. supra*, at 138–181.

[8] See generally Ogden, *op. cit. supra*; Porter, *op. cit. supra*.

ment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.[9] Nondiscriminatory and fairly applied literacy tests, upheld by this Court in *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, find justification on very similar grounds.

These viewpoints, to be sure, ring hollow on most contemporary ears. Their lack of acceptance today is evidenced by the fact that nearly all of the States, left to their own devices, have eliminated property or poll-tax qualifications; by the cognate fact that Congress and three-quarters of the States quickly ratified the Twenty-Fourth Amendment; and by the fact that rules such as

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[9] At the Constitutional Convention, for example, there was some sentiment to prescribe a freehold qualification for federal elections under Art. IV, § 1. The proposed amendment was defeated, in part because it was thought suffrage qualifications were best left to the States. See II Records of the Federal Convention 201–210 (Farrand ed. 1911). Madison's views were expressed as follows: "Whether the Constitutional qualification ought to be a freehold, would with him depend much on the probable reception such a change would meet with in States where the right was now exercised by every description of people. In several of the States a freehold was now the qualification. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty." *Id.,* at 203. See also Aristotle, Politics, Bks. III, IV; I Tocqueville, Democracy in America, c. xiii, at 199–202 (Knopf ed. 1948).

the "pauper exclusion" in Virginia law, Va. Const. § 23, Va. Code § 24–18, have never been enforced.[10]

Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process. It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the *laissez-faire* theory of society, *Lochner* v. *New York*, 198 U. S. 45, 75–76. The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism.[11]

I would affirm the decision of the District Court.

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[10] See *Harper* v. *Virginia State Board of Elections*, 240 F. Supp. 270, 271.

[11] Justice Holmes' admonition is particularly appropriate: "Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." 198 U. S., at 75–76.

EXHIBIT 35

REITMAN ET AL. *v.* MULKEY ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 483. Argued March 20–21, 1967.—Decided May 29, 1967.

The California Legislature, during the period 1959–1963, enacted several statutes regulating racial discrimination in housing. In 1964, pursuant to an initiative and referendum, Art. I, § 26, was added to the state constitution. It provided in part that neither the State nor any agency thereof "shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." The California Supreme Court held that Art. I, § 26, was designed to overturn state laws that bore on the right of private persons to discriminate, that it invalidly involved the State in racial discrimination in the housing market and that it changed the situation from one in which discriminatory practices were restricted to one where they are "encouraged," within the meaning of this Court's decisions. The court concluded that Art. I, § 26, unconstitutionally involves the State in racial discrimination and is therefore invalid under the Equal Protection Clause of the Fourteenth Amendment. *Held:* The California Supreme Court believes that Art. I, § 26, which does not merely repeal existing law forbidding private racial discrimination but authorizes racial discrimination in the housing market and establishes the right to discriminate as a basic state policy, will significantly encourage and involve the State in private discriminations. No persuasive considerations indicating that the judgments herein should be overturned have been presented, and they are affirmed. Pp. 373–381.

64 Cal. 2d 529, 877, 413 P. 2d 825, 847, affirmed.

Samuel O. Pruitt, Jr., argued the cause for petitioners. With him on the briefs was *William French Smith*.

Herman F. Selvin and *A. L. Wirin* argued the cause for respondents. With them on the brief were *Fred Okrand*, *Joseph A. Ball* and *Nathaniel S. Colley*.

Solicitor General Marshall, by special leave of Court, argued the cause for the United States, as *amicus curiae*, urging affirmance. With him on the brief were *Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, Nathan Lewin* and *Alan G. Marer*.

Briefs of *amici curiae*, urging affirmance, were filed by *Thomas C. Lynch*, Attorney General, *Charles A. O'Brien*, Chief Deputy Attorney General, *Miles T. Rubin*, Senior Assistant Attorney General, and *Loren Miller, Jr., Howard J. Bechefsky, Philip M. Rosten* and *Harold J. Smotkin*, Deputy Attorneys General, for the State of California; by *Louis J. Lefkowitz, pro se, Samuel A. Hirshowitz*, First Assistant Attorney General, and *George D. Zuckerman* and *Lawrence J. Gross*, Assistant Attorneys General, for the Attorney General of the State of New York; by *Gerald D. Marcus* for the California Democratic State Central Committee; by *Marshall W. Krause* for the American Civil Liberties Union of Northern California; by *Joseph B. Robison* and *Sol Rabkin* for the National Committee against Discrimination in Housing; and by *Abe F. Levy* for the United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) AFL-CIO, Region 6, et al.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question here is whether Art. I, § 26, of the California Constitution denies "to any person . . . the equal protection of the laws" within the meaning of the Fourteenth Amendment of the Constitution of the United States.[1] Section 26 of Art. I, an initiated measure sub-

[1] Section 1 of the Fourteenth Amendment provides as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

mitted to the people as Proposition 14 in a statewide ballot in 1964, provides in part as follows:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The real property covered by § 26 is limited to residential property and contains an exception for state-owned real estate.[2]

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[2] The following is the full text of § 26: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

"'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

"'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable." (Cal. Const., Art. I, § 26.)

The issue arose in two separate actions in the California courts, *Mulkey* v. *Reitman* and *Prendergast* v. *Snyder*. In *Reitman*, the Mulkeys, who are husband and wife and respondents here, sued under § 51 and § 52 of the California Civil Code [3] alleging that petitioners had refused to rent them an apartment solely on account of their race. An injunction and damages were demanded. Petitioners moved for summary judgment on the ground that §§ 51 and 52, insofar as they were the basis for the Mulkeys' action, had been rendered null and void by the adoption of Proposition 14 after the filing of the complaint. The trial court granted the motion and respondents took the case to the California Supreme Court.

In the *Prendergast* case, respondents, husband and wife, filed suit in December 1964 seeking to enjoin eviction from their apartment; respondents alleged that the eviction was motivated by racial prejudice and therefore would violate § 51 and § 52 of the Civil Code. Petitioner Snyder cross-complained for a judicial declaration that he was entitled to terminate the month-to-month tenancy even if his action was based on racial considerations. In denying petitioner's motion for summary

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[3] Cal. Civ. Code §§ 51 and 52 provide in part as follows:

"All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

. . . . . .

"Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

judgment, the trial court found it unnecessary to consider the validity of Proposition 14 because it concluded that judicial enforcement of an eviction based on racial grounds would in any event violate the Equal Protection Clause of the United States Constitution.[4] The cross-complaint was dismissed with prejudice [5] and petitioner Snyder appealed to the California Supreme Court which considered the case along with *Mulkey* v. *Reitman*. That court, in reversing the *Reitman* case, held that Art. I, § 26, was invalid as denying the equal protection of the laws guaranteed by the Fourteenth Amendment. 64 Cal. 2d 529, 413 P. 2d 825. For similar reasons, the court affirmed the judgment in the *Prendergast* case. 64 Cal. 2d 877, 413 P. 2d 847. We granted certiorari because the cases involve an important issue arising under the Fourteenth Amendment. 385 U. S. 967.

We affirm the judgments of the California Supreme Court. We first turn to the opinion of that court in *Reitman*, which quite properly undertook to examine the constitutionality of § 26 in terms of its "immediate objective," its "ultimate effect" and its "historical context and the conditions existing prior to its enactment." Judgments such as these we have frequently undertaken ourselves. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151; *Lombard* v. *Louisiana*, 373 U. S. 267; *Robinson* v. *Florida*, 378 U. S. 153; *Turner* v. *City of Memphis*, 369 U. S. 350; *Anderson* v. *Martin*, 375 U. S. 399. But here the California Supreme Court has addressed itself to these mat-

[4] The trial court considered the case to be controlled by *Abstract Investment Co.* v. *Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309, which in turn placed major reliance on *Shelley* v. *Kraemer*, 334 U. S. 1, and *Barrows* v. *Jackson*, 346 U. S. 249.

[5] Respondents' complaint was dismissed without prejudice based on the trial court's finding that petitioner would not seek eviction without the declaratory relief he had requested.

ters and we should give careful consideration to its views because they concern the purpose, scope, and operative effect of a provision of the California Constitution.

First, the court considered whether § 26 was concerned at all with private discriminations in residential housing. This involved a review of past efforts by the California Legislature to regulate such discriminations. The Unruh Act, Civ. Code §§ 51–52, on which respondents based their cases, was passed in 1959.[6] The Hawkins Act, formerly Health & Safety Code §§ 35700–35741, followed and prohibited discriminations in publicly assisted housing. In 1961, the legislature enacted proscriptions against restrictive covenants. Finally, in 1963, came the Rumford Fair Housing Act, Health & Safety Code §§ 35700–35744, superseding the Hawkins Act and prohibiting racial discriminations in the sale or rental of any private dwelling containing more than four units. That act was enforceable by the State Fair Employment Practice Commission.

It was against this background that Proposition 14 was enacted. Its immediate design and intent, the California court said, were "to overturn state laws that bore on the right of private sellers and lessors to discriminate," the Unruh and Rumford Acts, and "to forestall future state action that might circumscribe this right." This aim was successfully achieved: the adoption of Proposition 14 "generally nullifies both the Rumford and Unruh Acts as they apply to the housing market," and establishes "a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved."

Second, the court conceded that the State was permitted a neutral position with respect to private racial

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

discriminations and that the State was not bound by the Federal Constitution to forbid them. But, because a significant state involvement in private discriminations could amount to unconstitutional state action, *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the court deemed it necessary to determine whether Proposition 14 invalidly involved the State in racial discriminations in the housing market. Its conclusion was that it did.

To reach this result, the state court examined certain prior decisions in this Court in which discriminatory state action was identified. Based on these cases, *Robinson* v. *Florida*, 378 U. S. 153, 156; *Anderson* v. *Martin*, 375 U. S. 399; *Barrows* v. *Jackson*, 346 U. S. 249, 254; *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151, it concluded that a prohibited state involvement could be found "even where the state can be charged with only encouraging," rather than commanding discrimination. Also of particular interest to the court was MR. JUSTICE STEWART'S concurrence in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 726, where it was said that the Delaware courts had construed an existing Delaware statute as "authorizing" racial discrimination in restaurants and that the statute was therefore invalid. To the California court "[t]he instant case presents an undeniably analogous situation" wherein the State had taken affirmative action designed to make private discriminations legally possible. Section 26 was said to have changed the situation from one in which discrimination was restricted "to one wherein it is encouraged, within the meaning of the cited decisions"; § 26 was legislative action "which authorized private discrimination" and made the State "at least a partner in the instant act of discrimination . . . ." The court could "conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination . . . ." The judgment

of the California court was that § 26 unconstitutionally involves the State in racial discriminations and is therefore invalid under the Fourteenth Amendment.

There is no sound reason for rejecting this judgment. Petitioners contend that the California court has misconstrued the Fourteenth Amendment since the repeal of any statute prohibiting racial discrimination, which is constitutionally permissible, may be said to "authorize" and "encourage" discrimination because it makes legally permissible that which was formerly proscribed. But, as we understand the California court, it did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts. It did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations. What the court below did was first to reject the notion that the State was required to have a statute prohibiting racial discriminations in housing. Second, it held the intent of § 26 was to authorize private racial discriminations in the housing market, to repeal the Unruh and Rumford Acts and to create a constitutional right to discriminate on racial grounds in the sale and leasing of real property. Hence, the court dealt with § 26 as though it expressly authorized and constitutionalized the private right to discriminate. Third, the court assessed the ultimate impact of § 26 in the California environment and concluded that the section would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment.

The California court could very reasonably conclude that § 26 would and did have wider impact than a mere repeal of existing statutes. Section 26 mentioned neither

the Unruh nor Rumford Act in so many words. Instead, it announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease. Unruh and Rumford were thereby *pro tanto* repealed. But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. All individuals, partnerships, corporations and other legal entities, as well as their agents and representatives, could now discriminate with respect to their residential real property, which is defined as any interest in real property of any kind or quality, "irrespective of how obtained or financed," and seemingly irrespective of the relationship of the State to such interests in real property. Only the State is excluded with respect to property owned by it.[7]

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[7] In addition to the case we now have before us, two other cases decided the same day by the California Supreme Court are instructive concerning the range and impact of Art. I, § 26, of the California Constitution. In *Hill* v. *Miller*, 413 P. 2d 852, on rehearing, 64 Cal. 2d 757, 415 P. 2d 33, a Negro tenant sued to restrain an eviction from a leased, single-family dwelling. The notice to quit served by the owner had expressly recited: "The sole reason for this notice is that I have elected to exercise the right conferred upon me by Article I Section 26, California Constitution, to rent said premises to members of the Caucasian race." Although the California court had invalidated § 26, the court ruled against the Negro

This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "Only by sifting facts and weighing circumstances" on a case-by-case basis can a "nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722. Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26, and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in

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plaintiff because the Unruh Act did not cover single-family dwellings. Thus the landlord's reliance on § 26 was superfluous.

In *Peyton* v. *Barrington Plaza Corp.*, 64 Cal. 2d 880, 413 P. 2d 849, a Negro physician sued to require the defendant corporation to lease him an apartment in Barrington Plaza which was described in the opinion as follows:

"that defendant received a $17,000,000, low interest rate loan under the National Housing Act to construct Barrington Plaza; that such sum represents 90 percent of the construction costs of the plaza; that the development is a part of the urban redevelopment program undertaken by the City of Los Angeles; that Barrington Plaza is the largest apartment development in the western United States, providing apartment living for 2,500 people; that it includes many retail shops and professional services within its self-contained facilities; that it provides a fall-out shelter, completely stocked by the federal government with emergency supplies; that the plaza replaced private homes of both Caucasians and non-Caucasians; that the city effected zoning changes to accommodate the development; that the defendant's securities were sold, its construction contracts were let, its building permits were issued and its shops and professional services established all pursuant to state or local approval, cooperation and authority."

The defendant defended the action and moved for judgment on the pleadings based on Art. I, § 26, of the California Constitution. The motion was granted but the judgment was reversed based on the decision in *Mulkey* v. *Reitman*.

private racial discriminations to an unconstitutional degree. We accept this holding of the California court.

The assessment of § 26 by the California court is similar to what this Court has done in appraising state statutes or other official actions in other contexts. In *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151, the Court dealt with a statute which, as construed by the Court, authorized carriers to provide cars for white persons but not for Negroes. Though dismissal of the complaint on a procedural ground was affirmed, the Court made it clear that such a statute was invalid under the Fourteenth Amendment because a carrier refusing equal service to Negroes would be "acting in the matter under the authority of a state law." This was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of that case. Similarly, in *Nixon* v. *Condon*, 286 U. S. 73,[8] the Court was faced with a statute empowering the executive committee of a political party to prescribe the qualifications of its members for voting or for other participation, but containing no directions with respect to the exercise of that power. This was authority which the committee otherwise might not have had and which was used by the committee to bar Negroes from voting in primary elections. Reposing this power in the executive committee was said to insinuate the State into the self-regulatory, decision-making scheme of the voluntary association; the exercise of the power was viewed as an expression of state authority contrary to the Fourteenth Amendment.

In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the operator-lessee of a restaurant located in a

[8] This case was a sequel to *Nixon* v. *Herndon*, 273 U. S. 536, which outlawed statutory disqualification of Negroes from voting in primary elections.

building owned by the State and otherwise operated for public purposes, refused service to Negroes. Although the State neither commanded nor expressly authorized or encouraged the discriminations, the State had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction . . . has . . . made itself a party to the refusal of service . . ." which therefore could not be considered the purely private choice of the restaurant operator.

In *Peterson* v. *City of Greenville*, 373 U. S. 244, and in *Robinson* v. *Florida*, 378 U. S. 153, the Court dealt with state statutes or regulations requiring, at least in some respects, segregation in facilities and services in restaurants. These official provisions, although obviously unconstitutional and unenforceable, were deemed in themselves sufficient to disentitle the State to punish, as trespassers, Negroes who had been refused service in the restaurants. In neither case was any proof required that the restaurant owner had actually been influenced by the state statute or regulation. Finally, in *Lombard* v. *Louisiana*, 373 U. S. 267, the Court interpreted public statements by New Orleans city officials as announcing that the city would not permit Negroes to seek desegregated service in restaurants. Because the statements were deemed to have as much coercive potential as the ordinance in the *Peterson* case, the Court treated the city as though it had actually adopted an ordinance forbidding desegregated service in public restaurants.

None of these cases squarely controls the case we now have before us. But they do illustrate the range of situations in which discriminatory state action has been identified. They do exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations. Here we are dealing with a provision which does not just repeal an existing law

forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a word to indicate the dimensions of our problem.

This is not a case as simple as the one where a man with a bicycle or a car or a stock certificate or even a log cabin asserts the right to sell it to whomsoever he pleases, excluding all others whether they be Negro, Chinese, Japanese, Russians, Catholics, Baptists, or those with blue eyes. We deal here with a problem in the realm of zoning, similar to the one we had in *Shelley* v. *Kraemer*, 334 U. S. 1, where we struck down restrictive covenants.

Those covenants are one device whereby a neighborhood is kept "white" or "Caucasian" as the dominant interests desire. Proposition 14 in the setting of our modern housing problem is only another device of the same character.

Real estate brokers and mortgage lenders are largely dedicated to the maintenance of segregated communities.[1] Realtors commonly believe it is unethical to sell or rent to a Negro in a predominantly white or all-white neighborhood,[2] and mortgage lenders throw their weight along-

[1] Civil Rights U. S. A., Housing in Washington, D. C., U. S. Commission on Civil Rights 12–15 (1962).

[2] *Id.*, 12–13.

side segregated communities, rejecting applications by members of a minority group who try to break the white phalanx save and unless the neighborhood is in process of conversion into a mixed or a Negro community.[3] We are told by the Commission on Civil Rights:

> "Property owners' prejudices are reflected, magnified, and sometimes even induced by real estate brokers, through whom most housing changes hands. Organized brokers have, with few exceptions, followed the principle that only a 'homogeneous' neighborhood assures economic soundness. Their views in some cases are so vigorously expressed as to discourage property owners who would otherwise be concerned only with the color of a purchaser's money, and not with that of his skin. . . .[4]
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> . . . . . .
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> "The financial community, upon which mortgage financing—and hence the bulk of home purchasing and home building—depends, also acts to a large extent on the premise that only a homogeneous neighborhood can offer an economically sound investment. For this reason, plus the fear of offending their other clients, many mortgage-lending institutions refuse to provide home financing for houses in a 'mixed' neighborhood. The persistent stereotypes of certain minority groups as poor credit

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[3] *Id.*, 14–15.

[4] As the Hannah Commission said:

"Area housing patterns are sharply defined along racial lines. Most members of the housing industry appear to respect them. Although it is unlikely that these patterns are determined by formal agreement, it is probable that they are maintained by tacit understandings." *Id.*, 15.

risks also block the flow of credit, although these stereotypes have often been proved unjustified." Housing, U. S. Commission on Civil Rights 2–3 (1961).

The builders join in the same scheme: [5]

". . . private builders often adopt what they believe are the views of those to whom they expect to sell and of the banks upon whose credit their own operations depend. In short, as the Commission on Race and Housing has concluded, 'it is the real estate brokers, builders, and mortgage finance institutions, which translate prejudice into discriminatory action.' Thus, at every level of the private housing market members of minority groups meet mutually reinforcing and often unbreakable barriers of rejection."

Proposition 14 is a form of sophisticated discrimination [6] whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decisions [7] allow their government to do.

George A. McCanse, chairman of the legislative committee of the Texas Real Estate Association, while giving his views on Title IV of the proposed Civil Rights Act of 1966 (H. R. 14765), which would prohibit discrimination in housing by property owners, real estate brokers, and others engaged in the sale, rental or financing of housing, stated that he warned groups to which he spoke of "the grave dangers inherent in any type

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[5] Housing, U. S. Commission on Civil Rights 3 (1961).

[6] Freedom to the Free, Century of Emancipation, Report to the President, U. S. Commission on Civil Rights 96 (1963).

[7] *City of Richmond* v. *Deans*, 281 U. S. 704.

of legislation that would erode away the rights that go with the ownership of property." [8] He pointed out that

> "[E]ach time we citizens of this country lose any of the rights that go with the ownership of property, we are moving that much closer to a centralized government in which ultimately the right to own property would be denied." [9]

That apparently is a common view. It overlooks several things. First, the right to own or lease property is already denied to many solely because of the pigment of their skin; they are, indeed, under the control of a few who determine where and how the colored people shall live and what the nature of our cities will be. Second, the agencies that are zoning the cities along racial lines are state licensees.

Zoning is a state and municipal function. See *Euclid* v. *Ambler Co.*, 272 U. S. 365, 389 *et seq.*; *Berman* v. *Parker*, 348 U. S. 26, 34–35. When the State leaves that function to private agencies or institutions which are licensees and which practice racial discrimination and zone our cities into white and black belts or white and black ghettoes, it suffers a governmental function to be performed under private auspices in a way the State itself may not act. The present case is therefore kin to *Terry* v. *Adams*, 345 U. S. 461, 466, where a State allowed a private group (known as the Jaybird Association, which was the dominant political group in county elections) to perform an electoral function in derogation of the rights of Negroes under the Fifteenth Amendment.

Leaving the zoning function to groups which practice racial discrimination and are licensed by the States

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[8] Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 2d Sess., ser. 16, 1639 (1966).

[9] *Ibid.*

constitutes state action in the narrowest sense in which *Shelley* v. *Kraemer*, *supra*, can be construed. For as noted by MR. JUSTICE BLACK in *Bell* v. *Maryland*, 378 U. S. 226, 329 (dissenting), restrictive covenants "constituted a restraint on alienation of property, sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws, accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts, enforced by the State."

Under California law no person may "engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this State without first obtaining a real estate license." Calif. Bus. & Prof. Code § 10130. These licensees are designated to serve the public. Their licenses are not restricted, and could not be restricted, to effectuate a policy of segregation. That would be state action that is barred by the Fourteenth Amendment. There is no difference, as I see it, between a State authorizing a licensee to practice racial discrimination and a State, without any express authorization of that kind nevertheless launching and countenancing the operation of a licensing system in an environment where the whole weight of the system is on the side of discrimination. In the latter situation the State is impliedly sanctioning what it may not do specifically.

If we were in a domain exclusively private, we would have different problems. But urban housing is in the public domain as evidenced not only by the zoning problems presented but by the vast schemes of public financing with which the States and the Nation have been extensively involved in recent years. Urban housing is clearly marked with the public interest. Urban housing,

like restaurants, inns, and carriers (*Bell* v. *Maryland*, 378 U. S. 226, 253–255, separate opinion), or like telephone companies, drugstores, or hospitals, is affected with a public interest in the historic and classical sense. See *Lombard* v. *Louisiana*, 373 U. S. 267, 275–278 (concurring opinion).

I repeat what was stated by Holt, C. J., in *Lane* v. *Cotton*, 12 Mod. 472, 484 (1701):

> "[W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him . . . . If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier."

Since the real estate brokerage business is one that can be and is state-regulated and since it is state-licensed, it must be dedicated, like the telephone companies and the carriers and the hotels and motels, to the requirements of service to all without discrimination—a standard that in its modern setting is conditioned by the demands of the Equal Protection Clause of the Fourteenth Amendment.

And to those who say that Proposition 14 represents the will of the people of California, one can only reply:

> "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to . . . ." 5 Writings of James Madison 272 (Hunt ed. 1904).

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK, MR. JUSTICE CLARK, and MR. JUSTICE STEWART join, dissenting.

I consider that this decision, which cuts deeply into state political processes, is supported neither by anything "found" by the Supreme Court of California nor by any of our past cases decided under the Fourteenth Amendment. In my view today's holding, salutary as its result may appear at first blush, may in the long run actually serve to handicap progress in the extremely difficult field of racial concerns. I must respectfully dissent.

The facts of this case are simple and undisputed. The legislature of the State of California has in the last decade enacted a number of statutes restricting the right of private landowners to discriminate on the basis of such factors as race in the sale or rental of property. These laws aroused considerable opposition, causing certain groups to organize themselves and to take advantage of procedures embodied in the California Constitution permitting a "proposition" to be presented to the voters for a constitutional amendment. "Proposition 14" was

thus put before the electorate in the 1964 election and was adopted by a vote of 4,526,460 to 2,395,747. The Amendment, Art. I, § 26, of the State Constitution, reads in relevant part as follows:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." [1]

I am wholly at a loss to understand how this straightforward effectuation of a change in the California Constitution can be deemed a violation of the Fourteenth Amendment, thus rendering § 26 void and petitioners' refusal to rent their properties to respondents, because of their race, illegal under prior state law. The Equal Protection Clause of the Fourteenth Amendment, which forbids a State to use its authority to foster discrimination based on such factors as race, *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410; *Brown* v. *Board of Education*, 347 U. S. 483; *Goss* v. *Board of Education*, 373 U. S. 683, does not undertake to control purely personal prejudices and predilections, and individuals acting on their own are left free to discriminate on racial grounds if they are so minded, *Civil Rights Cases*, 109 U. S. 3. By the same token, the Fourteenth Amendment does not require of States the passage of laws preventing such private discrimination, although it does not of course disable them from enacting such legislation if they wish.

[1] "Real Property" is defined by § 26 as "any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other."

In the case at hand California, acting through the initiative and referendum, has decided to remain "neutral" in the realm of private discrimination affecting the sale or rental of private residential property; in such transactions private owners are now free to act in a discriminatory manner previously forbidden to them. In short, all that has happened is that California has effected a *pro tanto* repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance. The fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California Legislature cannot well be thought to affect, from a federal constitutional standpoint, the validity of what California has done. The Fourteenth Amendment does not reach such state constitutional action any more than it does a simple legislative repeal of legislation forbidding private discrimination.

I do not think the Court's opinion really denies any of these fundamental constitutional propositions. Rather it attempts to escape them by resorting to arguments which appear to me to be entirely ill-founded.

I.

The Court attempts to fit § 26 within the coverage of the Equal Protection Clause by characterizing it as in effect an affirmative call to residents of California to discriminate. The main difficulty with this viewpoint is that it depends upon a characterization of § 26 that cannot fairly be made. The provision is neutral on its face, and it is only by in effect asserting that this requirement of passive official neutrality is camouflage that the Court is able to reach its conclusion. In depicting the

provision as tantamount to active state encouragement of discrimination the Court essentially relies on the fact that the California Supreme Court so concluded. It is said that the findings of the highest court of California as to the meaning and impact of the enactment are entitled to great weight. I agree of course, that *findings of fact* by a state court should be given great weight, but this familiar proposition hardly aids the Court's holding in this case.

There is no disagreement whatever but that § 26 was meant to nullify California's fair-housing legislation and thus to remove from private residential property transactions the state-created impediment upon freedom of choice. There were no disputed issues of fact at all, and indeed the California Supreme Court noted at the outset of its opinion that "[i]n the trial court proceedings allegations of the complaint were not factually challenged, no evidence was introduced, and the only matter placed in issue was the legal sufficiency of the allegations." 64 Cal. 2d 529, 531–532, 413 P. 2d 825, 827. There was no finding, for example, that the defendants' actions were anything but the product of their own private choice. Indeed, since the alleged racial discrimination that forms the basis for the *Reitman* refusal to rent on racial grounds occurred in 1963, it is not possible to contend that § 26 in any way influenced this particular act. There were no findings as to the general effect of § 26. The Court declares that the California court "held the intent of § 26 was to authorize private racial discriminations in the housing market . . . ," *ante*, p. 376, but there is no supporting fact in the record for this characterization. Moreover, the grounds which prompt legislators or state voters to repeal a law do not determine its constitutional validity. That question is decided by what the law does, not by what those who

voted for it wanted it to do, and it must not be forgotten that the Fourteenth Amendment does not compel a State to put or keep any particular law about race on its books. The Amendment only forbids a State to pass or keep in effect laws discriminating on account of race. California has not done this.

A state enactment, particularly one that is simply permissive of private decision-making rather than coercive and one that has been adopted in this most democratic of processes, should not be struck down by the judiciary under the Equal Protection Clause without persuasive evidence of an invidious purpose or effect. The only "factual" matter relied on by the majority of the California Supreme Court was the context in which Proposition 14 was adopted, namely, that several strong antidiscrimination acts had been passed by the legislature and opposed by many of those who successfully led the movement for adoption of Proposition 14 by popular referendum. These circumstances, and these alone, the California court held, made § 26 unlawful under this Court's cases interpreting the Equal Protection Clause. This, of course, is nothing but a legal conclusion as to federal constitutional law, the California Supreme Court not having relied in any way upon the State Constitution. Accepting all the suppositions under which the state court acted, I cannot see that its conclusion is entitled to any special weight in the discharge of our own responsibilities. Put in another way, I cannot transform the California court's conclusion of law into a finding of fact that the State through the adoption of § 26 is actively promoting racial discrimination. It seems to me manifest that the state court decision rested entirely on what that court conceived to be the compulsion of the Fourteenth Amendment, not on any fact-finding by the state courts.

II.

There is no question that the adoption of § 26, repealing the former state antidiscrimination laws and prohibiting the enactment of such state laws in the future, constituted "state action" within the meaning of the Fourteenth Amendment. The only issue is whether this provision impermissibly deprives any person of equal protection of the laws. As a starting point, it is clear that any statute requiring unjustified discriminatory treatment is unconstitutional. *E. g., Nixon* v. *Herndon,* 273 U. S. 536; *Brown* v. *Board of Education, supra; Peterson* v. *City of Greenville,* 373 U. S. 244. And it is no less clear that the Equal Protection Clause bars as well discriminatory governmental administration of a statute fair on its face. *E. g., Yick Wo* v. *Hopkins,* 118 U. S. 356. This case fits within neither of these two categories: Section 26 is by its terms inoffensive, and its provisions require no affirmative governmental enforcement of any sort. A third category of equal-protection cases, concededly more difficult to characterize, stands for the proposition that when governmental involvement in private discrimination reaches a level at which the State can be held responsible for the specific act of private discrimination, the strictures of the Fourteenth Amendment come into play. In dealing with this class of cases, the inquiry has been framed as whether the State has become "a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 725.

Given these latter contours of the equal-protection doctrine, the assessment of particular cases is often troublesome, as the Court itself acknowledges. *Ante,* pp. 378–379.

However, the present case does not seem to me even to approach those peripheral situations in which the question of state involvement gives rise to difficulties. See, *e. g., Evans* v. *Newton*, 382 U. S. 296; *Lombard* v. *Louisiana*, 373 U. S. 267. The core of the Court's opinion is that § 26 is offensive to the Fourteenth Amendment because it effectively *encourages* private discrimination. By focusing on "encouragement" the Court, I fear, is forging a slippery and unfortunate criterion by which to measure the constitutionality of a statute simply permissive in purpose and effect, and inoffensive on its face.

It is true that standards in this area have not been definitely formulated, and that acts of discrimination have been included within the compass of the Equal Protection Clause not merely when they were compelled by a state statute or other governmental pressures, but also when they were said to be "induced" or "authorized" by the State. Most of these cases, however, can be approached in terms of the impact and extent of affirmative state governmental activities, *e. g.*, the action of a sheriff, *Lombard* v. *Louisiana, supra;* the official supervision over a park, *Evans* v. *Newton, supra;* a joint venture with a lessee in a municipally owned building, *Burton* v. *Wilmington Parking Authority, supra.*[2] In

[2] In *McCabe* v. *Atchison, Topeka & Santa Fe R. Co.*, 235 U. S. 151, cited by the Court, the complaint of the Negro appellants was held to have been properly dismissed on the ground that its allegations were "altogether too vague and indefinite," *id.*, at 163. In dictum the Court stated that where a State regulated the facilities of a common carrier it could not constitutionally enact a statute that did not comply with the "separate but equal" doctrine. Whatever the implications of the Fourteenth Amendment may be as to common carriers, compare the opinions of Goldberg, J., concurring, and BLACK, J., dissenting, in *Bell* v. *Maryland*, 378 U. S. 226, 286,

situations such as these the focus has been on positive state cooperation or partnership in affirmatively promoted activities, an involvement that could have been avoided. Here, in contrast, we have only the straightforward adoption of a neutral provision restoring to the sphere of free choice, left untouched by the Fourteenth Amendment, private behavior within a limited area of the racial problem. The denial of equal protection emerges only from the conclusion reached by the Court that the implementation of a new policy of governmental neutrality, embodied in a constitutional provision and replacing a former policy of antidiscrimination, has the effect of lending encouragement to those who wish to discriminate. In the context of the actual facts of the case, this conclusion appears to me to state only a truism: people who want to discriminate but were previously forbidden to do so by state law are now left free because the State has chosen to have no law on the subject at all. Obviously whenever there is a change in the law it will have resulted from the concerted activity of those who desire the change, and its enactment will allow those supporting the legislation to pursue their private goals.

A moment of thought will reveal the far-reaching possibilities of the Court's new doctrine, which I am sure the Court does not intend. Every act of private discrimination is either forbidden by state law or permitted by it. There can be little doubt that such permissiveness—whether by express constitutional or statutory provision, or implicit in the common law—to some extent "encourages" those who wish to discriminate to do so. Under this theory "state action" in the form of laws

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318, nothing in *McCabe* would appear to have much relevance to the problem before us today.

Neither is there force in the Court's reliance on *Nixon* v. *Condon*, 286 U. S. 73, a voting case decided under the Fifteenth as well as the Fourteenth Amendment.

that do nothing more than passively permit private discrimination could be said to tinge *all* private discrimination with the taint of unconstitutional state encouragement.

This type of alleged state involvement, simply evincing a refusal to involve itself at all, is of course very different from that illustrated in such cases as *Lombard, Peterson, Evans,* and *Burton, supra,* where the Court found active involvement of state agencies and officials in specific acts of discrimination. It is also quite different from cases in which a state enactment could be said to have the obvious purpose of fostering discrimination. *Anderson* v. *Martin,* 375 U. S. 399. I believe the state action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, actively fostering discrimination. Only in such a case is ostensibly "private" action more properly labeled "official." I do not believe that the mere enactment of § 26, on the showing made here, falls within this class of cases.

III.

I think that this decision is not only constitutionally unsound, but in its practical potentialities short-sighted. Opponents of state antidiscrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable. More fundamentally, the doctrine underlying this decision may hamper, if not preclude, attempts to deal with the delicate and troublesome problems of race relations through the legislative process. The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience, and compromise, and is best done by legislatures rather than by courts. When

legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum. This decision, I fear, may inhibit such flexibility. Here the electorate itself overwhelmingly wished to overrule and check its own legislature on a matter left open by the Federal Constitution. By refusing to accept the decision of the people of California, and by contriving a new and ill-defined constitutional concept to allow federal judicial interference, I think the Court has taken to itself powers and responsibilities left elsewhere by the Constitution.

I believe the Supreme Court of California misapplied the Fourteenth Amendment, and would reverse its judgments, and remand the case for further appropriate proceedings.

EXHIBIT 36

KATZENBACH, ATTORNEY GENERAL, ET AL. *v.* MORGAN ET UX.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 847. Argued April 18, 1966.—Decided June 13, 1966.*

Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4 (e) of the Voting Rights Act of 1965 to the extent that the provision prohibits enforcement of the statutory requirement for literacy in English as applied to numerous New York City residents from Puerto Rico who, because of that requirement, had previously been denied the right to vote. Section 4 (e) provides that no person who has completed the sixth grade in a public school, or an accredited private school, in Puerto Rico in which the language of instruction was other than English shall be disfranchised for inability to read or write English. A three-judge District Court granted appellees declaratory and injunctive relief, holding that in enacting § 4 (e) Congress had exceeded its powers. *Held:* Section 4 (e) is a proper exercise of the powers under § 5 of the Fourteenth Amendment, and by virtue of the Supremacy Clause, New York's English literacy requirement cannot be enforced to the extent it conflicts with § 4 (e). Pp. 646–658.

(a) Though the States have power to fix voting qualifications, they cannot do so contrary to the Fourteenth Amendment or any other constitutional provision. P. 647.

(b) Congress' power under § 5 of the Fourteenth Amendment to enact legislation prohibiting enforcement of a state law is not limited to situations where the state law has been adjudged to violate the provisions of the Amendment which Congress sought to enforce. It is therefore the Court's task here to determine, not whether New York's English literacy requirement as applied violates the Equal Protection Clause, but whether § 4 (e)'s prohibition against that requirement is "appropriate legislation" to enforce the Clause. *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, distinguished. Pp. 648–650.

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*Together with No. 877, *New York City Board of Elections* v. *Morgan et ux.*, also on appeal from the same court.

(c) Section 5 of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees. The test of *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, is to be applied to determine whether a congressional enactment is "appropriate legislation" under § 5 of the Fourteenth Amendment. Pp. 650–651.

(d) Section 4 (e) was enacted to enforce the Equal Protection Clause as a measure to secure nondiscriminatory treatment by government for numerous Puerto Ricans residing in New York, both in the imposition of voting qualifications and the provision or administration of governmental services. Pp. 652–653.

(e) Congress had an adequate basis for deciding that § 4 (e) was plainly adapted to that end. Pp. 653–656.

(f) Section 4 (e) does not itself invidiously discriminate in violation of the Fifth Amendment for failure to extend relief to those educated in non-American flag schools. A reform measure such as § 4 (e) is not invalid because Congress might have gone further than it did and did not eliminate all the evils at the same time. Pp. 656–658.

247 F. Supp. 196, reversed.

Solicitor General Marshall argued the cause for appellants in No. 847. With him on the brief were *Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, St. John Barrett* and *Louis M. Kauder.*

J. Lee Rankin argued the cause for appellant in No. 877. With him on the brief were *Norman Redlich* and *Seymour B. Quel.*

Alfred Avins argued the cause and filed a brief for appellees in both cases.

Rafael Hernandez Colon, Attorney General, argued the cause and filed a brief for the Commonwealth of Puerto Rico, as *amicus curiae,* urging reversal.

Jean M. Coon, Assistant Attorney General, argued the cause for the State of New York, as *amicus curiae,* urging affirmance. With her on the brief were *Louis J. Lefko-*

witz, Attorney General, and *Ruth Kessler Toch*, Acting Solicitor General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These cases concern the constitutionality of § 4 (e) of the Voting Rights Act of 1965.[1] That law, in the respects pertinent in these cases, provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4 (e) insofar as it *pro tanto* prohibits

[1] The full text of § 4 (e) is as follows:

"(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

"(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English." 79 Stat. 439, 42 U. S. C. § 1973b (e) (1964 ed., Supp. I).

the enforcement of the election laws of New York [2] requiring an ability to read and write English as a condition of voting. Under these laws many of the several hundred thousand New York City residents who have migrated there from the Commonwealth of Puerto Rico had previously been denied the right to vote, and appellees attack § 4 (e) insofar as it would enable many of

[2] Article II, § 1, of the New York Constitution provides, in pertinent part:

"Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

Section 150 of the New York Election Law provides, in pertinent part:

". . . In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A 'new voter,' within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight."

Section 168 of the New York Election Law provides, in pertinent part:

"1. The board of regents of the state of New York shall make provisions for the giving of literacy tests.

. . . . .

"2. . . . But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and including the sixth grade in a public school or a private school accredited by the Commonwealth of

these citizens to vote.[3] Pursuant to § 14 (b) of the Voting Rights Act of 1965, appellees commenced this proceeding in the District Court for the District of Columbia seeking a declaration that § 4 (e) is invalid and an injunction prohibiting appellants, the Attorney General of the United States and the New York City Board of Elections, from either enforcing or complying with

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Puerto Rico in which school instruction is carried on predominantly in the English language or a matriculation card issued by a college or university to a student then at such institution or a certificate or a letter signed by an official of the university or college certifying to such attendance."

Section 168 of the Election Law as it now reads was enacted while § 4 (e) was under consideration in Congress. See 111 Cong. Rec. 19376–19377. The prior law required the successful completion of the eighth rather than the sixth grade in a school in which the language of instruction was English.

[3] This limitation on appellees' challenge to § 4 (e), and thus on the scope of our inquiry, does not distort the primary intent of § 4 (e). The measure was sponsored in the Senate by Senators Javits and Kennedy and in the House by Representatives Gilbert and Ryan, all of New York, for the explicit purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York. Throughout the congressional debate it was repeatedly acknowledged that § 4 (e) had particular reference to the Puerto Rican population in New York. That situation was the almost exclusive subject of discussion. See 111 Cong. Rec. 11028, 11060–11074, 15666, 16235–16245, 16282–16283, 19192–19201, 19375–19378; see also Voting Rights, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 6400, 89th Cong., 1st Sess., 100–101, 420–421, 508–517 (1965). The Solicitor General informs us in his brief to this Court, that in all probability the practical effect of § 4 (e) will be limited to enfranchising those educated in Puerto Rican schools. He advises us that, aside from the schools in the Commonwealth of Puerto Rico, there are no public or parochial schools in the territorial limits of the United States in which the predominant language of instruction is other than English and which would have generally been attended by persons who are otherwise qualified to vote save for their lack of literacy in English.

§ 4 (e).[4] A three-judge district court was designated. 28 U. S. C. §§ 2282, 2284 (1964 ed.). Upon cross motions for summary judgment, that court, one judge dissenting, granted the declaratory and injunctive relief appellees sought. The court held that in enacting § 4 (e) Congress exceeded the powers granted to it by the Constitution and therefore usurped powers reserved to the States by the Tenth Amendment. 247 F. Supp. 196. Appeals were taken directly to this Court, 28 U. S. C. §§ 1252, 1253 (1964 ed.), and we noted probable jurisdiction. 382 U. S. 1007. We reverse. We hold that, in the application challenged in these cases, § 4 (e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment[5] and that by force of the

[4] Section 14 (b) provides, in pertinent part:

"No court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue . . . any restraining order or temporary or permanent injunction against the . . . enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto." 79 Stat. 445, 42 U. S. C. § 1973*l* (b) (1964 ed., Supp. I).

The Attorney General of the United States was initially named as the sole defendant. The New York City Board of Elections was joined as a defendant after it publicly announced its intention to comply with § 4 (e); it has taken the position in these proceedings that § 4 (e) is a proper exercise of congressional power. The Attorney General of the State of New York has participated as *amicus curiae* in the proceedings below and in this Court, urging § 4 (e) be declared unconstitutional. The United States was granted leave to intervene as a defendant, 28 U. S. C. § 2403 (1964 ed.); Fed. Rule Civ. Proc. 24 (a).

[5] "SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It is therefore unnecessary for us to consider whether § 4 (e) could be sustained as an exercise of power under the Territorial Clause, Art. IV, § 3; see dissenting opinion of Judge McGowan below, 247 F. Supp., at 204; or as a measure to discharge certain treaty obligations of the United States, see Treaty of Paris of 1898, 30 Stat. 1754, 1759; United Nations Charter, Articles 55 and 56;

Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with § 4 (e).

Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, Art. I, § 2; Seventeenth Amendment; *Ex parte Yarbrough,* 110 U. S. 651, 663. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action. The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote.[6]

Art. I, § 8, cl. 18. Nor need we consider whether § 4 (e) could be sustained insofar as it relates to the election of federal officers as an exercise of congressional power under Art. I, § 4, see *Minor* v. *Happersett,* 21 Wall. 162, 171; *United States* v. *Classic,* 313 U. S. 299, 315; Literacy Tests and Voter Requirements in Federal and State Elections, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 480, S. 2750, and S. 2979, 87th Cong., 2d Sess., 302, 306–311 (1962) (brief of the Attorney General); nor whether § 4 (e) could be sustained, insofar as it relates to the election of state officers, as an exercise of congressional power to enforce the clause guaranteeing to each State a republican form of government, Art. IV, § 4; Art. I, § 8, cl. 18.

[6] *Harper* v. *Virginia Board of Elections,* 383 U. S. 663; *Carrington* v. *Rash,* 380 U. S. 89. See also *United States* v. *Mississippi,* 380 U. S. 128; *Louisiana* v. *United States,* 380 U. S. 145, 151; *Lassiter* v. *Northampton Election Bd.,* 360 U. S. 45; *Pope* v. *Williams,* 193 U. S. 621, 632–634; *Minor* v. *Happersett,* 21 Wall. 162; cf. *Burns* v. *Richardson, ante,* p. 73, at 92; *Reynolds* v. *Sims,* 377 U. S. 533.

The Attorney General of the State of New York argues that an exercise of congressional power under § 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that § 4 (e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4 (e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of § 5 supports such a construction.[7] As was said with regard to § 5 in *Ex parte Virginia*, 100 U. S. 339, 345, "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.[8] It would confine the legislative power

[7] For the historical evidence suggesting that the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary, see generally Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L. J. 1353, 1356–1357; Harris, The Quest for Equality, 33–56 (1960); tenBroek, The Antislavery Origins of the Fourteenth Amendment 187–217 (1951).

[8] Senator Howard, in introducing the proposed Amendment to the Senate, described § 5 as "a direct affirmative delegation of power to Congress," and added:

"It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in

in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay* v. *New York*, 332 U. S. 261, 282–284.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. Compare also *Guinn* v. *United States*, 238 U. S. 347, 366; *Camacho* v. *Doe*, 31 Misc. 2d 692, 221 N. Y. S. 2d 262 (1958), aff'd 7 N. Y. 2d 762, 163 N. E. 2d 140 (1959); *Camacho* v. *Rogers*, 199 F. Supp. 155 (D. C. S. D. N. Y. 1961). *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such

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good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." Cong. Globe, 39th Cong., 1st Sess., 2766, 2768 (1866).

This statement of § 5's purpose was not questioned by anyone in the course of the debate. Flack, The Adoption of the Fourteenth Amendment 138 (1908).

legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18.[9] The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Ex parte Virginia, 100 U. S., at 345–346, decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power under § 5 had this same broad scope:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

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[9] In fact, earlier drafts of the proposed Amendment employed the "necessary and proper" terminology to describe the scope of congressional power under the Amendment. See tenBroek, The Antislavery Origins of the Fourteenth Amendment 187–190 (1951). The substitution of the "appropriate legislation" formula was never thought to have the effect of diminishing the scope of this congressional power. See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and the earlier proposals).

Strauder v. *West Virginia*, 100 U. S. 303, 311; *Virginia* v. *Rives*, 100 U. S. 313, 318. Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by "appropriate legislation" the provisions of that amendment; and we recently held in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 326, that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." That test was identified as the one formulated in *McCulloch* v. *Maryland*. See also *James Everard's Breweries* v. *Day*, 265 U. S. 545, 558–559 (Eighteenth Amendment). Thus the *McCulloch* v. *Maryland* standard is the measure of what constitutes "appropriate legislation" under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

We therefore proceed to the consideration whether § 4 (e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch* v. *Maryland* standard, whether § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution." [10]

[10] Contrary to the suggestion of the dissent, *post*, p. 668, § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated sys-

There can be no doubt that § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted § 4 (e) "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English." The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, § 4 (e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

Section 4 (e) may be readily seen as "plainly adapted" to furthering these aims of the Equal Protection Clause. The practical effect of § 4 (e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.[11] Sec-

tems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

[11] Cf. *James Everard's Breweries* v. *Day, supra,* which held that, under the Enforcement Clause of the Eighteenth Amendment, Congress could prohibit the prescription of intoxicating malt liquor for medicinal purposes even though the Amendment itself only prohibited the manufacture and sale of intoxicating liquors for beverage purposes. Cf. also the settled principle applied in the *Shreveport*

tion 4 (e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws." It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support § 4 (e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.[12]

The result is no different if we confine our inquiry to the question whether § 4 (e) was merely legislation aimed

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Case (*Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342), and expressed in *United States* v. *Darby*, 312 U. S. 100, 118, that the power of Congress to regulate interstate commerce "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . ." Accord, *Atlanta Motel* v. *United States*, 379 U. S. 241, 258.

[12] See, *e. g.*, 111 Cong. Rec. 11061–11062, 11065–11066, 16240; Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507–508.

at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided,[13] and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement,[14] whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.[15] Finally, Congress might well have concluded that

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[13] The principal exemption complained of is that for persons who had been eligible to vote before January 1, 1922. See n. 2, *supra*.

[14] This evidence consists in part of statements made in the Constitutional Convention first considering the English literacy requirement, such as the following made by the sponsor of the measure: "More precious even than the forms of government are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern European races . . . . The danger has begun. . . . We should check it." III New York State Constitutional Convention 3012 (Rev. Record 1916). See also *id.*, at 3015–3017, 3021–3055. This evidence was reinforced by an understanding of the cultural milieu at the time of proposal and enactment, spanning a period from 1915 to 1921—not one of the enlightened eras of our history. See generally Chafee, Free Speech in the United States 102, 237, 269–282 (1954 ed.). Congress was aware of this evidence. See, *e. g.*, Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, *supra*, 507–513; Voting Rights, House Hearings, n. 3, *supra*, 508–513.

[15] Other States have found ways of assuring an intelligent exercise of the franchise short of total disenfranchisement of persons not

as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs.[16] Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see

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literate in English. For example, in Hawaii, where literacy in either English or Hawaiian suffices, candidates' names may be printed in both languages, Hawaii Rev. Laws § 11-38 (1963 Supp.); New York itself already provides assistance for those exempt from the literacy requirement and are literate in no language, N. Y. Election Law § 169; and, of course, the problem of assuring the intelligent exercise of the franchise has been met by those States, more than 30 in number, that have no literacy requirement at all, see *e. g.*, Fla. Stat. Ann. §§ 97.061, 101.061 (1960) (form of personal assistance); New Mexico Stat. Ann. §§ 3-2-11, 3-3-13 (personal assistance for those literate in no language), §§ 3-3-7, 3-3-12, 3-2-41 (1953) (ballots and instructions authorized to be printed in English or Spanish). Section 4 (e) does not preclude resort to these alternative methods of assuring the intelligent exercise of the franchise. True, the statute precludes, for a certain class, disenfranchisement and thus limits the States' choice of means of satisfying a purported state interest. But our cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, see, *e. g.*, *Carrington* v. *Rash*, 380 U. S. 89, 96; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 670; *Thomas* v. *Collins*, 323 U. S. 516, 529–530; *Thornhill* v. *Alabama*, 310 U. S. 88, 95–96; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4; *Meyer* v. *Nebraska*, 262 U. S. 390; and Congress is free to apply the same principle in the exercise of its powers.

[16] See, *e. g.*, 111 Cong. Rec. 11060–11061, 15666, 16235. The record in this case includes affidavits describing the nature of New York's two major Spanish-language newspapers, one daily and one weekly, and its three full-time Spanish-language radio stations and affidavits from those who have campaigned in Spanish-speaking areas.

South Carolina v. *Katzenbach, supra,* to which it brought a specially informed legislative competence,[17] it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

There remains the question whether the congressional remedies adopted in § 4 (e) constitute means which are not prohibited by, but are consistent "with the letter and spirit of the constitution." The only respect in which appellees contend that § 4 (e) fails in this regard is that the section itself works an invidious discrimination in violation of the Fifth Amendment by prohibiting the enforcement of the English literacy requirement only for those educated in American-flag schools (schools located within United States jurisdiction) in which the language of instruction was other than English, and not for those educated in schools beyond the territorial limits of the United States in which the language of instruction was also other than English. This is not a complaint that Congress, in enacting § 4 (e), has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the

[17] See, *e. g.*, 111 Cong. Rec. 11061 (Senator Long of Louisiana and Senator Young), 11064 (Senator Holland), drawing on their experience with voters literate in a language other than English. See also an affidavit from Representative Willis of Louisiana expressing the view that on the basis of his thirty years' personal experience in politics he has "formed a definite opinion that French-speaking voters who are illiterate in English generally have as clear a grasp of the issues and an understanding of the candidates, as do people who read and write the English language."

relief effected in § 4 (e) to those educated in non-American-flag schools. We need not pause to determine whether appellees have a sufficient personal interest to have § 4 (e) invalidated on this ground, see generally *United States* v. *Raines*, 362 U. S. 17, since the argument, in our view, falls on the merits.

Section 4 (e) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. Thus we need not decide whether a state literacy law conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminates invidiously against those educated in non-American-flag schools. We need only decide whether the challenged limitation on the relief effected in § 4 (e) was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights, see n. 15, *supra*, is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen* v. *Ward*, 279 U. S. 337, 339, that a legislature need not "strike at all evils at the same time," *Semler* v. *Dental Examiners*, 294 U. S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489.

Guided by these principles, we are satisfied that appellees' challenge to this limitation in § 4 (e) is without merit. In the context of the case before us, the congressional choice to limit the relief effected in § 4 (e) may,

for example, reflect Congress' greater familiarity with the quality of instruction in American-flag schools, [18] a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico,[19] an awareness of the Federal Government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools,[20] and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.[21] We have no occasion to determine in this case whether such factors would justify a similar distinction embodied in a voting-qualification law that denied the franchise to persons educated in non-American-flag schools. We hold only that the limitation on relief effected in § 4 (e) does not constitute a forbidden discrimination since these factors might well have been the basis for the decision of Congress to go "no farther than it did."

We therefore conclude that § 4 (e), in the application challenged in this case, is appropriate legislation to enforce the Equal Protection Clause and that the judgment of the District Court must be and hereby is

Reversed.

MR. JUSTICE DOUGLAS joins the Court's opinion except for the discussion, at pp. 656–658, of the question whether the congressional remedies adopted in § 4 (e) constitute means which are not prohibited by, but are consistent with "the letter and spirit of the constitution." On that

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[18] See, *e. g.*, 111 Cong. Rec. 11060–11061.

[19] See Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1 (1953).

[20] See, *e. g.*, 111 Cong. Rec. 11060–11061, 11066, 11073, 16235. See Osuna, A History of Education in Puerto Rico (1949).

[21] See, *e. g.*, 111 Cong. Rec. 16235; Voting Rights, House Hearings, n. 3, *supra*, 362. See also Jones Act of 1917, 39 Stat. 953, conferring United States citizenship on all citizens of Puerto Rico.

question, he reserves judgment until such time as it is presented by a member of the class against which that particular discrimination is directed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.*

Worthy as its purposes may be thought by many, I do not see how § 4 (e) of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973b (e) (1964 ed. Supp. I), can be sustained except at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and judicial function and the boundaries between federal and state political authority. By the same token I think that the validity of New York's literacy test, a question which the Court considers *only* in the context of the federal statute, must be upheld. It will conduce to analytical clarity if I discuss the second issue first.

I.

The Cardona Case (No. 673).

This case presents a straightforward Equal Protection problem. Appellant, a resident and citizen of New York, sought to register to vote but was refused registration because she failed to meet the New York English literacy qualification respecting eligibility for the franchise.[1] She maintained that although she could not read or write English, she had been born and educated in Puerto Rico and was literate in Spanish. She alleges that New York's statute requiring satisfaction of an English literacy test is an arbitrary and irrational classification that violates the

*[This opinion applies also to *Cardona* v. *Power*, *post*, p. 672.]

[1] The pertinent portions of the New York Constitution, Art. II, § 1, and statutory provisions are reproduced in the Court's opinion, *ante*, pp. 644–645, n. 2.

Equal Protection Clause at least as applied to someone who, like herself, is literate in Spanish.

Any analysis of this problem must begin with the established rule of law that the franchise is essentially a matter of state concern, *Minor* v. *Happersett*, 21 Wall. 162; *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, subject only to the overriding requirements of various federal constitutional provisions dealing with the franchise, *e. g.*, the Fifteenth, Seventeenth, Nineteenth, and Twenty-fourth Amendments,[2] and, as more recently decided, to the general principles of the Fourteenth Amendment. *Reynolds* v. *Sims*, 377 U. S. 533; *Carrington* v. *Rash*, 380 U. S. 89.

The Equal Protection Clause of the Fourteenth Amendment, which alone concerns us here, forbids a State from arbitrarily discriminating among different classes of persons. Of course it has always been recognized that nearly all legislation involves some sort of classification, and the equal protection test applied by this Court is a narrow one: a state enactment or practice may be struck down under the clause only if it cannot be justified as founded upon a rational and permissible state policy. See, *e. g.*, *Powell* v. *Pennsylvania*, 127 U. S. 678; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Walters* v. *City of St. Louis*, 347 U. S. 231.

It is suggested that a different and broader equal protection standard applies in cases where "fundamental liberties and rights are threatened," see *ante*, p. 655, note 15; dissenting opinion of DOUGLAS, J., in *Cardona*, *post*,

[2] The Fifteenth Amendment forbids denial or abridgment of the franchise "on account of race, color, or previous condition of servitude"; the Seventeenth deals with popular election of members of the Senate; the Nineteenth provides for equal suffrage for women; the Twenty-fourth outlaws the poll tax as a qualification for participation in federal elections.

pp. 676–677, which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause.

Thus for me, applying the basic equal protection standard, the issue in this case is whether New York has shown that its English-language literacy test is reasonably designed to serve a legitimate state interest. I think that it has.

In 1959, in *Lassiter* v. *Northampton Election Bd., supra,* this Court dealt with substantially the same question and resolved it unanimously in favor of the legitimacy of a state literacy qualification. There a North Carolina English literacy test was challenged. We held that there was "wide scope" for State qualifications of this sort. 360 U. S., at 51. Dealing with literacy tests generally, the Court there held:

> "The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. . . . It was said last century in Massachusetts that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage. *Stone* v. *Smith,* 159 Mass. 413–414, 34 N. E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that

policy. We cannot say, however, that it is not an allowable one measured by constitutional standards." 360 U. S., at 51–53.

I believe the same interests recounted in *Lassiter* indubitably point toward upholding the rationality of the New York voting test. It is true that the issue here is not so simply drawn between literacy *per se* and illiteracy. Appellant alleges that she is literate in Spanish, and that she studied American history and government in United States Spanish-speaking schools in Puerto Rico. She alleges further that she is "a regular reader of the New York City Spanish-language daily newspapers and other periodicals, which . . . provide proportionately more coverage of government and politics than do most English-language newspapers," and that she listens to Spanish-language radio broadcasts in New York which provide full treatment of governmental and political news. It is thus maintained that whatever may be the validity of literacy tests *per se* as a condition of voting, application of such a test to one literate in Spanish, in the context of the large and politically significant Spanish-speaking community in New York, serves no legitimate state interest, and is thus an arbitrary classification that violates the Equal Protection Clause.

Although to be sure there is a difference between a totally illiterate person and one who is literate in a foreign tongue, I do not believe that this added factor vitiates the constitutionality of the New York statute. Accepting appellant's allegations as true, it is nevertheless also true that the range of material available to a resident of New York literate only in Spanish is much more limited than what is available to an English-speaking resident, that the business of national, state, and local government is conducted in English, and that propositions, amendments, and offices for which candidates are running listed on the ballot are likewise in English. It

is also true that most candidates, certainly those campaigning on a national or statewide level, make their speeches in English. New York may justifiably want its voters to be able to understand candidates directly, rather than through possibly imprecise translations or summaries reported in a limited number of Spanish news media. It is noteworthy that the Federal Government requires literacy in English as a prerequisite to naturalization, 66 Stat. 239, 8 U. S. C. § 1423 (1964 ed.), attesting to the national view of its importance as a prerequisite to full integration into the American political community. Relevant too is the fact that the New York English test is not complex,[3] that it is fairly adminis-

[3] The test is described in McGovney, The American Suffrage Medley 63 (1949) as follows: "The examination is based upon prose compositions of about ten lines each, prepared by the personnel of the State Department of Education, designed to be of the level of reading in the sixth grade . . . . These are uniform for any single examination throughout the state. The examination is given by school authorities and graded by school superintendents or teachers under careful instructions from the central authority, to secure uniformity of grading as nearly as is possible." The 1943 test, submitted by the Attorney General of New York as representative, is reproduced below:

NEW YORK STATE REGENTS LITERACY TEST
(To be filled in by the candidate in ink)

Write your name here.....
First name Middle initial Last name
Write your address here.....
Write the date here.....
Month Day Year

Read this and then write the answers to the questions
Read it as many times as you need to

The legislative branch of the National Government is called the Congress of the United States. Congress makes the laws of the Nation. Congress is composed of two houses. The upper house is called the Senate and its members are called Senators. There are 96 Senators in the upper house, two from each State. Each United

tered,[4] and that New York maintains free adult education classes which appellant and members of her class are encouraged to attend.[5] Given the State's legitimate concern with promoting and safeguarding the intelligent use of the ballot, and given also New York's long experience with the process of integrating non-English-speaking residents into the mainstream of American life, I do not see how it can be said that this qualification for suffrage is unconstitutional. I would uphold the validity of the New York statute, unless the federal statute prevents that result, the question to which I now turn.

States Senator is elected for a term of six years. The lower house of Congress is known as the House of Representatives. The number of Representatives from each state is determined by the population of that state. At present there are 435 members of the House of Representatives. Each Representative is elected for a term of two years. Congress meets in the Capitol at Washington.

The answers to the following questions are to be taken from the above paragraph

1 How many houses are there in Congress? .....
2 What does Congress do? .....
3 What is the lower house of Congress called ?.....
4 How many members are there in the lower house? .....
5 How long is the term of office of a United States Senator? .....
6 How many Senators are there from each state? .....
7 For how long a period are members of the House of Representatives elected? .....
8 In what city does Congress meet? .....

[4] There is no allegation of discriminatory enforcement, and the method of examination, see n. 3, *supra*, makes unequal application virtually impossible. McGovney has noted, *op. cit. supra*, at 62, that "New York is the only state in the Union that both has a reasonable reading requirement and administers it in a manner that secures uniformity of application throughout the state and precludes discrimination, so far as is humanly possible." See *Camacho* v. *Rogers*, 199 F. Supp. 155, 159–160.

[5] See McKinney's Consolidated Laws of New York Ann., Education Law § 4605. See generally Handbook of Adult Education in the United States 455–465 (Knowles ed. 1960).

II.

The Morgan Cases (Nos. 847 and 877).

These cases involve the same New York suffrage restriction discussed above, but the challenge here comes not in the form of a suit to enjoin enforcement of the state statute, but in a test of the constitutionality of a federal enactment which declares that "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language." Section 4 (e) of the Voting Rights Act of 1965. Section 4 (e) declares that anyone who has successfully completed six grades of schooling in an "American-flag" school, in which the primary language is not English, shall not be denied the right to vote because of an inability to satisfy an English literacy test.[6] Although the statute is framed in general terms, so far as has been shown it applies in actual effect only to citizens of Puerto Rican background, and the Court so treats it.

The pivotal question in this instance is what effect the added factor of a congressional enactment has on the straight equal protection argument dealt with above. The Court declares that since § 5 of the Fourteenth Amendment[7] gives to the Congress power to "enforce"

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[6] The statute makes an exception to its sixth-grade rule so that where state law "provides that a different level of education is presumptive of literacy," the applicant must show that he has completed "an equivalent level of education" in the foreign-language United States school.

[7] Section 5 of the Fourteenth Amendment states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

the prohibitions of the Amendment by "appropriate" legislation, the test for judicial review of any congressional determination in this area is simply one of rationality; that is, in effect, was Congress acting rationally in declaring that the New York statute is irrational? Although § 5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the Amendment's prohibition on arbitrary state action, *Ex parte Virginia,* 100 U. S. 339, I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature.

When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. See *Strauder* v. *West Virginia,* 100 U. S. 303, 310. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all. Thus, in *Ex parte Virginia, supra,* involving a federal statute making it a federal crime to disqualify anyone from jury service because of race, the Court first held as a matter of constitutional law that "the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color." 100 U. S., at 345. Only then did the Court hold that to enforce this prohibition upon state discrimination, Congress could enact a criminal statute of the type under consideration. See also *Clyatt* v. *United States,* 197 U. S. 207, sustaining the constitutionality of the anti-

peonage laws, 14 Stat. 546, now 42 U. S. C. § 1994 (1964 ed.), under the Enforcement Clause of the Thirteenth Amendment.

A more recent Fifteenth Amendment case also serves to illustrate this distinction. In *South Carolina* v. *Katzenbach*, 383 U. S. 301, decided earlier this Term, we held certain remedial sections of this Voting Rights Act of 1965 constitutional under the Fifteenth Amendment, which is directed against deprivations of the right to vote on account of race. In enacting those sections of the Voting Rights Act the Congress made a detailed investigation of various state practices that had been used to deprive Negroes of the franchise. See 383 U. S., at 308–315. In passing upon the remedial provisions, we reviewed first the "voluminous legislative history" as well as judicial precedents supporting the basic congressional finding that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges. See 383 U. S., at 309, 329–330, 333–334. Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative.

Section 4 (e), however, presents a significantly different type of congressional enactment. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command, that is, whether a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine. Were the rule otherwise, Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments,

let alone those under other provisions of the Constitution, by resorting to congressional power under the Necessary and Proper Clause. In view of this Court's holding in *Lassiter, supra,* that an English literacy test is a permissible exercise of state supervision over its franchise, I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by § 4 (e). In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.

I do not mean to suggest in what has been said that a legislative judgment of the type incorporated in § 4 (e) is without any force whatsoever. Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.[8] In *South Carolina* v. *Katzenbach, supra,* such legislative findings were made to show that racial discrimination in voting was actually occurring. Similarly, in *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, and *Katzenbach* v. *McClung,* 379 U. S. 294, this Court upheld

[8] See generally Karst, Legislative Facts in Constitutional Litigation, 1960 The Supreme Court Review 75 (Kurland ed.); Alfange, The Relevance of Legislative Facts in Constitutional Law, 114 U. Pa. L. Rev. 637 (1966).

Title II of the Civil Rights Act of 1964 under the Commerce Clause. There again the congressional determination that racial discrimination in a clearly defined group of public accommodations did effectively impede interstate commerce was based on "voluminous testimony," 379 U. S., at 253, which had been put before the Congress and in the context of which it passed remedial legislation.

But no such factual data provide a legislative record supporting § 4 (e)[9] by way of showing that Spanish-speaking citizens are fully as capable of making informed decisions in a New York election as are English-speaking citizens. Nor was there any showing whatever to support the Court's alternative argument that § 4 (e) should be viewed as but a remedial measure designed to cure or assure against unconstitutional discrimination of other varieties, *e. g.*, in "public schools, public housing and law enforcement," *ante*, p. 652, to which Puerto Rican minorities might be subject in such communities as New York. There is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns. See *Heart of Atlanta Motel, supra; South Carolina* v. *Katzenbach, supra.*

Thus, we have here not a matter of giving deference to a congressional estimate, based on its determination of legislative facts, bearing upon the validity *vel non* of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection. Although this kind of declaration is of course

[9] There were no committee hearings or reports referring to this section, which was introduced from the floor during debate on the full Voting Rights Act. See 111 Cong. Rec. 11027, 15666, 16234.

entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation, I do not believe it lessens our responsibility to decide the fundamental issue of whether in fact the state enactment violates federal constitutional rights.

In assessing the deference we should give to this kind of congressional expression of policy, it is relevant that the judiciary has always given to congressional enactments a presumption of validity. *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 457–458. However, it is also a canon of judicial review that state statutes are given a similar presumption, *Butler* v. *Commonwealth*, 10 How. 402, 415. Whichever way this case is decided, one statute will be rendered inoperative in whole or in part, and although it has been suggested that this Court should give somewhat more deference to Congress than to a state legislature,[10] such a simple weighing of presumptions is hardly a satisfying way of resolving a matter that touches the distribution of state and federal power in an area so sensitive as that of the regulation of the franchise. Rather it should be recognized that while the Fourteenth Amendment is a "brooding omnipresence" over all state legislation, the substantive matters which it touches are all within the primary legislative competence of the States. Federal authority, legislative no less than judicial, does not intrude unless there has been a denial by state action of Fourteenth Amendment limitations, in this instance a denial of equal protection. At least in the area of primary state concern a state statute that passes constitutional muster under the judicial standard of rationality should not be permitted to be set at naught by a mere contrary con-

[10] See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 154–155 (1893).

gressional pronouncement unsupported by a legislative record justifying that conclusion.

To deny the effectiveness of this congressional enactment is not of course to disparage Congress' exertion of authority in the field of civil rights; it is simply to recognize that the Legislative Branch like the other branches of federal authority is subject to the governmental boundaries set by the Constitution. To hold, on this record, that § 4 (e) overrides the New York literacy requirement seems to me tantamount to allowing the Fourteenth Amendment to swallow the State's constitutionally ordained primary authority in this field. For if Congress by what, as here, amounts to mere *ipse dixit* can set that otherwise permissible requirement partially at naught I see no reason why it could not also substitute its judgment for that of the States in other fields of their exclusive primary competence as well.

I would affirm the judgments in each of these cases.[11]

[11] A number of other arguments have been suggested to sustain the constitutionality of § 4 (e). These are referred to in the Court's opinion, *ante*, pp. 646–647, n. 5. Since all of such arguments are rendered superfluous by the Court's decision and none of them is considered by the majority, I deem it unnecessary to deal with them save to say that in my opinion none of those contentions provides an adequate constitutional basis for sustaining the statute.

EXHIBIT 37

UNITED STATES *v.* GUEST ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA.

No. 65. Argued November 9, 1965.—
Decided March 28, 1966.

Appellees, six private individuals, were indicted under 18 U. S. C. § 241 for conspiring to deprive Negro citizens in the vicinity of Athens, Georgia, of the free exercise and enjoyment of rights secured to them by the Constitution and laws of the United States, viz., the right to use state facilities without discrimination on the basis of race, the right freely to engage in interstate travel, and the right to equal enjoyment of privately owned places of public accommodation, now guaranteed by Title II of the Civil Rights Act of 1964. The indictment specified various means by which the objects of the conspiracy would be achieved, including causing the arrest of Negroes by means of false reports of their criminal acts. The District Court dismissed the indictment on the ground that it did not involve rights which are attributes of national citizenship, to which it deemed § 241 solely applicable. The court also held the public-accommodation allegation legally inadequate for failure to allege discriminatory motivation which the court thought essential to charge an interference with a right secured by Title II, and because the enforcement remedies in Title II were deemed exclusive. The United States appealed directly to this Court under the Criminal Appeals Act. *Held:*

1. This Court has no jurisdiction under the Criminal Appeals Act to review the invalidation of that portion of the indictment concerning interference with the right to use public accommodations, the District Court's ruling with respect thereto being based, at least alternatively, not on a construction of a statute but on what the court conceived to be a pleading defect. Pp. 749–752.

2. The allegation in the indictment of state involvement in the conspiracy charged under § 241 was sufficient to charge a violation of rights protected by the Fourteenth Amendment. Pp. 753–757.

(a) Section 241 includes within its coverage Fourteenth Amendment rights whether arising under the Equal Protection

Clause, as in this case, or under the Due Process Clause, as in *United States* v. *Price, post,* p. 787. P. 753.

(b) As construed to protect Fourteenth Amendment rights § 241 is not unconstitutionally vague since by virtue of its being a conspiracy statute it operates only against an offender acting with specific intent to infringe the right in question (*Screws* v. *United States,* 325 U. S. 91) and the right to equal use of public facilities described in the indictment has been made definite by decisions of this Court. Pp. 753–754.

(c) The State's involvement need be neither exclusive nor direct in order to create rights under the Equal Protection Clause. Pp. 755–756.

(d) The allegation concerning the arrest of Negroes by means of false reports was sufficiently broad to cover a charge of active connivance by state agents or other official discriminatory conduct constituting a denial of rights protected by the Equal Protection Clause. Pp. 756–757.

3. Section 241 reaches conspiracies specifically directed against the exercise of the constitutional right to travel freely from State to State and to use highways and other instrumentalities for that purpose; the District Court therefore erred in dismissing the branch of the indictment relating to that right. Pp. 757–760.

246 F. Supp. 475, reversed and remanded.

Solicitor General Marshall argued the cause for the United States. With him on the brief were *Assistant Attorney General Doar, Louis F. Claiborne* and *David Rubin.*

Charles J. Bloch, by appointment of the Court, 380 U. S. 969, argued the cause and filed a brief for appellee Lackey.

James E. Hudson argued the cause and filed a brief for appellees Guest et al.

MR. JUSTICE STEWART delivered the opinion of the Court.

The six defendants in this case were indicted by a United States grand jury in the Middle District of

Georgia for criminal conspiracy in violation of 18 U. S. C. § 241 (1964 ed.). That section provides in relevant part:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> . . . . . .
>
> "They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

In five numbered paragraphs, the indictment alleged a single conspiracy by the defendants to deprive Negro citizens of the free exercise and enjoyment of several specified rights secured by the Constitution and laws of the United States.[1] The defendants moved to dismiss

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[1] The indictment, filed on October 16, 1964, was as follows:

"THE GRAND JURY CHARGES:

"Commencing on or about January 1, 1964, and continuing to the date of this indictment, HERBERT GUEST, JAMES SPERGEON LACKEY, CECIL WILLIAM MYERS, DENVER WILLIS PHILLIPS, JOSEPH HOWARD SIMS, and GEORGE HAMPTON TURNER, did, within the Middle District of Georgia, Athens Division, conspire together, with each other, and with other persons to the Grand Jury unknown, to injure, oppress, threaten, and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and laws of the United States:

"1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accommodation;

"2. The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia,

the indictment on the ground that it did not charge an offense under the laws of the United States. The District Court sustained the motion and dismissed the indictment as to all defendants and all numbered paragraphs of the indictment. 246 F. Supp. 475.

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owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

"3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

"4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

"5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia.

"It was a part of the plan and purpose of the conspiracy that its objects be achieved by various means, including the following:

"1. By shooting Negroes;

"2. By beating Negroes;

"3. By killing Negroes;

"4. By damaging and destroying property of Negroes;

"5. By pursuing Negroes in automobiles and threatening them with guns;

"6. By making telephone calls to Negroes to threaten their lives, property, and persons, and by making such threats in person;

"7. By going in disguise on the highway and on the premises of other persons;

"8. By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts; and

"9. By burning crosses at night in public view.

"All in violation of Section 241, Title 18, United States Code."

The only additional indication in the record concerning the factual details of the conduct with which the defendants were charged is the statement of the District Court that: "It is common knowledge that two of the defendants, Sims and Myers, have already been prosecuted in the Superior Court of Madison County, Georgia for the murder of Lemuel A. Penn and by a jury found not guilty." 246 F. Supp. 475, 487.

The United States appealed directly to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731.[2] We postponed decision of the question of our jurisdiction to the hearing on the merits. 381 U. S. 932. It is now apparent that this Court does not have jurisdiction to decide one of the issues sought to be raised on this direct appeal. As to the other issues, however, our appellate jurisdiction is clear, and for the reasons that follow, we reverse the judgment of the District Court. As in *United States* v. *Price*, *post*, p. 787, decided today, we deal here with issues of statutory construction, not with issues of constitutional power.

I.

The first numbered paragraph of the indictment, reflecting a portion of the language of § 201 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (a) (1964 ed.), alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens in the free exercise and enjoyment of:

> "The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accommodation." [3]

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[2] This appeal concerns only the first four numbered paragraphs of the indictment. The Government conceded in the District Court that the fifth paragraph added nothing to the indictment, and no question is raised here as to the dismissal of that paragraph.

[3] Section 201 (a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a (a) (1964 ed.), provides:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

The criteria for coverage of motion picture theaters by the Act are stated in §§ 201 (b)(3) and 201 (c)(3), 42 U. S. C. §§ 2000a

The District Court held that this paragraph of the indictment failed to state an offense against rights secured by the Constitution or laws of the United States. The court found a fatal flaw in the failure of the paragraph to include an allegation that the acts of the defendants were motivated by racial discrimination, an allegation the court thought essential to charge an interference with rights secured by Title II of the Civil Rights Act of 1964.[4] The court went on to say that, in any event, 18 U. S. C. § 241 is not an available sanction to protect rights secured by that title because § 207 (b) of the 1964 Act, 42 U. S. C. § 2000a–6 (b) (1964 ed.), specifies that the remedies provided in Title II itself are

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(b)(3) and 2000a (c)(3) (1964 ed.); the criteria for coverage of restaurants are stated in §§ 201 (b)(2) and 201 (c)(2), 42 U. S. C. §§ 2000a (b)(2) and 2000a (c)(2) (1964 ed.). No issue is raised here as to the failure of the indictment to allege specifically that the Act is applicable to the places of public accommodation described in this paragraph of the indictment.

[4] The District Court said: "The Government contends that the rights enumerated in paragraph 1 stem from Title 2 of the Civil Rights Act of 1964, and thus automatically come within the purview of § 241. The Government conceded on oral argument that paragraph one would add nothing to the indictment absent the Act. It is not clear how the rights mentioned in paragraph one can be said to come from the Act because § 201 (a), upon which the draftsman doubtless relied, lists the essential element 'without discrimination or segregation on the ground of race, color, religion, or national origin.' This element is omitted from paragraph one of the indictment, and does not appear in the charging part of the indictment. The Supreme Court said in Cruikshank, supra, 92 U. S. at page 556, where deprivation of right to vote was involved,

"'We may suspect that "race" was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense and cannot be supplied by implication. Everything essential must be charged positively, not inferentially. The defect here is not in form, but in substance.'" 246 F. Supp. 475, 484.

to be the exclusive means of enforcing the rights the title secures.[5]

A direct appeal to this Court is available to the United States under the Criminal Appeals Act, 18 U. S. C. § 3731, from "a decision or judgment . . . dismissing any indictment . . . or any count thereof, where such decision or judgment is based upon the . . . construction of the statute upon which the indictment . . . is founded." In the present case, however, the District Court's judgment as to the first paragraph of the indictment was based, at least alternatively, upon its determination that this paragraph was defective as a matter of pleading. Settled principles of review under the Criminal Appeals Act therefore preclude our review of the District Court's judgment on this branch of the indictment. In *United States* v. *Borden Co.*, 308 U. S. 188, Chief Justice Hughes, speaking for a unanimous Court, set out these principles with characteristic clarity:

> "The established principles governing our review are these: (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indict-

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[5] Section 207 (b) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–6 (b) (1964 ed.), states:

"The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

Relying on this provision and its legislative history, the District Court said: "It seems crystal clear that the Congress in enacting the Civil Rights Act of 1964 did not intend to subject anyone to any possible criminal penalties except those specifically provided for in the Act itself." 246 F. Supp., at 485.

ment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review. . . ." 308 U. S., at 193.

See also *United States* v. *Swift & Co.*, 318 U. S. 442, 444.

The result is not changed by the circumstance that we have jurisdiction over this appeal as to the other paragraphs of the indictment. *United States* v. *Borden, supra,* involved an indictment comparable to the present one for the purposes of jurisdiction under the Criminal Appeals Act. In *Borden,* the District Court had held all four counts of the indictment invalid as a matter of construction of the Sherman Act, but had also held the third count defective as a matter of pleading. The Court accepted jurisdiction on direct appeal as to the first, second, and fourth counts of the indictment, but it dismissed the appeal as to the third count for want of jurisdiction. "The Government's appeal does not open the whole case." 308 U. S. 188, 193.

It is hardly necessary to add that our ruling as to the Court's lack of jurisdiction now to review this aspect of the case implies no opinion whatsoever as to the correctness either of the District Court's appraisal of this paragraph of the indictment as a matter of pleading or of the court's view of the preclusive effect of § 207 (b) of the Civil Rights Act of 1964.

II.

The second numbered paragraph of the indictment alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

> "The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof."

Correctly characterizing this paragraph as embracing rights protected by the Equal Protection Clause of the Fourteenth Amendment, the District Court held as a matter of statutory construction that 18 U. S. C. § 241 does not encompass any Fourteenth Amendment rights, and further held as a matter of constitutional law that "any broader construction of § 241 . . . would render it void for indefiniteness." 246 F. Supp., at 486. In so holding, the District Court was in error, as our opinion in *United States* v. *Price*, *post*, p. 787, decided today, makes abundantly clear.

To be sure, *Price* involves rights under the Due Process Clause, whereas the present case involves rights under the Equal Protection Clause. But no possible reason suggests itself for concluding that § 241—if it protects Fourteenth Amendment rights—protects rights secured by the one Clause but not those secured by the other. We have made clear in *Price* that when § 241 speaks of "any right or privilege secured . . . by the Constitution or laws of the United States," it means precisely that.

Moreover, inclusion of Fourteenth Amendment rights within the compass of 18 U. S. C. § 241 does not render the statute unconstitutionally vague. Since the gravamen of the offense is conspiracy, the requirement that the offender must act with a specific intent to inter-

fere with the federal rights in question is satisfied. *Screws* v. *United States*, 325 U. S. 91; *United States* v. *Williams*, 341 U. S. 70, 93–95 (dissenting opinion). And the rights under the Equal Protection Clause described by this paragraph of the indictment have been so firmly and precisely established by a consistent line of decisions in this Court,[6] that the lack of specification of these rights in the language of § 241 itself can raise no serious constitutional question on the ground of vagueness or indefiniteness.

Unlike the indictment in *Price*, however, the indictment in the present case names no person alleged to have acted in any way under the color of state law. The argument is therefore made that, since there exist no Equal Protection Clause rights against wholly private action, the judgment of the District Court on this branch of the case must be affirmed. On its face, the argument is unexceptionable. The Equal Protection Clause speaks to the State or to those acting under the color of its authority.[7]

In this connection, we emphasize that § 241 by its clear language incorporates no more than the Equal Protection Clause itself; the statute does not purport to give substantive, as opposed to remedial, implementation to

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[6] See, *e. g.*, *Brown* v. *Board of Education*, 347 U. S. 483 (schools); *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54, *Wright* v. *Georgia*, 373 U. S. 284, *Watson* v. *Memphis*, 373 U. S. 526, *City of New Orleans* v. *Barthe*, 376 U. S. 189 (parks and playgrounds); *Holmes* v. *City of Atlanta*, 350 U. S. 879 (golf course); *Mayor and City Council of Baltimore City* v. *Dawson*, 350 U. S. 877 (beach); *Muir* v. *Louisville Park Theatrical Assn.*, 347 U. S. 971 (auditorium); *Johnson* v. *Virginia*, 373 U. S. 61 (courthouse); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (parking garage); *Turner* v. *City of Memphis*, 369 U. S. 350 (airport).

[7] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

any rights secured by that Clause.[8] Since we therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.[9]

It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause "does not . . . add any thing to the rights which one citizen has under the Constitution against another." *United States* v. *Cruikshank*, 92 U. S. 542, 554–555. As MR. JUSTICE DOUGLAS more recently put it, "The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*." *United States* v. *Williams*, 341 U. S. 70, 92 (dissenting opinion). This has been the view of the Court from the beginning. *United States* v. *Cruikshank*, *supra*; *United States* v. *Harris*, 106 U. S. 629; *Civil Rights Cases*, 109 U. S. 3; *Hodges* v. *United States*, 203 U. S. 1; *United States* v. *Powell*, 212 U. S. 564. It remains the Court's view today. See, *e. g.*, *Evans* v. *Newton*, 382 U. S. 296; *United States* v. *Price*, *post*, p. 787.

This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative

[8] See p. 747, *supra*.

[9] Thus, contrary to the suggestion in MR. JUSTICE BRENNAN'S separate opinion, nothing said in this opinion has the slightest bearing on the validity or construction of Title III or Title IV of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000b, 2000c (1964 ed.).

forces leading to the constitutional violation. See, *e. g.*, *Shelley* v. *Kraemer*, 334 U. S. 1; *Pennsylvania* v. *Board of Trusts*, 353 U. S. 230; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Peterson* v. *City of Greenville*, 373 U. S. 244; *Lombard* v. *Louisiana*, 373 U. S. 267; *Griffin* v. *Maryland*, 378 U. S. 130; *Robinson* v. *Florida*, 378 U. S. 153; *Evans* v. *Newton*, *supra*.

This case, however, requires no determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause. This is so because, contrary to the argument of the litigants, the indictment in fact contains an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss. One of the means of accomplishing the object of the conspiracy, according to the indictment, was "By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."[10] In *Bell* v. *Maryland*, 378 U. S. 226, three members of the Court expressed the view that a private businessman's invocation of state police and judicial action to carry out his own policy of racial discrimination was sufficient to create Equal Protection Clause rights in those against whom the racial discrimination was directed.[11] Three other members of the Court strongly disagreed with that view,[12] and three expressed no opinion on the question. The allegation of the extent of official involvement in the present case is not clear. It may charge no more than co-operative private and state action similar to that involved in *Bell*, but it may go considerably further. For example, the allegation is broad enough to cover a charge of active connivance by agents of the State in the making of the "false reports," or other conduct amount-

[10] See note 1, *supra*.

[11] 378 U. S. 226, at 242 (separate opinion of MR. JUSTICE DOUGLAS); *id.*, at 286 (separate opinion of Mr. Justice Goldberg).

[12] *Id.*, at 318 (dissenting opinion of MR. JUSTICE BLACK).

ing to official discrimination clearly sufficient to constitute denial of rights protected by the Equal Protection Clause. Although it is possible that a bill of particulars, or the proof if the case goes to trial, would disclose no co-operative action of that kind by officials of the State, the allegation is enough to prevent dismissal of this branch of the indictment.

III.

The fourth numbered paragraph of the indictment alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

> "The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." [13]

The District Court was in error in dismissing the indictment as to this paragraph. The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. In *Crandall* v. *Nevada*, 6 Wall. 35, invali-

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[13] The third numbered paragraph alleged that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

"The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia."

Insofar as the third paragraph refers to the use of local public facilities, it is covered by the discussion of the second numbered paragraph of the indictment in Part II of this opinion. Insofar as the third paragraph refers to the use of streets or highways in interstate commerce, it is covered by the present discussion of the fourth numbered paragraph of the indictment.

dating a Nevada tax on every person leaving the State by common carrier, the Court took as its guide the statement of Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492:

> "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

See 6 Wall., at 48–49.

Although the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State," [14] that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.[15] In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. See *Williams* v. *Fears*, 179 U. S. 270, 274; *Twining* v. *New Jersey*, 211 U. S. 78, 97; *Edwards* v. *California*, 314 U. S. 160, 177 (concurring opinion), 181 (concurring opinion); *New York* v. *O'Neill*, 359 U. S. 1, 6–8; 12–16 (dissenting opinion).

In *Edwards* v. *California*, 314 U. S. 160, invalidating a California law which impeded the free interstate passage of the indigent, the Court based its reaffirmation of the federal right of interstate travel upon the Commerce Clause. This ground of decision was consistent with precedents firmly establishing that the federal com-

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[14] Art. IV, Articles of Confederation.

[15] See Chafee, Three Human Rights in the Constitution of 1787, at 185 (1956).

merce power surely encompasses the movement in interstate commerce of persons as well as commodities. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 203; *Covington & Cincinnati Bridge Co.* v. *Kentucky,* 154 U. S. 204, 218–219; *Hoke* v. *United States,* 227 U. S. 308, 320; *United States* v. *Hill,* 248 U. S. 420, 423. It is also well settled in our decisions that the federal commerce power authorizes Congress to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in interstate commerce. *Mitchell* v. *United States,* 313 U. S. 80; *Henderson* v. *United States,* 339 U. S. 816; *Boynton* v. *Virginia,* 364 U. S. 454; *Atlanta Motel* v. *United States,* 379 U. S. 241; *Katzenbach* v. *McClung,* 379 U. S. 294.

Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further.[16] All have agreed that the right exists. Its explicit recognition as one of the federal rights protected by what is now 18 U. S. C. § 241 goes back at least as far as 1904. *United States* v. *Moore,* 129 F. 630, 633. We reaffirm it now.[17]

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[16] The District Court relied heavily on *United States* v. *Wheeler,* 254 U. S. 281, in dismissing this branch of the indictment. That case involved an alleged conspiracy to compel residents of Arizona to move out of that State. The right of interstate travel was, therefore, not directly involved. Whatever continuing validity *Wheeler* may have as restricted to its own facts, the dicta in the *Wheeler* opinion relied on by the District Court in the present case have been discredited in subsequent decisions. Cf. *Edwards* v. *California,* 314 U. S. 160, 177, 180 (DOUGLAS, J., concurring); *United States* v. *Williams,* 341 U. S. 70, 80.

[17] As emphasized in MR. JUSTICE HARLAN'S separate opinion, § 241 protects only against interference with rights secured by other federal laws or by the Constitution itself. The right to interstate travel is a right that the Constitution itself guarantees, as the cases cited in the text make clear. Although these cases in fact involved governmental interference with the right of free interstate travel,

This does not mean, of course, that every criminal conspiracy affecting an individual's right of free interstate passage is within the sanction of 18 U. S. C. § 241. A specific intent to interfere with the federal right must be proved, and at a trial the defendants are entitled to a jury instruction phrased in those terms. *Screws* v. *United States*, 325 U. S. 91, 106–107. Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought. Accordingly, it was error to grant the motion to dismiss on this branch of the indictment.

For these reasons, the judgment of the District Court is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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their reasoning fully supports the conclusion that the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private. In this connection, it is important to reiterate that the right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.

We are not concerned here with the extent to which interstate travel may be regulated or controlled by the exercise of a State's police power acting within the confines of the Fourteenth Amendment. See *Edwards* v. *California*, 314 U. S. 160, 184 (concurring opinion); *New York* v. *O'Neill*, 359 U. S. 1, 6–8. Nor is there any issue here as to the permissible extent of federal interference with the right within the confines of the Due Process Clause of the Fifth Amendment. Cf. *Zemel* v. *Rusk*, 381 U. S. 1; *Aptheker* v. *Secretary of State*, 378 U. S. 500; *Kent* v. *Dulles*, 357 U. S. 116.

MR. JUSTICE CLARK, with whom MR. JUSTICE BLACK and MR. JUSTICE FORTAS join, concurring.

I join the opinion of the Court in this case but believe it worthwhile to comment on its Part II in which the Court discusses that portion of the indictment charging the appellees with conspiring to injure, oppress, threaten and intimidate Negro citizens of the United States in the free exercise and enjoyment of:

> "The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof."

The appellees contend that the indictment is invalid since 18 U. S. C. § 241, under which it was returned, protects only against interference with the exercise of the right to equal utilization of state facilities, which is not a right "secured" by the Fourteenth Amendment in the absence of state action. With respect to this contention the Court upholds the indictment on the ground that it alleges the conspiracy was accomplished, in part, "[b]y causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." The Court reasons that this allegation of the indictment might well cover active connivance by agents of the State in the making of these false reports or in carrying on other conduct amounting to official discrimination. By so construing the indictment, it finds the language sufficient to cover a denial of rights protected by the Equal Protection Clause. The Court thus removes from the case any necessity for a "determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause." A study of the language in the indictment clearly shows

that the Court's construction is not a capricious one, and I therefore agree with that construction, as well as the conclusion that follows.

The Court carves out of its opinion the question of the power of Congress, under § 5 of the Fourteenth Amendment, to enact legislation implementing the Equal Protection Clause or any other provision of the Fourteenth Amendment. The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities. My Brother BRENNAN, however, says that the Court's disposition constitutes an acceptance of appellees' aforesaid contention as to § 241. Some of his language further suggests that the Court indicates *sub silentio* that Congress does not have the power to outlaw such conspiracies. Although the Court specifically rejects any such connotation, *ante*, p. 755, it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.

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

I join Parts I and II [1] of the Court's opinion, but I cannot subscribe to Part III in its full sweep. To the extent that it is there held that 18 U. S. C. § 241 (1964 ed.) reaches conspiracies, embracing only the action of

[1] The action of three of the Justices who join the Court's opinion in nonetheless cursorily pronouncing themselves on the far-reaching constitutional questions deliberately not reached in Part II seems to me, to say the very least, extraordinary.

private persons, to obstruct or otherwise interfere with the right of citizens freely to engage in interstate travel, I am constrained to dissent. On the other hand, I agree that § 241 does embrace state interference with such interstate travel, and I therefore consider that this aspect of the indictment is sustainable on the reasoning of Part II of the Court's opinion.

This right to travel must be found in the Constitution itself. This is so because § 241 covers only conspiracies to interfere with any citizen in the "free exercise or enjoyment" of a right or privilege "secured to him by the Constitution or laws of the United States," and no "right to travel" can be found in § 241 or in any other law of the United States. My disagreement with this phase of the Court's opinion lies in this: While past cases do indeed establish that there is a constitutional "right to travel" between States free from unreasonable *governmental* interference, today's decision is the first to hold that such movement is also protected against *private* interference, and, depending on the constitutional source of the right, I think it either unwise or impermissible so to read the Constitution.

Preliminarily, nothing in the Constitution expressly secures the right to travel. In contrast the Articles of Confederation provided in Art. IV:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . ."

This right to "free ingress and regress" was eliminated from the draft of the Constitution without discussion even though the main objective of the Convention was to create a stronger union. It has been assumed that the clause was dropped because it was so obviously an essential part of our federal structure that it was necessarily subsumed under more general clauses of the Constitution. See *United States* v. *Wheeler*, 254 U. S. 281, 294. I propose to examine the several asserted constitutional bases for the right to travel, and the scope of its protection in relation to each source.

I.

Because of the close proximity of the right of ingress and regress to the Privileges and Immunities Clause of the Articles of Confederation it has long been declared that the right is a privilege and immunity of national citizenship under the Constitution. In the influential opinion of Mr. Justice Washington on circuit, *Corfield* v. *Coryell*, 4 Wash. C. C. 371 (1825), the court addressed itself to the question—"what are the privileges and immunities of citizens in the several states?" *Id.*, at 380. *Corfield* was concerned with a New Jersey statute restricting to state citizens the right to rake for oysters, a statute which the court upheld. In analyzing the Privileges and Immunities Clause of the Constitution, Art. IV, § 2, the court stated that it confined "these expressions to those privileges and immunities which are, in their nature, *fundamental*," and listed among them "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . ." *Id.*, at 380–381.

The dictum in *Corfield* was given general approval in the first opinion of this Court to deal directly with the right of free movement, *Crandall* v. *Nevada*, 6 Wall. 35,

which struck down a Nevada statute taxing persons leaving the State. It is first noteworthy that in his concurring opinion Mr. Justice Clifford asserted that he would hold the statute void exclusively on commerce grounds for he was clear "that the State legislature cannot impose any such burden upon commerce among the several States." 6 Wall., at 49. The majority opinion of Mr. Justice Miller, however, eschewed reliance on the Commerce Clause and the Import-Export Clause and looked rather to the nature of the federal union:

> "'The people of these United States constitute one nation. . . . This government has necessarily a capital established by law . . . . That government has a right to call to this point any or all of its citizens to aid in its service . . . . The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established." 6 Wall., at 43–44.

Accompanying this need of the Federal Government, the Court found a correlative right of the citizen to move unimpeded throughout the land:

> "He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are

> conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." 6 Wall., at 44.

The focus of that opinion, very clearly, was thus on impediments by the States on free movement by citizens. This is emphasized subsequently when Mr. Justice Miller asserts that this approach is "neither novel nor unsupported by authority," because it is, fundamentally, a question of the exercise of a State's taxing power to obstruct the functions of the Federal Government: "[T]he right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied." 6 Wall., at 44–45.

Later cases, alluding to privileges and immunities, have in dicta included the right to free movement. See *Paul* v. *Virginia*, 8 Wall. 168, 180; *Williams* v. *Fears*, 179 U. S. 270, 274; *Twining* v. *New Jersey*, 211 U. S. 78.

Although the right to travel thus has respectable precedent to support its status as a privilege and immunity of national citizenship, it is important to note that those cases all dealt with the right of travel simply as affected by oppressive *state* action. Only one prior case in this Court, *United States* v. *Wheeler*, 254 U. S. 281, was argued precisely in terms of a right to free movement as against interference by private individuals. There the Government alleged a conspiracy under the predecessor of § 241 against the perpetrators of the notorious Bisbee Deportations.[2] The case was argued straightforwardly in terms of whether the right to free ingress and

[2] For a discussion of the deportations, see The President's Mediation Comm'n, Report on the Bisbee Deportations (November 6, 1917).

egress, admitted by both parties to be a right of national citizenship, was constitutionally guaranteed against private conspiracies. The Brief for the Defendants in Error, whose counsel was Charles Evans Hughes, later Chief Justice of the United States, gives as one of its main points: "So far as there is a right pertaining to Federal citizenship to have free ingress or egress with respect to the several States, the right is essentially one of protection against the action of the States themselves and of those acting under their authority." Brief, at p. i. The Court, with one dissent, accepted this interpretation of the right of unrestricted interstate movement, observing that *Crandall* v. *Nevada, supra,* was inapplicable because, *inter alia,* it dealt with state action. 254 U. S., at 299. More recent cases discussing or applying the right to interstate travel have always been in the context of oppressive state action. See, *e. g., Edwards* v. *California,* 314 U. S. 160, and other cases discussed, *infra.*[3]

It is accordingly apparent that the right to unimpeded interstate travel, regarded as a privilege and immunity of national citizenship, was historically seen as a method of breaking down state provincialism, and facilitating the creation of a true federal union. In the one case in which a private conspiracy to obstruct such movement was heretofore presented to this Court, the predecessor of the very statute we apply today was held not to encompass such a right.

II.

A second possible constitutional basis for the right to move among the States without interference is the Commerce Clause. When Mr. Justice Washington articulated

[3] The Court's reliance on *United States* v. *Moore,* 129 F. 630, is misplaced. That case held only that it was not a privilege or immunity to organize labor unions. The reference to "the right to pass from one state to any other" was purely incidental dictum.

the right in *Corfield*, it was in the context of a state statute impeding economic activity by outsiders, and he cast his statement in economic terms. 4 Wash. C. C., at 380–381. The two concurring Justices in *Crandall* v. *Nevada*, *supra*, rested solely on the commerce argument, indicating again the close connection between freedom of commerce and travel as principles of our federal union. In *Edwards* v. *California*, 314 U. S. 160, the Court held squarely that the right to unimpeded movement of persons is guaranteed against oppressive state legislation by the Commerce Clause, and declared unconstitutional a California statute restricting the entry of indigents into that State.

Application of the Commerce Clause to this area has the advantage of supplying a longer tradition of case law and more refined principles of adjudication. States do have rights of taxation and quarantine, see *Edwards* v. *California*, 314 U. S., at 184 (concurring opinion), which must be weighed against the general right of free movement, and Commerce Clause adjudication has traditionally been the means of reconciling these interests. Yet this approach to the right to travel, like that found in the privileges and immunities cases, is concerned with the interrelation of state and federal power, not—with an exception to be dealt with in a moment—with private interference.

The case of *In re Debs*, 158 U. S. 564, may be thought to raise some doubts as to this proposition. There the United States sought to enjoin Debs and members of his union from continuing to obstruct—by means of a strike—interstate commerce and the passage of the mails. The Court held that Congress and the Executive could certainly act to keep the channels of interstate commerce open, and that a court of equity had no less power to enjoin what amounted to a public nuisance. It might

be argued that to the extent *Debs* permits the Federal Government to obtain an injunction against the private conspiracy alleged in the present indictment,[4] the criminal statute should be applicable as well on the ground that the governmental interest in both cases is the same, namely to vindicate the underlying policy of the Commerce Clause. However, § 241 is not directed toward the vindication of governmental interests; it requires a private right under federal law. No such right can be found in *Debs*, which stands simply for the proposition that the Commerce Clause gives the Federal Government standing to sue on a basis similar to that of private individuals under nuisance law. The substantive rights of private persons to enjoin such impediments, of course, devolve from state not federal law; any seemingly inconsistent discussion in *Debs* would appear substantially vitiated by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

I cannot find in any of this past case law any solid support for a conclusion that the Commerce Clause embraces a right to be free from private interference. And the Court's opinion here makes no such suggestion.

III.

One other possible source for the right to travel should be mentioned. Professor Chafee, in his thoughtful study, "Freedom of Movement," [5] finds both the privileges and immunities approach and the Commerce Clause approach unsatisfactory. After a thorough review of the history

[4] It is not even clear that an equity court would enjoin a conspiracy of the kind alleged here, for traditionally equity will not enjoin a crime. See Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1013–1018 (1965).

[5] In Three Human Rights in the Constitution of 1787, at 162 (1956).

and cases dealing with the question he concludes that this "valuable human right," *id.*, at 209, is best seen in due process terms:

> "Already in several decisions the Court has used the Due Process Clause to safeguard the right of the members of any race to reside where they please inside a state, regardless of ordinances and injunctions. Why is not this clause equally available to assure the right to live in any state one desires? And unreasonable restraints by the national government on mobility can be upset by the Due Process Clause in the Fifth Amendment . . . . Thus the 'liberty' of all human beings which cannot be taken away without due process of law includes liberty of speech, press, assembly, religion, and also liberty of movement." *Id.*, at 192–193.

This due process approach to the right to unimpeded movement has been endorsed by this Court. In *Kent* v. *Dulles*, 357 U. S. 116, the Court asserted that "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment," *id.*, at 125, citing *Crandall* v. *Nevada*, *supra*, and *Edwards* v. *California*, *supra*. It is true that the holding in that case turned essentially on statutory grounds. However, in *Aptheker* v. *Secretary of State*, 378 U. S. 500, the Court, applying this constitutional doctrine, struck down a federal statute forbidding members of Communist organizations to obtain passports. Both the majority and dissenting opinions affirmed the principle that the right to travel is an aspect of the liberty guaranteed by the Due Process Clause.

Viewing the right to travel in due process terms, of course, would clearly make it inapplicable to the present case, for due process speaks only to governmental action.

IV.

This survey of the various bases for grounding the "right to travel" is conclusive only to the extent of showing that there has never been an acknowledged constitutional right to be free from private interference, and that the right in question has traditionally been seen and applied, whatever the constitutional underpinning asserted, only against governmental impediments. The right involved being as nebulous as it is, however, it is necessary to consider it in terms of policy as well as precedent.

As a general proposition it seems to me very dubious that the Constitution was intended to create certain rights of private individuals as against other private individuals. The Constitutional Convention was called to establish a nation, not to reform the common law. Even the Bill of Rights, designed to protect personal liberties, was directed at rights against governmental authority, not other individuals. It is true that there is a very narrow range of rights against individuals which have been read into the Constitution. In *Ex parte Yarbrough*, 110 U. S. 651, the Court held that implicit in the Constitution is the right of citizens to be free of private interference in federal elections. *United States* v. *Classic*, 313 U. S. 299, extended this coverage to primaries. *Logan* v. *United States*, 144 U. S. 263, applied the predecessor of § 241 to a conspiracy to injure someone in the custody of a United States marshal; the case has been read as dealing with a privilege and immunity of citizenship, but it would seem to have depended as well on extrapolations from statutory provisions providing for supervision of prisoners. The Court in *In re Quarles*, 158 U. S. 532, extending *Logan*, *supra*, declared that there was a right of federal citizenship to inform federal officials of violations of federal law. See also *United*

States v. *Cruikshank*, 92 U. S. 542, 552, which announced in dicta a federal right to assemble to petition the Congress for a redress of grievances.

Whatever the validity of these cases on their own terms, they are hardly persuasive authorities for adding to the collection of privileges and immunities the right to be free of private impediments to travel. The cases just discussed are narrow, and are essentially concerned with the vindication of important relationships with the Federal Government—voting in federal elections, involvement in federal law enforcement, communicating with the Federal Government. The present case stands on a considerably different footing.

It is arguable that the same considerations which led the Court on numerous occasions to find a right of free movement against oppressive state action now justify a similar result with respect to private impediments. *Crandall* v. *Nevada*, *supra*, spoke of the need to travel to the capital, to serve and consult with the offices of government. A basic reason for the formation of this Nation was to facilitate commercial intercourse; intellectual, cultural, scientific, social, and political interests are likewise served by free movement. Surely these interests can be impeded by private vigilantes as well as by state action. Although this argument is not without force, I do not think it is particularly persuasive. There is a difference in power between States and private groups so great that analogies between the two tend to be misleading. If the State obstructs free intercourse of goods, people, or ideas, the bonds of the union are threatened; if a private group effectively stops such communication, there is at most a temporary breakdown of law and order, to be remedied by the exercise of state authority or by appropriate federal legislation.

To decline to find a constitutional right of the nature asserted here does not render the Federal Government

helpless. As to interstate commerce by railroads, federal law already provides remedies for "undue or unreasonable prejudice," 24 Stat. 380, as amended, 49 U. S. C. § 3 (1) (1964 ed.), which has been held to apply to racial discrimination. *Henderson* v. *United States,* 339 U. S. 816. A similar statute applies to motor carriers, 49 Stat. 558, as amended, 49 U. S. C. § 316 (d) (1964 ed.), and to air carriers, 72 Stat. 760, 49 U. S. C. § 1374 (b) (1964 ed.). See *Boynton* v. *Virginia,* 364 U. S. 454; *Fitzgerald* v. *Pan American World Airways,* 229 F. 2d 499. The Civil Rights Act of 1964, 78 Stat. 243, deals with other types of obstructions to interstate commerce. Indeed, under the Court's present holding, it is arguable that any conspiracy to discriminate in public accommodations having the effect of impeding interstate commerce could be reached under § 241, unaided by Title II of the Civil Rights Act of 1964. Because Congress has wide authority to legislate in this area, it seems unnecessary—if prudential grounds are of any relevance, see *Baker* v. *Carr,* 369 U. S. 186, 258–259 (CLARK, J., concurring)—to strain to find a dubious constitutional right.

V.

If I have succeeded in showing anything in this constitutional exercise, it is that until today there was no federal right to be free from private interference with interstate transit, and very little reason for creating one. Although the Court has ostensibly only "discovered" this private right in the Constitution and then applied § 241 mechanically to punish those who conspire to threaten it, it should be recognized that what the Court has in effect done is to use this all-encompassing criminal statute to fashion federal common-law crimes, forbidden to the federal judiciary since the 1812 decision in *United States* v. *Hudson,* 7 Cranch 32. My Brother DOUGLAS, dissenting in *United States* v. *Classic, supra,*

noted well the dangers of the indiscriminate application of the predecessor of § 241: "It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated, and then to particularize it as a crime because it is highly offensive." 313 U. S., at 331–332.

I do not gainsay that the immunities and commerce provisions of the Constitution leave the way open for the finding of this "private" constitutional right, since they do not speak solely in terms of governmental action. Nevertheless, I think it wrong to sustain a criminal indictment on such an uncertain ground. To do so subjects § 241 to serious challenge on the score of vagueness and serves in effect to place this Court in the position of making criminal law under the name of constitutional interpretation. It is difficult to subdue misgivings about the potentialities of this decision.

I would sustain this aspect of the indictment only on the premise that it sufficiently alleges state interference with interstate travel, and on no other ground.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

I join Part I of the Court's opinion. I reach the same result as the Court on that branch of the indictment discussed in Part III of its opinion but for other reasons. See footnote 3, *infra*. And I agree with so much of Part II as construes 18 U. S. C. § 241 (1964 ed.) to encompass conspiracies to injure, oppress, threaten or intimidate citizens in the free exercise or enjoyment of Fourteenth Amendment rights and holds that, as so construed, § 241 is not void for indefiniteness. I do not agree, however, with the remainder of Part II which holds, as I read the opinion, that a conspiracy to interfere with the exercise of the right to equal utilization of

state facilities is not, within the meaning of § 241, a conspiracy to interfere with the exercise of a "right . . . secured . . . by the Constitution" unless discriminatory conduct by state officers is involved in the alleged conspiracy.

I.

The second numbered paragraph of the indictment charges that the defendants conspired to injure, oppress, threaten, and intimidate Negro citizens in the free exercise and enjoyment of "[t]he right to the equal utilization, without discrimination upon the basis of race, of public facilities . . . owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof." Appellees contend that as a matter of statutory construction § 241 does not reach such a conspiracy. They argue that a private conspiracy to interfere with the exercise of the right to equal utilization of the state facilities described in that paragraph is not, within the meaning of § 241, a conspiracy to interfere with the exercise of a right "secured" by the Fourteenth Amendment because "there exist no Equal Protection Clause rights against wholly private action."

The Court deals with this contention by seizing upon an allegation in the indictment concerning one of the means employed by the defendants to achieve the object of the conspiracy. The indictment alleges that the object of the conspiracy was to be achieved, in part, "[b]y causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts . . . ." The Court reads this allegation as "broad enough to cover a charge of active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination clearly sufficient to constitute denial of rights protected by the Equal Protection Clause," and the Court holds that this allegation, so construed, is sufficient to "prevent dismissal of this

branch of the indictment." [1] I understand this to mean that, no matter how compelling the proof that private conspirators murdered, assaulted, or intimidated Negroes in order to prevent their use of state facilities, the prosecution under the second numbered paragraph must fail in the absence of proof of active connivance of law enforcement officers with the private conspirators in causing the false arrests.

Hence, while the order dismissing the second numbered paragraph of the indictment is reversed, severe limitations on the prosecution of that branch of the indictment are implicitly imposed. These limitations could only stem from an acceptance of appellees' contention that, because there exist no Equal Protection Clause rights against wholly private action, a conspiracy of private persons to interfere with the right to equal utilization of state facilities described in the second numbered paragraph is not a conspiracy to interfere with a "right . . . secured . . . by the Constitution" within the meaning of § 241. In other words, in the Court's

[1] As I read the indictment, the allegation regarding the false arrests relates to all the other paragraphs and not merely, as the Court suggests, to the second numbered paragraph of the indictment. See n. 1 in the Court's opinion. Hence, assuming that, as maintained by the Court, the allegation could be construed to encompass discriminatory conduct by state law enforcement officers, it would be a sufficient basis for preventing the dismissal of each of the other paragraphs of the indictment. The right to be free from discriminatory conduct by law enforcement officers while using privately owned places of public accommodation (paragraph one) or while traveling from State to State (paragraphs three and four), or while doing anything else, is unquestionably secured by the Equal Protection Clause. It would therefore be unnecessary to decide whether the right to travel from State to State is itself a right secured by the Constitution or whether paragraph one is defective either because of the absence of an allegation of a racial discriminatory motive or because of the exclusive remedy provision of the Civil Rights Act of 1964, § 207 (b), 78 Stat. 246, 42 U. S. C. § 2000a–6 (b) (1964 ed.).

view the only right referred to in the second numbered paragraph that is, for purposes of § 241, "secured . . . by the Constitution" is a right to be free—when seeking access to state facilities—from discriminatory conduct by state officers or by persons acting in concert with state officers.[2]

I cannot agree with that construction of § 241. I am of the opinion that a conspiracy to interfere with the right to equal utilization of state facilities described in the second numbered paragraph of the indictment is a conspiracy to interfere with a "right . . . secured . . . by the Constitution" within the meaning of § 241—without regard to whether state officers participated in the alleged conspiracy. I believe that § 241 reaches such a private conspiracy, not because the Fourteenth Amendment of its own force prohibits such a conspiracy, but because § 241, as an exercise of congressional power under § 5 of that Amendment, prohibits *all* conspiracies to interfere with the exercise of a "right . . . secured . . . by the Constitution" and because the right to equal utilization of state facilities is a "right . . . secured . . . by the Constitution" within the meaning of that phrase as used in § 241.[3]

My difference with the Court stems from its construction of the term "secured" as used in § 241 in the phrase a "right . . . secured . . . by the Constitution or laws

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[2] I see no basis for a reading more consistent with my own view in the isolated statement in the Court's opinion that "the rights under the Equal Protection Clause described by this paragraph [two] of the indictment have been . . . firmly and precisely established by a consistent line of decisions in this Court . . . ."

[3] Similarly, I believe that § 241 reaches a private conspiracy to interfere with the right to travel from State to State. I therefore need not reach the question whether the Constitution of its own force prohibits private interferences with that right; for I construe § 241 to prohibit such interferences, and as so construed I am of the opinion that § 241 is a valid exercise of congressional power.

of the United States." The Court tacitly construes the term "secured" so as to restrict the coverage of § 241 to those rights that are "fully protected" by the Constitution or another federal law. Unless private interferences with the exercise of the right in question are prohibited by the Constitution itself or another federal law, the right cannot, in the Court's view, be deemed "secured . . . by the Constitution or laws of the United States" so as to make § 241 applicable to a private conspiracy to interfere with the exercise of that right. The Court then premises that neither the Fourteenth Amendment nor any other federal law [4] prohibits private interferences with the exercise of the right to equal utilization of state facilities.

In my view, however, a right can be deemed "secured . . . by the Constitution or laws of the United States," within the meaning of § 241, even though only governmental interferences with the exercise of the right are prohibited by the Constitution itself (or another fed-

[4] This premise is questionable. Title III of the Civil Rights Act of 1964, 78 Stat. 246, 42 U. S. C. § 2000b (1964 ed.), authorizes the Attorney General on complaint from an individual that he is "being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision," to commence a civil action "for such relief as may be appropriate" and against such parties as are "necessary to the grant of effective relief." Arguably this would authorize relief against private parties not acting in concert with state officers. (This title of the Act does not have an exclusive remedy similar to § 207 (b) of Title II, 42 U. S. C. § 2000a–6 (b).)

The Court affirmatively disclaims any intention to deal with Title III of the Civil Rights Act of 1964 in connection with the second numbered paragraph of the indictment. But, as the District Judge observed in his opinion, the Government maintained that the right described in that paragraph was "secured" by the Fourteenth Amendment and, "additionally," by Title III of the Civil Rights Act of 1964. 246 F. Supp., at 484. That position was not effectively abandoned in this Court.

eral law). The term "secured" means "created by, arising under or dependent upon," *Logan* v. *United States*, 144 U. S. 263, 293, rather than "fully protected." A right is "secured . . . by the Constitution" within the meaning of § 241 if it emanates from the Constitution, if it finds its source in the Constitution. Section 241 must thus be viewed, in this context, as an exercise of congressional power to amplify prohibitions of the Constitution addressed, as is invariably the case, to government officers; contrary to the view of the Court, I think we are dealing here with a statute that seeks to implement the Constitution, not with the "bare terms" of the Constitution. Section 241 is not confined to protecting rights against private conspiracies that the Constitution or another federal law also protects against private interferences. No such duplicative function was envisioned in its enactment. See Appendix in *United States* v. *Price*, *post*, p. 807. Nor has this Court construed § 241 in such a restrictive manner in other contexts. Many of the rights that have been held to be encompassed within § 241 are not additionally the subject of protection of specific federal legislation or of any provision of the Constitution addressed to private individuals. For example, the prohibitions and remedies of § 241 have been declared to apply, without regard to whether the alleged violator was a government officer, to interferences with the right to vote in a federal election, *Ex parte Yarbrough*, 110 U. S. 651, or primary, *United States* v. *Classic*, 313 U. S. 299; the right to discuss public affairs or petition for redress of grievances, *United States* v. *Cruikshank*, 92 U. S. 542, 552, cf. *Hague* v. *CIO*, 307 U. S. 496, 512–513 (opinion of Roberts, J.); *Collins* v. *Hardyman*, 341 U. S. 651, 663 (dissenting opinion); the right to be protected against violence while in the lawful custody of a federal officer, *Logan* v. *United States*, 144 U. S. 263; and the right to inform of violations of

federal law, *In re Quarles and Butler*, 158 U. S. 532. The full import of our decision in *United States* v. *Price*, *post*, p. 787, at pp. 796–807, regarding § 241 is to treat the rights purportedly arising from the Fourteenth Amendment in parity with those rights just enumerated, arising from other constitutional provisions. The reach of § 241 should not vary with the particular constitutional provision that is the source of the right. For purposes of applying § 241 to a private conspiracy, the standard used to determine whether, for example, the right to discuss public affairs or the right to vote in a federal election is a "right . . . secured . . . by the Constitution" is the very same standard to be used to determine whether the right to equal utilization of state facilities is a "right . . . secured . . . by the Constitution."

For me, the right to use state facilities without discrimination on the basis of race is, within the meaning of § 241, a right created by, arising under and dependent upon the Fourteenth Amendment and hence is a right "secured" by that Amendment. It finds its source in that Amendment. As recognized in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, "The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights . . . ." The Fourteenth Amendment commands the State to provide the members of all races with equal access to the public facilities it owns or manages, and the right of a citizen to use those facilities without discrimination on the basis of race is a basic corollary of this command. Cf. *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (C. A. 8th Cir. 1956). Whatever may be the status of the right to equal utilization of *privately owned facilities*, see generally *Bell* v. *Maryland*, 378 U. S. 226, it must be emphasized that we

are here concerned with the right to equal utilization of *public facilities owned or operated by or on behalf of the State.* To deny the existence of this right or its constitutional stature is to deny the history of the last decade, or to ignore the role of federal power, predicated on the Fourteenth Amendment, in obtaining nondiscriminatory access to such facilities. It is to do violence to the common understanding, an understanding that found expression in Titles III and IV of the Civil Rights Act of 1964, 78 Stat. 246, 42 U. S. C. §§ 2000b, 2000c (1964 ed.), dealing with state facilities. Those provisions reflect the view that the Fourteenth Amendment creates the right to equal utilization of state facilities. Congress did not preface those titles with a provision comparable to that in Title II [5] explicitly creating the right to equal utilization of certain privately owned facilities. Congress rightly assumed that a specific legislative declaration of the right was unnecessary, that the right arose from the Fourteenth Amendment itself.

In reversing the District Court's dismissal of the second numbered paragraph, I would therefore hold that proof at the trial of the conspiracy charged to the defendants in that paragraph will establish a violation of § 241 without regard to whether there is also proof that state law enforcement officers actively connived in causing the arrests of Negroes by means of false reports.

II.

My view as to the scope of § 241 requires that I reach the question of constitutional power—whether § 241 or legislation indubitably designed to punish entirely pri-

[5] "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U. S. C. § 2000a (a) (1964 ed.).

vate conspiracies to interfere with the exercise of Fourteenth Amendment rights constitutes a permissible exercise of the power granted to Congress by § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of" the Amendment.

A majority of the members of the Court [6] expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy. Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection. It made that determination in enacting § 241, see the Appendix in *United States* v. *Price, post,* p. 807, and, therefore § 241 is constitutional legislation as applied to reach the private conspiracy alleged in the second numbered paragraph of the indictment.

I acknowledge that some of the decisions of this Court, most notably an aspect of the *Civil Rights Cases,* 109 U. S. 3, 11, have declared that Congress' power under

[6] The majority consists of the Justices joining my Brother CLARK'S opinion and the Justices joining this opinion. The opinion of MR. JUSTICE STEWART construes § 241 as applied to the second numbered paragraph to require proof of active participation by state officers in the alleged conspiracy and that opinion does not purport to deal with this question.

§ 5 is confined to the adoption of "appropriate legislation for correcting the effects of . . . prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous." I do not accept—and a majority of the Court today rejects—this interpretation of § 5. It reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary;[7] and it attributes a far too limited objective to the Amendment's sponsors.[8] Moreover, the language of § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment are virtually the same, and we recently held in *South Carolina* v. *Katzenbach, ante,* p. 301, at 326, that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." The classic formulation of that test by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, was there adopted:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end,

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[7] Congress, not the judiciary, was viewed as the more likely agency to implement fully the guarantees of equality, and thus it could be presumed the primary purpose of the Amendment was to augment the power of Congress, not the judiciary. See James, The Framing of the Fourteenth Amendment 184 (1956); Harris, The Quest for Equality 53–54 (1960); Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L. J. 1353, 1356 (1964).

[8] As the first Mr. Justice Harlan said in dissent in the *Civil Rights Cases,* 109 U. S., at 54: "It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section [§ 5], to clothe Congress with power and authority to meet that danger." See *United States* v. *Price, post,* p. 787, at 803–806, and Appendix.

> which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

It seems to me that this is also the standard that defines the scope of congressional authority under § 5 of the Fourteenth Amendment. Indeed, *South Carolina* v. *Katzenbach* approvingly refers to *Ex parte Virginia*, 100 U. S. 339, 345–346, a case involving the exercise of the congressional power under § 5 of the Fourteenth Amendment, as adopting the *McCulloch* v. *Maryland* formulation for "each of the Civil War Amendments."

Viewed in its proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. No one would deny that Congress could enact legislation directing state officials to provide Negroes with equal access to state schools, parks and other facilities owned or operated by the State. Nor could it be denied that Congress has the power to punish state officers who, in excess of their authority and in violation of state law, conspire to threaten, harass and murder Negroes for attempting to use these facilities.[9] And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose.[10]

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[9] *United States* v. *Price*, *post*, p. 787. See *Screws* v. *United States*, 325 U. S. 91; *Williams* v. *United States*, 341 U. S. 97; *Monroe* v. *Pape*, 365 U. S. 167.

[10] Cf. *Atlanta Motel* v. *United States*, 379 U. S. 241, 258, applying the settled principle expressed in *United States* v. *Darby*, 312 U. S. 100, 118, that the power of Congress over interstate commerce "ex-

III.

Section 241 is certainly not model legislation for punishing private conspiracies to interfere with the exercise of the right of equal utilization of state facilities. It deals in only general language "with Federal rights and with all Federal rights" and protects them "in the lump," *United States* v. *Mosley*, 238 U. S. 383, 387; it protects in most general terms "any right or privilege secured . . . by the Constitution or laws of the United States." Congress has left it to the courts to mark the bounds of those words, to determine on a case-by-case basis whether the right purportedly threatened is a federal right. That determination may occur after the conduct charged has taken place or it may not have been anticipated in prior decisions; "a penumbra of rights may be involved, which none can know until decision has been made and infraction may occur before it is had." [11] Reliance on such wording plainly brings § 241 close to the danger line of being void for vagueness.

But, as the Court holds, a stringent scienter requirement saves § 241 from condemnation as a criminal statute failing to provide adequate notice of the proscribed conduct.[12] The gravamen of the offense is conspiracy, and therefore, like a statute making certain conduct criminal

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tends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . ."

[11] Mr. Justice Rutledge in *Screws* v. *United States*, 325 U. S., at 130.

[12] *Ante*, pp. 753–754. See generally, *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 342; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 412–413; *United States* v. *Ragen*, 314 U. S. 513, 524; *Gorin* v. *United States*, 312 U. S. 19, 27–28; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501–503; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348.

only if it is done "willfully," § 241 requires proof of a specific intent for conviction. We have construed § 241 to require proof that the persons charged conspired to act in defiance, or in reckless disregard, of an announced rule making the federal right specific and definite. *United States* v. *Williams*, 341 U. S. 70, 93–95 (opinion of DOUGLAS, J.); *Screws* v. *United States*, 325 U. S. 91, 101–107 (opinion of DOUGLAS, J.) (involving the predecessor to 18 U. S. C. § 242). Since this case reaches us on the pleadings, there is no occasion to decide now whether the Government will be able on trial to sustain the burden of proving the requisite specific intent *vis-à-vis* the right to travel freely from State to State or the right to equal utilization of state facilities. Compare *James* v. *United States*, 366 U. S. 213, 221–222 (opinion of WARREN, C. J.). In any event, we may well agree that the necessity to discharge that burden can imperil the effectiveness of § 241 where, as is often the case, the pertinent constitutional right must be implied from a grant of congressional power or a prohibition upon the exercise of governmental power. But since the limitation on the statute's effectiveness derives from Congress' failure to define—with any measure of specificity—the rights encompassed, the remedy is for Congress to write a law without this defect. To paraphrase my Brother DOUGLAS' observation in *Screws* v. *United States*, 325 U. S., at 105, addressed to a companion statute with the same shortcoming, if Congress desires to give the statute more definite scope, it may find ways of doing so.

EXHIBIT 38

THE ROLE OF THE SUPREME COURT AS THE INTERPRETER OF THE CONSTITUTION

(Address by U.S. Senator Sam J. Ervin, Jr. (Democrat, North Carolina), Before the Atlanta Bar Association at Atlanta, Ga., on May 6, 1966.)

I am grateful to you for the privilege of being in your great State, which is so ably represented in the Senate by my good friends, Dick Russell and Herman Talmadge. I will repeat here what I have often said elsewhere. By reason of his character, his devotion to duty, his experience, and his learning, Dick Russell is the best qualified man in this country for the Presidency of the United States.

The Constitution of my native State of North Carolina has always contained a warning which all Americans would do well to heed. It is this: "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." Let us recur to some fundamental principles.

The men who composed the Constitutional Convention of 1787 were wise men. They had read the history of the long and bitter struggle of man for freedom, and had found this shocking but everlasting truth inscribed upon each page of that history: No man or set of men can be safely trusted with governmental power of an unlimited nature. As a consequence, they were determined, above all things, to establish a government of laws and not of men.

To prevent the exercise of arbitrary power by the Federal Government, they embodied in the Constitution the doctrine of the separation of governmental powers. In so doing, they utilized this doctrine in a two-fold way. They delegated to the Federal Government the powers necessary to enable it to discharge its functions as a central government, and they left to each State the power to regulate its own internal affairs. It was this use of the doctrine of the separation of powers which prompted Chief Justice Chase to make this trenchant observation in *Texas vs. White* (7 Wall. (U.S.) 700): "The Constitution, in all its provisions, looks to an indestructible union, composed of indestructible States."

In their other utilization of the doctrine of the separation of governmental powers, the members of the Convention of 1787 vested the power to make laws in the Congress, the power to execute laws in the President, and the power to interpret laws in the Supreme Court and such inferior courts as the Congress might establish. Moreover, they declared, in essence, that the legislative, the executive, and the judicial powers of the Federal Government should forever remain separate and distinct from each other.

This brings me to my subject: The Role of the Supreme Court as the Interpreter of the Constitution.

In discussing this subject, I must tell you the truth about the Supreme Court.

I know it is not popular in some quarters to tell the truth about this tribunal. Admonitions of this character come to us daily from such quarters: When the Supreme Court speaks, its decisions must be accepted as sacrosanct by the bench, the bar, and the people of America, even though they constitute encroachments on the constitutional domain of the President or the Congress, or tend to reduce the States to meaningless zeros on the nation's map. Indeed, the bench, the bar, and the people must do more than this. They must speak of the Snpreme Court at all times with a reverence akin to that which inspired Job to speak thus of Jehovah: "Though He slay me, yet will I trust him."

To be sure, all Americans should obey the decrees in cases in which they are parties, even though they may honestly and reasonably deem snch decrees unwarranted. Bnt it is sheer intellectual rubbish to contend that Americans are required to believe in the infallibility of judges, or to make mental obeisance to judicial aberrations. They have an inalienable right to think and speak their honest thoughts concerning all things under the sun, including the decisions of Supreme Court majorities. It is well this is so because the late Chief Justice Stone spoke an indisputable truth when he said: "Where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action, and fearless comment upon it."

As one whose major efforts have centered in the administration of justice, I have the abiding conviction that "tyranny on the bench is as objectionable as tyranny on the throne" and that my loyalty to constitutional government compels me to oppose it. In entertaining this conviction, I find myself in the company of such great Americans as Thomas Jefferson, Andrew Jackson, and Abraham Lincoln, who refused to accept in abject silence what they conceived to be judicial usurpations.

I do not find it easy to express my disapproval of tbe action of the Supreme Court. I was taught in my youth to repose an absolute confidence in that tribunal by my father, an active practitioner of law in North Carolina for 65 years, who was accustomed to refer to it with almost reverential awe. He used to say that the Supreme Court would administer justice according to law though the heavens fell.

I regret to say, however, that the course of the Supreme Court in recent years has been such as to cause me to ponder the question whether fidelity to fact ought not to induce its members to remove from the portal of the building which bouses it the majestic words, "Equal Justice Under Law," and to substitute for them the superscription, "Not justice under law, but justice according to the personal notions of the temporary occupants of this building."

The truth is that on many occasions during recent years the Supreme Court has usurped and exercised the power of tbe Congress and the States to amend the Constitution while professing to interpret it.

In so doing, the Supreme Court has encroached upon the constitutional powers of Congress as the nation's legislative body, and struck down State action and State legislation in areas clearly committed to the States by our system of constitutional government. This action has been accompanied by overruling, repudiating, or ignoring many contrary precedents of earlier years.

A study of the decisions invalidating State action and State legislation compels the conclusion that some Supreme Court Justices now deem themselves to be the final and infallible supervisors of the desirability or wisdom of all State action and all State legislation.

This is tragic, indeed, because there is nothing truer than the belief attributed to the late Justice Louis D. Brandeis by Judge Learned Hand, that "the States are the only breakwater against the ever pounding surf which threatens to submerge the individual and destroy the only kind of society in which personality can survive."

Time does not permit me to analyze or even enumerate all of the decisions which sustain what I have said. I must content myself with stating in summary form the effect of only a few of them.

Congress was told by the Court in the *Girouard* (328 U.S. 61) and *Yates* (354 U.S. 298) *Cases* that it really did not mean what it said in plain English when it enacted statntes to regulate the naturalization of aliens and to pnnish criminal conspiracies to overtbrow the government by force. Cougress was told by the Court in tbe *Watkins Case* (354 U.S. 178) that its committees must conduct their investigations according to rules imposed by tbe Court which make it virtually certain that no information will ever be obtained from an unwilling witness. Seventeen States and the District of Colnmbia were told by the Court in the *Brown* (347 U.S. 483) and *Bolling* (347 U.S. 497) *Cases* that the equal protection clause of the Fourteenth Amendment and tbe due process clause of the Fifth Amendment had lost their original meanings because the state of "psychological knowledge" had changed.

California was told by the Court in the *Lambert Case* (355 U.S. 225) that it cannot pnnish its residents for criminal offenses committed within its borders if such residents are ignorant of the statutes creating such criminal offenses. California was told by the Court in the first *Konigsberg Case* (353 U.S. 252) that it cannot resort to cross-examination to determine the fitness or qualifications of those who apply to it for licenses to practice law in its courts. New Hampshire and Pennsylvania were told by the Court in the *Sweezey* (354 U.S. 234) and *Nelson* (350 U.S. 497) *Cases* that they cannot investigate or punish seditious teachings or activities within their borders.

Arizona and New York were told by the Court in the *Elfbrandt* (April 18, 1966) and *Slochower* (350 U.S. 551) *Cases* that they cannot prescribe standards of propriety and fitness for the teachers of their youth. North Carolina was told by the Conrt in the first *Williams Case* (317 U.S. 287) that it cannot determine the marital status of its own citizens within its own borders. Pennsylvania and the trustees of the will of Stephen Girard, who had slumbered "In

the tongueless silence of the dreamless dust" for 126 years, were told by the Court in the *Board of Trusts Case* (353 U.S. 230) that the Fourteenth Amendment empowers the Court to write a post-mortem codicil to the will which Stephen Girard made while he walked earth's surface and entertained the belief that disposing of private property by will is a matter for its owner rather than judges.

Twenty-four States were told by the Court in the *Mapp Case* (367 U.S. 643) that the Fourth Amendment had somehow lost its original meaning 170 years after its ratification, and that in consequence they no longer had the power which they possessed in times past to regulate the admissibility in their own courts of evidence obtained by searches and seizures. Virginia was told by the Court in the *Button Case* (371 U.S. 415) that the N.A.A.C.P. and its attorneys were immune to prosecution or punishment for violating its laws against barratry, champerty, and maintenance. And in the *Baker* (369 U.S. 186), *Wesberry* (376 U.S. 1), *Reynolds* (377 U.S. 533), *WMCA* (377 U.S. 633), *Maryland Committee* (377 U.S. 656), *Davis* (377 U.S. 678), *Roman* (377 U.S. 695), and *Lucas* (377 U.S. 713) *Cases*, the Court hurled itself deeply into the political thicket of reapportionment with what has been aptly described as "no express constitutional mandate and scant implicit constitutional authority." (*The George Washington Law Review*, Vol. 32, No. 5, page 1123.)

I will mention two other decisions, *South Carolina* v. *Katzenbach*, and *Harper* v. *Virginia State Board of Elections*, which were handed down in March 1966.

The *Katzenbach Case* is incompatible with the constitutional doctrines of the equality and indestructibility of the States. It adjudges constitutional upon its face the Voting Rights Act of 1965, which illustrates Congressional tyranny at its worst and authorizes due process at its shabbiest. The rationale of the Act is that two wrongs make a right. "The Act alleges that election officers in six Southern States having literary tests as qualifications for voting have used such tests to deny literate Negroes the right to vote, and undertakes to correct the wrongs allegedly committed by such election officers by a strong dose of Federal tyranny, i.e., by compelling the six States to extend the ballot to all illiterates in violation of laws enacted by them in the exercise of their undoubted constitutional powers.

Let me enumerate the salient provisions of the Act.

By this Act Congress convicts six Southern States, either in whole or in part, of violating the Fifteenth Amendment by an irrational Congressional declaration in the form of a bill of attainder and *ex post facto* law, and on the basis of that Congressional conviction alone not only denies those States their constitutional power to use literacy tests as qualifications for voting, but also robs them of their constitutional power to change their laws in respect to procedures for voting without the prior consent of a Federal executive officer, to wit, the Attorney General, or a Federal Court, to wit, the United States District Court for the District of Columbia.

Under the Act, these States cannot seek an adjudication of their innocence or a vindication of their constitutional powers in any court on earth except the District Court of the United States for the District of Columbia, which sits at least 1,000 miles from some of the States convicted and punished for wrongdoing without a judicial trial, and in which all of them are denied for all practical purposes the right to compulsory process to obtain the attendance of witnesses in their behalf. Moreover, these States cannot obtain relief in that Court unless they prove not only that they have not violated the Fifteenth Amendment during the preceding five years, but also that there is no reasonable probability that they will do so at any future time.

I am constrained to observe that insofar as the protection of the six States and their election officers against Federal tyranny is concerned, the Constitution, as it is interpreted by the Court in the *Katzenbach Case*, is even more reactionary than King John was before Runnymede. The Court rules in express terms that these States and their election officers are not entitled to the protection which it held in *United States v. Brown* (381 U.S. 437) belongs to Commnnists as a matter of constitutional right.

The Harper Case overrules *Breedlove v. Suttles* (302 U.S. 277) and *Butler v. Thompson* (341 U.S. 937) and adjudges unconstitutional the Virginia Poll tax as a prerequisite of voting by a majority opinion which frankly states, in substance, that when the "notions" of Supreme Court Justices change, the meaning of the equal protection clause of the Fourteenth Amendment changes accordingly. What

the majority opinion says in plain English is that the United States is now governed by the personal notions of Supreme Court Justices and not by its written Constitution. In making this admission for the majority Mr. Justice Douglas ignored Mark Twain's admonition: "Truth is very precious. Use it sparingly." While the Justice's candor is admired, I must confess that his admission is disconcerting to those of us who believe in a government of laws rather than a government of men. I say this because the primary meaning attributed by the dictionary to the word "notion" is this: "A more or less general, vague or imperfect conception or idea of something."

In saying these things, I am not a lone voice crying in a constitutional wilderness. The concurring opinion of the late Justice Jackson in *Brown v. Allen* (344 U.S. 443, 535), and the resolution adopted by 36 State Chief Justices in Pasadena, California, disclose that a substantial portion of the judges and lawyers of America believe the Supreme Court is not confining itself to its allotted constitutional sphere.

I quote these words from Justice Jackson's concurring opinion: "Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles." Justice Jackson closed his observations on this score with this sage comment: "I know of no way we can have equal justice under law except we have some law."

Let us consider and weigh the reasoning of those who seek to justify the proposition that it is permissible for the Supreme Court to amend the Constitution under the guise of interpreting it.

They make these assertions: The Constitution must change to meet changing conditions. As its authorized interpreter, the Supreme Court has the rightful power at all times to make the Constitution conform to the views of the majority of its members. Since the doctrine of *stare decisis*, i.e., the rule that Judges stand by and follow the decisions of their own court, might handicap the Supreme Court in making the Constitution conform to the views of a majority of its members on some occasions, the Supreme Court is not bound by its own decisions on constitutional questions.

These arguments rest upon a wholly fallacious premise, namely, that the power to interpret and the power to amend are identical. The distinction between these powers is as wide as the gulf which yawns between Lazarus in Abraham's bosom and Dives in hell. The power to interpret the Constitution is the power to ascertain its meaning, and the power to amend the Constitution is the power to change its meaning.

It seems at first blush that those who advance these arguments overlook the significant fact that Article V of the Constitution vests the power to amend the Constitution in the Congress and the States, and not in the Chief Justice and Associate Justices of the Supreme Court. But not so. They simply nullify Article V with these neat assertions.

The method of amendment authorized by Article V is too cumbersome and slow. Consequently, the Supreme Court must do the amending. "The alternative is to let the Constitution freeze in the pattern which one generation gave it."

To a country lawyer, this is merely a "high falutin" way of saying that the oath of a Supreme Court Justice to support the Constitution does not obligate him to pay any attention to Article V or any other provision displeasing to him.

When all is said, the thesis that the Supreme Court has the rightful power to amend the Constitution under the guise of interpreting it is repugnant to the end the Founding Fathers had in mind when they gave this country a written Constitution. Indeed, it is incompatible with the primary object of all law.

The Federalist, Judge Thomas M. Cooley's monumental treatise on "Constitutional Limitations," and certain great decisions of the Supreme Court antedating the last quarter of a century, reveal with unmistakable clarity the end the Founding Fathers had in mind in giving our country a written Constitution.

The Founding Fathers "were not mere visionaries toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them." (*South Carolina vs. United States*, 199 U.S. 437)

They understood the facts of political life exceedingly well. "The history of the world had taught them that what was done in the past might be attempted in the future." In consequence, they foresaw that the fundamentals of the government they desired to establish and the liberties of the citizen they wished to secure would be put in peril troublous times by both the government and the people unless they protected such fundamentals of government and such liberties by "irrepealable law" binding equally upon the government and the governed at all times and under all circumstances. (*Ex Parte Milligan*, 4 Wall. (U.S.) 2)

The Founding Fathers knew that the surest way to protect the fundamentals of the government they desired to establish and the liberties of the citizen they wished to secure was to enshrine them in a written Constitution, and thus put them beyond the control of impatient public officials, temporary majorities, and the varying moods of public opinion. To this end, they framed and adopted a written Constitution, thereby putting into form the government they were creating and prescribing the powers that government was to take. (*South Carolina vs. United States;* Thomas M. Cooley's *Constitutional Limitations*, pages 88–89)

The Founding Fathers knew that "useful alterations" of some provisions of the Constitution would "be suggested by experience." Consequently, they made provision for amendment as set out in Article V. James Madison, whom historians rightly call the Father of tbe Constitution, informs us that the Constitutional Convention preferred this mode for amending the Constitution because "it guards equally against that extreme facility, which would render the Constitution too mutable, and that extreme difficulty, which might perpetuate its discovered faults." (*The Federalist*, No. 43)

Since the Constitution is a written instrument, its meaning does not alter, unless its wording is changed by amendment in the manner prescribed by Article V. "That which it meant when adopted it means now. . . . Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded." (*South Carolina vs. United States*)

Chief Justice John Marshall declared in his great opinion in *Gibbons vs. Ogden*, 9 Wheat. (U.S.) 213, that "the enlightened patriots who framed our Constitution and the people who adopted it must be understood . . . to have intended what they said."

This being true, it is as clear as the noonday sun that the role of the Supreme Court as the interpreter of the Constitution is simply to ascertain and give effect to the intent of its framers and the people who adoped it. (*Gibbons vs. Ogden*, 9 Wheat. (U.S.) 1; *Lake County vs. Rollins*, 130 U.S. 662.) As Justice Miller said in *Ex Parte Bain*, 121 U.S. 1: "It is never to be forgotten that in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."

Since the meaning of a written Constitution is fixed when it is adopted and is not different at any subsequent time when a court has occasion to pass upon it, Judge Cooley was justified in declaring in his "Constitutional Limitations" that "a court . . . which should allow a change in public sentiment to influence it in giving to a written Constitution a construction not warranted by the intent of its founders would be justly chargeable with reckless disregard of official oath and public duty."

I know that in recurring to fundamental principles I lay myself open to the charge that I am setting the clock back. As one who believes truth to be eternal, I am not troubled by this charge. Moreover, I have observed that the charge is usually made by those who labor under the delusion that there was little, if any, wisdom on earth before they arrived. It was a wise man and not a wag who suggested that these persons object to setting the clock back because it would require them to adjust their clocks and their minds forward.

Let us reflect at this point on the primary object of all law.

Laws are designed to furnish rules of conduct for government and people. As a consequence, a law is destitute of value unless it has sufficient stability to afford reliable rules to govern the conduct of government and people, and unless it can be found with reasonable certainty in established legal precedents. Justice Brandeis had this truth in mind when he said: "It is usually more important that a rule of law be settled, than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legislation."

If the thesis that a majority of the members of the Supreme Court have the rightful power to change the meaning of the Constitution under the guise of interpreting it every time a sitting Justice waivers in mind or a newly appointed Justice ascends the bench should find permanent acceptance, the Constitution would become to all practical intents and purposes an uncertain and unstable document of no beneficial value to the country. Yea, more than this, it would become a constant menace to sound government at all levels, and to the freedom of the millions of Americans who are not at liberty to join Supreme Court Justices in saying that Supreme Court decisions on constitutional questions are not binding on them.

I cannot forbear expressing my opinion that the notion that Supreme Court Justices are not bound by the decisions of the Court on constitutional questions exalts Supreme Court Justices above all other men, and is of the stuff of which judicial oligarchies are made. Be this as it may, what Justice Benjamin N. Cardozo said in "The Nature of the Judicial Process" concerning the contention that the judge is always privileged to substitute his individual sense of justice for rules of law applies with equal force to this notion. "That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law." (Page 136)

What I have said on this point finds full support in the ringing words of Edward Douglas White, one of the ablest lawyers and wisest judges ever to grace the Supreme Court bench. He said: "In the discharge of its function of interpreting the Constitution, this Court exercises an august power . . . It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them . . . The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people." (Dissenting opinion, *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 651–652)

What has been said does not deny to the Supreme Court the power to overrule a prior decision in any instance where proper judicial restraint justifies such action. A sound criterion for determining when proper judicial restraint justifies a judge in overruling a precedent is to be found in the standard which Judge Learned Hand says his friend and colleague, Judge Thomas Swan, set for his own guidance: "He will not overrule a precedent unless he can be satisfied beyond peradventure that it was untenable when made; and not even then, if it has gathered around it the support of a substantial body of decisions based on it." (*The Spirit of Liberty*, 212)

In ending this phase of my remarks, I wish to emphasize that precedents set by the Supreme Court on constitutional questions were tenable when made if they conformed to the intention of those who framed and adopted the constitutional provisions involved, no matter how inconsistent they may be with the views of Justices subsequently ascending the bench.

This brings me to the argument that Supreme Court Justices must nullify Article V and usurp the power to amend the Constitution while pretending to interpret it to keep the Constitution from freezing "in the pattern which one generation gave it."

I assert with all the emphasis at my command that there is really no substantial validity in this argument. I take this position for three reasons:

First. Although the Constitution does not change its meaning in the absence of amendment under Article V, the provisions of the Constitution are pliable in the sense that they reach into the future and embrace all new conditions falling within the scope of the powers which they in terms confer. (*Missouri P.R. Co.* v. *United States* (271 U.S. 603); *South Carolina* v. *United States*) Existing grants of constitutional powers will enable the Federal Government to take action in virtually all new fields in which action on its part will be appropriate.

Second. As the possessor of all the legislative power of the Federal Government, Congress has complete authority at all times to make, amend, or repeal laws relating to all matters committed by the Constitution to the Federal Government.

Third. For these reasons, occasions which really call for amendments to the Constitution are comparatively rare. While it is frequently asserted that the method for amending the Constitution prescribed by Article V. is too cumbersome and slow for practical purposes, those who make the assertion furnish no satisfactory proof of its truth. To be sure, they cite as evidence the failure of Congress and the States to make constitutional changes they deem desirable. They overlook the fact, however, that the evidence they cite has just as logical a tendency to prove that the wisdom of Congress and the States exceeds theirs. Thomas Riley Marshall said that "it is as easy to amend the Constitution of the United States as it used to be to draw a cork." While this statement is not literally true, it is substantialy true in instances where Congress and the States believe a constitutional amendment to be advisable.

In the final analysis, those who contend that Supreme Court Justices are justified in changing the meaning of constitutional provisions while pretending to interpret them confuse right and power.

What Justice Cardozo said of the judge as a legislator in "The Nature of the Judicial Process" is relevant here.

He said: "I think the difficulty has its origin in the failure to distinguish between right and power, between the command embodied in a judgment and the jural principle to which the obedience of the judge is due. Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law." (*The Nature of the Judicial Process*, 1921 edition, 129)

Let me refer in closing to the Father of our Country, who was President of the Convention which wrote our Constitution. As the Encyclopaedia Britannica says, the weight of George Washiagton's character did more than any other single force to bring the Convention to an agreement and to obtain ratification of the Constitution afterward.

If the America which George Washington and the other Founding Fathers created is to endure, Supreme Court Justices as well as Presidents and Congresses must heed what he said in his Farewell Address to the American people.

After emphasizing that the Framers of the Constitution distributed the powers of government among "different depositories" to confine public officials "within their respective constitutional spheres" and thus prevent "despotism." George Washington observed that the preservation of the Constitution's distribution of the powers of government is "as necessary as" its institution. He added this admonition:

"If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. * * But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield."

EXHIBIT 39

PROFESSOR KURLAND'S SPEECH ON THE SUPREME COURT, AT NOTRE DAME

[From the Congressional Record, Aug. 10, 1964]

THE COURT OF THE UNION OR JULIUS CAESAR REVISED

Mr. ERVIN. Mr. President, on February 29, 1964, Prof. Philip B. Kurland of the Law School of the University of Chicago made a most illuminating address before a conference upon the so-called Court of the Union Amendment at the Law School of the University of Notre Dame. He entitled his address "The Court of the Union or Julius Caesar Revised."

I have been privileged from time to time to read addresses and comments of Professor Kurland upon various constitutional and legal subjects. Such reading has convinced me that Professor Kurland possesses in the highest degree an understanding of the supreme values inherent in the primary purposes of our Constitution and the dangers posed to these primary purposes by impatient officials who would sacrifice their supreme values in their zeal to accomplish in

haste temporary ends which they desire. For this reason, anything which Professor Kurland may say upon constitutional subjects merits wide dissemination and deep consideration by all persons interested in constitutional government.

As a consequence, I ask unanimous consent that Professor Kurland's speech be printed at this point in the body of the RECORD.

There being no objections, the speech was ordered to be printed in the RECORD, as follows:

"THE COURT OF THE UNION OR JULIUS CAESAR REVISED

"(By Philip B. Kurland, professor of law, the University of Chicago Law School)

"(NOTE.—The paper which follows was delivered at a conference, held at the Law School of the University of Notre Dame on February 29. It will appear in a forthcoming issue of the Notre Dame Lawyer, and appears here with the permission of the editors of that journal and of the author.)

"Dean O'Meara's subpena was greeted by honest protests from me that I had nothing to contribute to the great debate over the proposed constitutional amendments that are the subject of today's conference. The dean apparently of the belief that suffering might help this audience toward moral regeneration, suggested that I come anyway. I proceed then to prove my proposition and to test his hypothesis."

I have chosen as a title for this small effort: "Julius Caesar Revised." "Revised" because, unlike Mark Anthony, I have been invited here not to bury Caesar but to praise him. Our Caesar, the Supreme Court, unlike Shakespeare's Julius, does not call for a funeral oration, because the warnings of lions in the streets—instead of under the throne—were timely heeded as well as sounded. Caesar was thus able to rally his friends to fend off the death strokes that the conspirators would have inflicted. The conspiratorial leaders were the members of the Council of State Governments. The daggers they proposed to use were the chief justices of the various high State courts, to whom they would entrust, under the resounding label of "the Court of the Union," the power to review judgments of the Supreme Court of the United States whenever that tribunal dared to inhibit the power of the States. It should be made clear that the chief justices of the States would be the instruments of the crime and not its perpetrators. You will recall that when these chief justices spoke through their collective voice, the Conference of Chief Justices, in condemnation of some of the transgressions of the Supreme Court, they asked only that the physician heal himself. They did not propose any organic changes, however little they like the Court's work. Their report stated:[1]

"When we turn to the specific field of the effect of judicial decisions on Federal-State relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos."

Even in the absence of Caesar's murder, however, it is possible to pose the issue raised by Brutus: whether our Caesar has been unduly ambitious and grasping of power? And implicit in this question is a second: If Caesar's ambitions do constitute a threat to the republic, is assassination the appropriate method for dealing with that threat?

The second question is easier of answer than the first. Whether Caesar be guilty or not, it would seem patently clear that his murder, as proposed, must be resisted. Its consequences could only be costly and destructive civil conflict resulting in the creation of a new Caesar in the place of the old one, a new Caesar not nearly so well-equipped to perform the task nor even so benevolent as Julius himself.

It is probably because of the obvious absurdity of the method chosen for limiting the Supreme Court's powers that there is today even more unanimity in opposition to the proposal than existed when Caesar was last attacked—not by the current self-styled patricians, but by the plebeians under the leadership of Franklin Delano Roosevelt. For then it was only the conservatives that came to the defense of the Court; the liberals were prepared to destroy it. Today, as Prof.

[1] Report of the committee on Federal-State Relationships as Affected by Judicial Decisions, August 1958.

Charles Black has made clear, even if in rather patronizing tones, the conservatives are solidly lined up in defense of an institution many of whose decisions are repugnant to them.[2] The conservatives would seem to be concerned with the preservation of the institution; the liberals with the preservation of the benefits that the current Court has awarded them. For the latter the contents of Caesar's will appears to make the difference.

It would seem, therefore, that only those close to the lunatic fringe, the Birchers and the White Citizens Councils and others of their ilk, are prepared to support the purported court-of-the-union plan. Even in the Council of State Governments the proposed amendment was supported by a majority of only one vote. The few legislatures that have voted in support of this amendment are those normally concerned with their war on Robin Hood and similarly dangerous radicals. I do not mean to suggest that the Court is not in danger of being restrained. But I do think that the proposed method of destruction is not a very real threat unless this country is already closer to Gibbon's Rome than to Caesar's.

On the other hand, to say that the plan for a Court of the Union is an absurdity is not to answer the question whether Caesar suffers from an excess of ambitions. The great debate called for by the Chief at the American Law Institute meeting last May has not really concerned itself with this problem. The great debate has taken the form of rhetorical forays. Each side argues that the proposed limitation on the powers of the Court would result in the removal of national power and the enhancement of the power of the States. The forces of Cassius and Brutus argue that this is a desirable result because the dispersal of government power is the only means of assuring that individual liberty will not be trodden under the tyrannous boots of socialist egalitarianism. Antony contends that the adoption of the proposals would be to return us to fragmented confederation impotent to carry on the duties of governments in the world of the 20th century. Roosevelt's words about a "horse and buggy era" are this time used in defense of the Court. With all due respect, I submit that the essential question remains unanswered. The Talmud tells us that ambition destroys its possessor. Does the Court's behavoir invite its own destruction?

In what ways is it charged that this Caesar seeks for power that does not belong to him? Some such assertions can be rejected as the charges of disappointed suitors. But there are others that cannot be so readily dismissed on the ground of the malice of claimant. Allow me to itemize a few of the latter together with some supporting testimony:

Item. The Court has unreasonably infringed on the authority committed by the Constitution to other branches of the Government.

Listen to one of the recent witnesses:

"The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding the claim, the Court attempts to effect reforms in a field in which the Constitution, as plainly as can be, has committed exclusively to the political process.

"This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of Government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system."

This is not the charge of a Georgia legislator. These are the words of Mr. Justice Harlan, spoken as recently as last February 17, in *Wesberry* v. *Sanders*.[3]

Item. The Supreme Court has severely and unnecessarily limited the power of the States to enforce their criminal laws.

Thus one recent critic had this to say:

"The rights of the States to develop and enforce their own judicial procedures, consistent with the 14th amendment, have long been recognized as essential to the concept of a healthy federalism. Those rights are today attenuated if not obliterated in the name of a victory for the 'struggle for personal liberty.' But the Constitution comprehends another struggle of equal importance and places on (the Supreme Court) the burden of maintaining it—the struggle for law and

[2] Black, The Occasions of Justice 80 (1963).
[3] 376 U.S. xxx, at xxx (1964).

order. I regret that the Court does not often recognize that each defeat in that struggle chips away inexorably at the base of that very personal liberty which it seeks to protect. One is reminded of the exclamation of Pyrrhus: 'One more such victory * * * and we are utterly undone.' "

This, I should tell you, is not the conference of Chief Justices complaining about the abuses of Federal habeas corpus practices; it is Mr. Justice Clark expressing his dissatisfaction in *Fay* v. *Noia*.[4]

Item. The Court has revived the evils of "substantive due process," the cardinal sin committed by the Hughes Court, and the one that almost brought about its destruction.

Here another expert witness has said:

"Finally, I deem this application of 'cruel and unusual punishment' so novel that I suspect the Court was hard put to find a way to ascribe to the framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon State legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding."

This is the hand as well as the voice of Mr. Justice White in *Robinson* v. *California*.[5]

Item. The Court has usurped the powers of the National Legislature in rewriting statutes to express its own policy rather than executing the decisions made by the branch of Government charged with that responsibility.

Listen to two deponents whose right to speak to such an issue is not ordinarily challenged.

"What the Court appears to have done is to create not simply a duty of inspection, but an absolute duty to discovery of all defects; in short, it has made the B. & O. the insurer of the conditions of all premises and equipment, whether its own or others, upon which its employees may work. This is wholly salutary principle of compensation for industrial injury incorporated by workmen's compensation statutes, but it is not the one created by the FELA, which premises liability upon negligence of the employing railroad. It is my view that, as a matter of policy, employees such as the petitioner, who are injured in the course of their employment, should be entitled to prompt and adequate compensation regardless of the employer's negligence and free from traditional commonlaw rules limiting recovery. But Congress has elected a different test of liability which, until changed, courts are obliged to apply."

No, those are not the words of Mr. Justice Frankfurter, but those of his successor, Mr. Justice Goldberg, in *Shenker* v. *Baltimore & Ohio R. Co.*[6]

Listen to the same criticism in even more strident tones:

"The present case * * * will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature."

Here we have Mr. Justice Douglas in dissent from the opinion of Mr. Justice Black in *Arizona* v. *California*.[7]

Item. The Court writes or rewrites law for the purpose of conferring benefits on Negroes that it would not afford to others.

I offer here some testimony endorsed by Justices Harlan, Clark, and Stewart, in *NAACP* v. *Buttons*.[8]

"No member of this Court would disagree that the validity of State action claimed to infringe rights assured by the 14th amendment is to be judged by the same basic constitutional standard whether or not racial problems are involved. No worse setback could befall the great principles established by *Brown* v. *Board of Education*, 347 U.S. 483, than to give fairminded persons reasons to think otherwise. With all respect, I believe that the striking down of this Virginia statute cannot be squared with accepted constitutional doctrine in the domain of State regulatory power over the legal profession.

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[4] 372 U.S. 391, 446–47 (1963).
[5] 370 U.S. 660, 689 (1962).
[6] 374 U.S. xxx, at xxx (1963).
[7] 374 U.S. xxx, at xxx (1963).
[8] 371 U.S. 415, 448 (1963).

Item. The Court disregards precedents at will without offering adequate reasons for change.

Mr. Justice Brennan puts his charge in short compass in *Pan American Airways* v. *United States*.[9]

"The root error, as I see it, in the Court's decision is that it works an extraordinary and unwarranted departure from the settled principles by which the antitrust and regulatory regimes of law are accommodated to each other."

Item. The Court uses its judgments not only to resolve the case before it but to prepare advisory opinions or worse, advisory opinions that do not advise.

The testimony here includes the following:

"The Court has done little more today than to supply new phrases—imprecise in scope and uncertain in meaning—for the habeas corpus vocabulary for district court judges. And because they purport to establish mandatory requirements rather than guidelines, the tests elaborated in the Court's opinion run the serious risk of becoming talismanic phrases, the mechanistic invocation of which will alone determine whether or not a hearing is to be had.

"More fundamentally, the enunciation of an elaborate set of standards governing habeas corpus hearings is in no sense required, or even invited, in order to decide the case * * * and the many pages of the Court's opinion which set these standards forth cannot, therefore, be justified even in terms of the normal function of dictum. The reasons for the rule against advisory opinions which purport to decide questions not actually in issue are too well established to need repeating at this late date."

This is not the plea by academic followers of Herbert Wechsler for principled decisions nor even an argument by Wechsler's opponents for ad hoc resolutions. It is the view of Mr. Justice Stewart in *Townsend* v. *Sain*.[10]

Item. Not unrelated to the charge just specified is the proposition that the Court seeks out constitutional problems when it could very well rest judgment on less lofty grounds.

Here is the Chief Justice himself speaking in *Communist Party* v. *Subversive Activities Control Board:*[11]

"I do not believe that strongly felt convictions on constitntional questions or a desire to shorten the course of this litigation justifies the Court in resolving any of the constitutional questions presented so long as the record makes manifest, as I think it does, the existence of nonconstitutional questions upon which this phase of the proceedings should be adjudicated. I do not think that tbe Court's action can be justified."

Item. The Court has unduly circumscribed the congressional power of investigation.

The testimony I offer here is not that of the chairman of the House Un-American Affairs Committee nor that of the Birch Society. It derives from Mr. Justice White's opinion in *Gibson* v. *Florida Investigation Committee:*[12]

"The net effect of the Court's decision is, of course, to insulate from effective legislation the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations. Until such a group, chosen as an object of Communist Party action, has been effectively reduced to vassalage, legislative bodies may seek no information from the organization under attack by duty-bound Communists. When the job has been done, and the legislative committee can prove it, it then has the hollow privilege of recording another victory for the Communist Party, which both Congress and this Court have found to be an organization under the direction of a foreign power, dedicated to the overthrow of the Government if necessary by force and violence."

Item. I will close the list with the repeated charge that the due process clause of the 14th amendment as applied by the Court consists only of the "evanescent standards" of each judge's notions of natural law. The charge is most strongly supported by the opinions of Mr. Justice Black in *Adamson* v. *California*[13] and *Rochin* v. *California*,[14] to which I commend you.

I close the catalog not because it is exhausted. These constitute but a small part of Brutus' indictment and an even smaller proportion of the witnesses prepared to testify to the Court's grasp for power. These witnesses are impressive,

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[9] 371 U.S. 296, 319 (1963).
[10] 372 U.S. 293, 327 (1963).
[11] 367 U.S. 1, 116 (1961).
[12] 372 U.S. 539, 585 (1963).
[13] 332 U.S. 46, 68 (1947).
[14] 342 U.S. 165, 174 (1952).

however, for they are not enemies of the Court but part of it. Moreover, their depositions may be garnered simply by thumbing the pages of the recent volumes of the U.S. Reports, which is exactly the way that my partial catalog was created.

Let me make clear that this testimony does not prove Caesar's guilt, but only demonstrates that these charges cannot be dismissed out of hand. The fact that they are endorsed by such irresponsible groups as would support the proposed constitutional amendment does not add to their validity. But neither does such support invalidate them.

What then of Antony's defenses of Caesar?

First is the proposition that our Caesar has done no more than perform the duties with which he is charged. We have it from no less eminent an authority than Paul Freund that the Court has not exceeded its functions and he defines them thus: [15]

"First of all, the Court has a responsibility to maintain the constitutional order, the distribution of public power and the limitation on that power.

"A second great mission of the Court is to maintain a common market of continental extent against State barriers or State trade preferences.

"In the third place there falls to the Court a vital role in the preservation of an open society, whose government is to remain both responsive and responsible. Responsive government requires freedom of expression; responsible government demands fairness of representation."

And so, Professor Freund suggests, the Court has done no more than its duty and he predicts that we shall be grateful to it: [16]

"The future is not likely to bring a lessening of government intervention in our personal concerns. And as science advances into outer and inner space—the far reaches of the galaxy and the deep recesses of the mind—as physical controls become possible over our genetic and our psychic constitutions we may have reason to be thankful that some limits are set by our legal constitution. We may have reason to be grateful that we are being equipped with legal controls, with decent procedures, with access to the centers of decisionmaking, and participation in our secular destiny, for our days and for the days we shall not see."

It is not clear to me that the second defense is really different from the first. Here we are met with the proposition that the Court, politically the least responsible branch of government, has proved itself to be morally the most responsible. In short, the Court has acted because the other branches of government, State and National have failed to act. And a parade of horribles would not be imaginary that marched before us the abuses that the community has rained on the Negro; the evils of McCarthyism and the continued restrictions on freedom of thought committeed by the National Legislature; the refusal of the States and the Nation to make it possible for the voices of the disenfranchised to be heard, either by preventing groups from voting, or by mechanisms for continued control of the legislature by the politically entrenched, including gerrymandering, and subordination of majority rule by the filibuster and committee control of Congress; the police tactics that violate the most treasured rights of the human personality, police tactics that we have all coudemned when exercised by the Nazis and the Communists. This list too, may be extended almost to infinity. There can be little doubt that the other branches of Government have failed in meeting some of their essential obligations to provide constitutional government.

The third defense is that which I have labeled the defense of Caesar's will. It is put most frankly and tersely by Prof. John Roche in this way.[17]

"As a participant in American society in 1963—somewhat removed from the abstract world of democratic political theory—I am delighted when the Supreme Court takes action against bad policy on whatever constitutional basis it can establish or invent. In short, I accept Aristotle's dictum that the essence of political tragedy is for the good to be opposed in the name of the perfect. Thus, while I wish with Professors Wechsler and Kurland, inter alios, that Supreme Court Justices could proceed on the same principles as British judges, it does not unsettle or irritate me when they behave like Americans. Had I been a member of the Court in 1954, I would unhesitatingly have supported the constitutional

[15] Freund, The Supreme Court Under Attack, 25 U. Pitt. L. Rev. 1, 5–6 (1963).
[16] Id. at 7.
[17] Roche, The Expatriation Cases: "Breathes There the Man With Soul So Dead?" 1963 Supreme Court Review, 325, 326 n. 4.

death sentence on racial segregation even though it seems to me that in a properly ordered democratic society this should be a task for the legislature. To paraphrase St. Augustine, in this world one must take his breaks where he finds them."

There then are the pleadings. I do not pretend to a capacity to decide the case. It certainly isn't ripe for summary judgment or judgment on the pleadings. I am fearful only that if the case goes to issue in this manner, the result will be chaos whichever side prevails. For, like Judge Learned Hand, I am apprehensive that if nothing protects our democracy and freedom except the bulwarks that the Court can erect, we are doomed to failure. Thus, I would answer the question that purports to be mooted today, whether the court-of-the-union amendment should be promulgated, in the words of that great judge:[18]

"And so, to sum up, I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent; and I do not believe that their independence should be impaired because of their constitutional function. But the price of this immunity, I insist, is that they should not have the last word in those basic conflicts of 'right and wrong—between those whose endless war justice resides.' You may ask then what will become of the fundamental principles of equity and fairplay which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."

I find then that I have come neither to praise nor to bury Caesar. I should only remind those who would destroy Caesar of the self-destruction to which the noble Brutus was brought; nor can the Antonys among us—who would use Caesar for their own ends—rejoice at his ultimate fate. For Caesar himself, I should borrow the advice given Cromwell by Worley: "I charge thee, fling away ambition: By that sin fell the angels."

EXHIBIT 40

[From U.S. News & World Report, Mar. 7, 1958]

FAMOUS JUDGE REBUKES SUPREME COURT

(By David Lawrence)

Judge Learned Hand, now retired, is one of the most eminent men ever to sit on the federal bench. For many years he presided over the Second Circuit Court of Appeals in New York, and his opinions were usually accepted by the Supreme Court of the United States. Indeed his opinions came to be regarded by the legal profession as among the most persuasive expositions of "the law of the land."

Recently Judge Hand delivered a series of three lectures before the students at Harvard Law School. He dealt with the widely debated concept that the Supreme Court may "legislate" at will.

These lectures have just been published by the Harvard University Press. While they are written in dispassionate and restrained phrases, the lesson contained therein is unmistakable. It is one of sharp rebuke of the Supreme Court for a tendency to set itself up as a "third legislative chamber."

Judge Hand issues a warning as to what the American citizen faces whenever the Supreme Court not only restricts the right of legislative bodies to legislate but itself assumes a legislative function.

Judge Hand does not confine his criticism merely to the present-day Supreme Court. He points out that an 1894 opinion of the Court foreshadowed current trends. He quotes the Court's declaration at that time that a State Legislature's "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

Judge Hand observes that "such a definition leaves no alternative to regarding the court as a third legislative chamber." He then notes the subsequent dis-

[18] Hand, The Spirit of Liberty 164 (2d ed. 1953).

avowals of such a doctrine by the Supreme Court and cites a 1952 opinion which says:

"Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation, nor to decide whether the policy which it expresses offends the public welfare."

Judge Hand remarks: "One would suppose that these decisions and the opinions that accompanied them would have put an end—at least when economic interests only were at stake—to any judicial review of a statute because the choice made [by Congress or the State Legislatures] between the values and sacrifices in conflict did not commend itself to the Court's notions of justice."

Judge Hand finds, however, that the Supreme Court recently has not only proceeded to impose its own view of what is wise or unwise legislation, irrespective of constitutional powers, but seems to have applied hostile rules where "property" was involved and softer rules where "liberty" was at issue. He says:

"I cannot help thinking that it would have seemed a strange anomaly to those who penned the words in the Fifth [Amendment] to learn that they constituted severer restrictions as to Liberty than Property, especially now that Liberty not only includes freedom from personal restraint, but enough economic security to allow its possessor the enjoyment of a satisfactory life.

"I can see no more persuasive reason for supposing that a legislature is *a priori* less qualified to choose between 'personal' than between economic values; and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second."

Judge Hand puts his finger on the cases that today transcend all others as examples of usurpation of power by the Supreme Court. He says:

"The question arose in acute form in 'The Segregation Cases.' In these decisions did the Court mean to 'overrule' the 'legislative judgment' of States by its own reappraisal of the relative values at stake? Or did it hold that it was alone enough to invalidate the statutes that they had denied racial equality because the [Fourteenth] Amendment inexorably exempts that interest from legislative appraisal?

"It seems to me that we must assume that it did mean to reverse the 'legislative judgment' by its own appraisal. It acknowledged that there was no reliable inference to he drawn from the congressional debates in 1868 and it put its decision upon the 'feeling of inferiority' that 'segregation' was likely to instill in the minds of those who were educated as a group separated by their race alone.

"There is indeed nothing in the discussion [by the Supreme Court] that positively forbids the conclusion that the Court meant that racial equality was a value that must prevail against any conflictlng interest, but it was not necessary to go to such an extreme. *Plessy* v. *Ferguson* [the 1896 case approving 'separate but equal' facilities] was not overruled in form anyway; it ws distinguished [differentiated] because of the increased importance of education in the 56 years that had elapsed since it was decided.

"I do not see how this distinction can be reconclled with the notion tbat racial equality is a paramount value tbat State Legislatures are not to appraise and whose invasion is fatal to the validity of any statute.

"Whether the result would have been the same if the interests involved had been economic, of course, I cannot say, but there can be no doubt that at least as to 'Personal Rights' the old doctrine seems to have been reasserted.

"It is curious that no mention was made of Section Three [of the Fourteenth Amendment], which offered an escape from intervening, for it empowers Congress to 'enforce' all the preceding sections by 'appropriate legislation.'

"The Court must have regarded this as only a cumulative corrective, not being disposed to divest itself of that power of review that it has so often exercised and as often disclaimed.

"I must therefore conclude this part of what I have to say by acknowledging that I do not know what the doctrine is as to the scope of these clauses; I cannot frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the States within their accredited authority."

Judge Hand says he "has never been able to understand" on what hasis other than as a "*coup de main*" the Supreme Court adopted the view that it may actually legislate. By "*coup de main*," he means, of course, arbitrary usurpation of power.

Should we establish a "third legislative chamber"? This is the penetrating question asked by Judge Hand, but he adds quickly: "If we do need a third

chamber it should appear for what it is, and not as the interpreter of inscrutable principles."

But Judge Hand doubts the wisdom of letting a judge "serve as a communal mentor" and deems inexpedient any such wider form of review based on the "moral radiation" of court decisions. He gives these reasons for his view:

"In the first place it is apparent, I submit, that in so far as it is made part of the duties of judges to take sides in political controversies, their known or expected convictions or predilections will, and indeed should, be at least one determinant in their appointment and an important one.

"There has been plenty of past experience that confirms this; indeed, we have become so used to it that we accept it as a matter of course.

"No doubt it is inevitable, however circumscribed his duty may be, that the personal proclivities of an interpreter will to some extent interject themselves into the meaning he imputes to a text, but in very much the greater part of a judge's duties he is charged with freeing himself as far as he can from all personal preferences, and that becomes difficult in proportion as these are strong.

"The degree to which he will secure compliance with his commands depends in large measure upon how far the community believes him to be the mouthpiece of a public will, conceived as a resultant of many conflicting strains that have come, at least provisionally, to a consensus.

"This sanction disappears in so far as it is supposed permissible for him covertly to smuggle into his decisions his personal notions of what is desirable, however disinterested personally those may be.

"Compliance will then much more depend upon a resort to force, not a desirable expedient when it can be avoided."

Those last words could apply to the use of troops at Little Rock, which certainly was "not a desirable expedient" and could have been avoided.

There seems no doubt that Judge Hand would like to see the Supreme Court adhere to its basic function of interpreting legislation without adding laws not written by the people's legislatures. He evidently deplores the tendency to vest political power in the Supreme Conrt of the United States whose Justices are appointed for life. He concludes:

"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, while I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

"Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture."

Judge Hand has rendered a great service to contemporary understanding of the true limits of the Supreme Court's powers. For there are limits, and the Congress, acting for the people, can and should impose such limits lest we fall victim to absolutism in our own institutions.

EXHIBIT 41

[From U.S. News & World Report, Oct. 24, 1958]

HOW U.S. JUDGES FEEL ABOUT THE SUPREME COURT

(A critical attitude toward the Supreme Court is now found to exist among federal judges. This is revealed in a poll by "U.S. News & World Report." The poll asked federal judges whether they agreed with a report adopted recently by 36 State chief justices. That report criticized the Supreme Court for playing a "role of policy maker." Of federal judges who expressed an opinion, 54 per cent agreed with that criticism. Replying to the poll were 128 judges representing all regions of the country.)

A poll of judges in federal courts indicates that a majority of the judges who expressed an opinion are critical toward the Supreme Court of the U.S.

This majority agreed with the conclusion of a report by 36 State chief justices that the Supreme Court "too often has tended to adopt the role of policy maker without proper judicial restraint."

A minority of judges who replied disagreed with that conclusion.

There are 351 judges, active and retired, on U.S. district courts and U.S. circuit courts of appeals. These were asked by "U.S. News & World Report," in a mail questionnaire, whether they agreed or disagreed with conclusions in a report approved by the Conference of Chief Justices of State Supreme Courts.

This report, critical of the Supreme Court of the U.S. was approved, 36 to 8, in a formal vote by the Chief Justices of State Supreme Courts at their annual meeting last August. Four justices were not present at the vote; two abstained.

Full text of the report itself, more than 11,000 words, was mailed by "U.S. News & World Report" along with the questionnaire to all federal judges.

Each federal district and circuit judge was asked simply to mark an "X" before the statement "I agree" or "I disagree" with the conclusions of the report adopted by the Conference of State Chief Justices. This report did not directly concern itself with the issue of segregation of races in schools, nor did it mention the Supreme Court decision in the desegregation cases. It did criticize the Supreme Court for lack of "proper judicial restraint" in rulings that deal with the "extent and extension of federal power, and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment."

In the poll by U.S. News & World Report," replies were received from 128 judges, or 36.5 per cent of those polled. Replies were representative of all regions and of the full membership of judges of the U.S. district courts as well as of judges of U.S. circuit courts of appeals.

Of all those who answered the questionnaire:

Forty-six per cent expressed agreement with the conclusions of chief justices of State supreme courts.

Thirty-nine per cent disagreed with the State chief justices.

Fifteen per cent preferred not to express any view.

Of all those who did express an opinion:

Fifty-four per cent agreed with the report of the State chief justices, which said that the Supreme Court of U.S. "too often has tended to adopt the role of policy maker without proper judicial restraint."

Forty-six per cent disagreed with this conclusion.

By regions, the judges voted this way:

From Washington, D.C., replies were received from 38.5 per cent of the 26 judges sitting on U.S. district courts and U.S. circuit courts of appeals.

Of those in Washington, D.C., who replied:

Eighty per cent agreed with the chief justices of the State supreme courts in their criticism of the Supreme Court of U.S.

Twenty per cent disagreed.

There were no replies received from the "no opinion" category.

It is in the nation's capital that judges are most closely in contact with the Supreme Court of U.S.

In the South, 50 per cent of the federal judges replied.

Of those who replied from the South:

Fifty-five and one-half per cent agreed with the report of the State chief justices that the Supreme Court of U.S. has acted without proper judicial restraint.

Twenty-eight per cent of judges in the South disagreed.

Sixteen and one-half per cent mailed back the questionnaire but preferred not to express a view.

(States of South: Ala., Ark., Fla., Ga., La., Miss., N.C., S.C., Tenn., Tex., Va.)

Outside the South, 33 per cent of the judges replied.

Of those who replied from outside the South:

Forty-two and four-tenths per cent agreed with the report of the State chief justices in their criticism of the Supreme Court of U.S.

Forty-three and one-half percent disagreed.

Fourteen and one-tenth per cent who replied preferred not to express a view.

Of those outside the South who did express their views:

Forty-nine and four-tenths per cent agreed with the State chief justices.

Fifty and six-tenths per cent disagreed.

Gallup appraisal. A response of 36.5 per cent to a mail poll is rated by those whose business it is to conduct polls as "very good indeed."

George Gallup, Director of the American Institute of Public Opinion, when asked prior to the completion of the above poll to evaluate mail questionnaires generally, said this:

"A mail return which receives from 20 to 30 per cent of replies is about average. Anything from 30 to 40 per cent is very good.

"A questionnaire to which the recipient can give an offhand reply will get better results than a questionnaire which requires the recipient to read any lengthy document before replying. If you get a 30 to 40 per cent return, therefore, when there is a lengthy document accompanying the questionnaire, to be read by the recipient, I should say the results would be very good, indeed."

A mail poll drawing replies from 36.5 per cent of all federal judges other than those on the Supreme Court of U.S. itself is described by professional samplers of opinion as providing a fair measure of opinion of all the judges polled.

What the poll tells. The poll of U.S. district judges and judges on the U.S. circuit courts of appeals, as a result, shows this:

A majority of federal judges participating in the poll are agreed that the Supreme Court "too often" has not exercised "proper judicial restraint" in exercising its power to make policy.

This majority approved the statement of the 36 chief justices of State supreme courts that "in the light of the immense power of the Supreme Court and its practical non-reviewability in most instances, no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role."

A majority of federal judges participating likewise agrees with the report of the chief justices of State supreme courts when it says: "We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers."

The poll made by "U.S. News & World Report" was conducted by the mail to determine whether or not federal judges agreed or disagreed with the formal poll of State chief justices in the view expressed in their report that the Supreme Court is extending the power of the Federal Government at expense of the individual States "without proper judicial restraint."

Critics of criticism. The New York "Times" is reported to have made an effort through its own reporters to dissuade judges from participating in the poll. "Times" reporters called by telephone a number of judges and, some of these judges say, argued with them that they would not reply.

While the poll by "U.S. News & World Report" was in progress, the New York "Times" printed a story under a headline: "Judges Angered by Poll on Court, More Than a Score Express Indignation over Magazine Survey on Critical Report." This story said that New York "Times" reporters had "sampled" federal judges in "several cities." The article expressed the opinion that not a quarter of those polled would reply. In Washington another newspaper, the "Post and Times Herald," also polled some of the federal judges about the "U.S. News & World Report" poll. The "Post and Times Herald" predicted that "less than a 20 per cent return" would be received.

The "U.S. News & World Report" poll was conducted in confidence, and judges were not asked to sign their names. A substantial number, nonetheless, did sign their names after checking the answer.

The Supreme Court of U.S. many times in the past, as now, has been a center of controversy over the use of its power. The report of chief justices of State supreme courts and the poll of judges on federal courts below the Supreme Court reveal a strong undercurrent of criticism of the Supreme Court among judges themselves. The report of the State chief justices was printed in full text in the October 3 issue of "U.S. News & World Report."

EXHIBIT 42

WARDEN, MARYLAND PENITENTIARY *v.* HAYDEN.

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

No. 480. Argued April 12, 1967.—Decided May 29, 1967.

The police were informed that an armed robbery had occurred and that the suspect, respondent, had thereafter entered a certain house. Minutes later they arrived there and were told by respondent's wife that she had no objection to their searching the house. Certain officers arrested respondent in an upstairs bedroom when it became clear he was the only man in the house. Others simultaneously searched the first floor and cellar. One found weapons in a flush tank; another, looking "for a man or the money," found in a washing machine clothing of the type the suspect was said to have worn. Ammunition was also found. These items were admitted into evidence without objection at respondent's trial which resulted in his conviction. After unsuccessful state court proceedings respondent sought and was denied habeas corpus relief in the District Court. The Court of Appeals found the search lawful, but reversed on the ground that the clothing seized during the search was immune from seizure, being of "evidential value only." *Held:*

1. "The exigencies of the situation," in which the officers were in pursuit of a suspected armed felon in the house which he had entered only minutes before they arrived, permitted their warrantless entry and search. *McDonald* v. *United States,* 335 U. S. 451, 456. Pp. 298–300.

2. The distinction prohibiting seizure of items of only evidential value and allowing seizure of instrumentalities, fruits, or contraband is no longer accepted as being required by the Fourth Amendment. Pp. 300–310.

(a) There is no rational distinction between a search for "mere evidence" and one for an "instrumentality" in terms of the privacy which is safeguarded by the Fourth Amendment; nor does the language of the Amendment itself make such a distinction. Pp. 301–302.

(b) The clothing items involved here are not "testimonial" or "communicative" and their introduction did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber* v. *California,* 384 U. S. 757. Pp. 302–303.

(c) The premise that property interests control government's search and seizure rights, on which *Gouled* v. *United States*, 255 U. S. 298, partly rested, is no longer controlling as the Fourth Amendment's principal object is the protection of privacy, not property. Pp. 303–306.

(d) The related premise of *Gouled* that government may not seize evidence for the purpose of proving crime has also been discredited. The Fourth Amendment does not bar a search for that purpose provided that there is probable cause, as there was here, for the belief that the evidence sought will aid in a particular apprehension or conviction. Pp. 306–307.

(e) The remedy of suppression, with its limited, functional consequence, has made possible the rejection of both the related *Gouled* premises. P. 307.

(f) Just as the suppression of evidence does not require the return of such items as contraband, the introduction of "mere evidence" does not entitle the State to its retention if it is being wrongfully withheld. Pp. 307–308.

(g) The numerous and confusing exceptions to the "mere evidence" limitation make it questionable whether it affords any meaningful protection. P. 309.

363 F. 2d 647, reversed.

Franklin Goldstein, Assistant Attorney General of Maryland, argued the cause for petitioner. With him on the brief was *Francis B. Burch*, Attorney General.

Albert R. Turnbull, by appointment of the Court, 385 U. S. 985, argued the cause and filed a brief for respondent, *pro hac vice*, by special leave of Court.

Ralph S. Spritzer, by special leave of Court, argued the cause for the United States, as *amicus curiae*, urging reversal. With him on the brief were *Solicitor General Marshall*, *Assistant Attorney General Vinson*, *Nathan Lewin* and *Beatrice Rosenberg*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We review in this case the validity of the proposition that there is under the Fourth Amendment a "distinction

between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime." [1]

A Maryland court sitting without a jury convicted respondent of armed robbery. Items of his clothing, a cap, jacket, and trousers, among other things, were seized during a search of his home, and were admitted in evidence without objection. After unsuccessful state court proceedings, he sought and was denied federal habeas corpus relief in the District Court for Maryland.[2] A divided panel of the Court of Appeals for the Fourth Circuit reversed. 363 F. 2d 647. The Court of Appeals believed that *Harris* v. *United States*, 331 U. S. 145, 154, sustained the validity of the search, but held that respondent was correct in his contention that the clothing seized was improperly admitted in evidence because the items had "evidential value only" and therefore were not

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[1] *Harris* v. *United States*, 331 U. S. 145, 154; see also *Gouled* v. *United States*, 255 U. S. 298; *United States* v. *Lefkowitz*, 285 U. S. 452, 465–466; *United States* v. *Rabinowitz*, 339 U. S. 56, 64, n. 6; *Abel* v. *United States*, 362 U. S. 217, 234–235.

[2] Hayden did not appeal from his conviction. He first sought relief by an application under the Maryland Post Conviction Procedure Act which was denied without hearing. The Maryland Court of Appeals reversed and remanded for a hearing. 233 Md. 613, 195 A. 2d 692. The trial court denied relief after hearing, concluding "that the search of his home and the seizure of the articles in question were proper." His application for federal habeas corpus relief resulted, after hearing in the District Court, in the same conclusion.

lawfully subject to seizure. We granted certiorari. 385 U. S. 926. We reverse.[3]

I.

About 8 a. m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took some $363 and ran. Two cab drivers in the vicinity, attracted by shouts of "Holdup," followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5'8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to police who were proceeding to the scene of the robbery. Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection.[4]

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[3] The State claims that, since Hayden failed to raise the search and seizure question at trial, he deliberately bypassed state remedies and should be denied an opportunity to assert his claim in federal court. See *Henry* v. *Mississippi*, 379 U. S. 443; *Fay* v. *Noia*, 372 U. S. 391. Whether or not the Maryland Court of Appeals actually intended, when it reversed the state trial court's denial of post-conviction relief, that Hayden be afforded a hearing on the merits of his claim, it is clear that the trial court so understood the order of the Court of Appeals. A hearing was held in the state courts, and the claim denied on the merits. In this circumstance, the Fourth Circuit was correct in rejecting the State's deliberate-bypassing claim. The deliberate-bypass rule is applicable only "to an applicant who has deliberately by-passed the orderly procedure of the state courts *and in so doing has forfeited his state court remedies.*" *Fay* v. *Noia*, *supra*, 372 U. S., at 438. (Emphasis added.) But see *Nelson* v. *California*, 346 F. 2d 73, 82 (C. A. 9th Cir. 1965).

[4] The state postconviction court found that Mrs. Hayden "gave the policeman permission to enter the home." The federal habeas corpus court stated it "would be justified in accepting the findings

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer who, according to the District Court, "was searching the cellar for a man or the money" found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All these items of evidence were introduced against respondent at his trial.

II.

We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, "the exigencies of the situation made that course imperative." *McDonald* v. *United States,* 335 U. S. 451, 456. The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation

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of historical fact made by Judge Sodaro on that issue . . . ," but concluded that resolution of the issue would be unnecessary, because the officers were "justified in entering and searching the house for the felon, for his weapons and for the fruits of the robbery."

if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

We do not rely upon *Harris* v. *United States, supra,* in sustaining the validity of the search. The principal issue in *Harris* was whether the search there could properly be regarded as incident to the lawful arrest, since Harris was in custody before the search was made and the evidence seized. Here, the seizures occurred prior to or immediately contemporaneous with Hayden's arrest, as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before the police arrived. The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.

It is argued that, while the weapons, ammunition, and cap may have been seized in the course of a search for weapons, the officer who seized the clothing was searching neither for the suspect nor for weapons when he looked into the washing machine in which he found the clothing. But even if we assume, although we do not decide, that the exigent circumstances in this case made lawful a search without warrant only for the suspect or his weapons, it cannot be said on this record that the officer who found the clothes in the washing machine was not searching for weapons. He testified that he was searching for the man or the money, but his failure to state explicitly that he was searching for weapons, in the absence of a specific question to that effect, can hardly be accorded controlling weight. He knew that the robber was armed and he did not know that some

weapons had been found at the time he opened the machine.[5] In these circumstances the inference that he was in fact also looking for weapons is fully justified.

III.

We come, then, to the question whether, even though the search was lawful, the Court of Appeals was correct in holding that the seizure and introduction of the items of clothing violated the Fourth Amendment because they are "mere evidence." The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by courts[6] and commentators.[7] The Court of Appeals, however, felt "obligated to adhere to it." 363 F. 2d, at 655. We today reject the distinction as based on premises no longer

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[5] The officer was asked in the District Court whether he found the money. He answered that he did not, and stated: "By the time I had gotten down into the basement I heard someone say upstairs, 'There's a man up here.'" He was asked: "What did you do then?" and answered: "By this time I had already discovered some clothing which fit the description of the clothing worn by the subject that we were looking for . . . ." It is clear from the record and from the findings that the weapons were found after or at the same time the police found Hayden.

[6] *People* v. *Thayer*, 63 Cal. 2d 635, 408 P. 2d 108, cert. denied, 384 U. S. 908; *State* v. *Bisaccia*, 45 N. J. 504, 213 A. 2d 185. Compare *United States* v. *Poller*, 43 F. 2d 911, 914 (C. A. 2d Cir. 1930).

[7] *E. g.*, Chafee, The Progress of the Law, 1919–1922, 35 Harv. L. Rev. 673 (1922); Kamisar, The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn. L. Rev. 891, 914–918 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474, 478 (1961); Comment, 45 N. C. L. Rev. 512 (1967); Comment, 66 Col. L. Rev. 355 (1966); Comment, 20 U. Chi. L. Rev. 319 (1953); Comment, 31 Yale L. J. 518 (1922). Compare, *e. g.*, Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361 (1921); Note, 54 Geo. L. J. 593 (1966).

accepted as rules governing the application of the Fourth Amendment.[8]

We have examined on many occasions the history and purposes of the Amendment.[9] It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of "the sanctity of a man's home and the privacies of life," *Boyd* v. *United States*, 116 U. S. 616, 630, from searches under indiscriminate, general authority. Protection of these interests was assured by prohibiting all "unreasonable" searches and seizures, and by requiring the use of warrants, which particularly describe "the place to be searched, and the persons or things to be seized," thereby interposing "a magistrate between the citizen and the police," *McDonald* v. *United States, supra*, 335 U. S., at 455.

Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband. On its face, the provision assures the "right of the people to be secure in their persons, houses, papers, and effects . . . ," without regard to the use to which any of these things are applied. This "right of the people" is certainly unrelated to the "mere evidence" limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumen-

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[8] This Court has approved the seizure and introduction of items having only evidential value without, however, considering the validity of the distinction rejected today. See *Schmerber* v. *California*, 384 U. S. 757; *Cooper* v. *California*, 386 U. S. 58.

[9] *E. g., Stanford* v. *Texas*, 379 U. S. 476, 481–485; *Marcus* v. *Search Warrant*, 367 U. S. 717, 724–729; *Frank* v. *Maryland*, 359 U. S. 360, 363–365. See generally Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937); Landynski, Search and Seizure and the Supreme Court (1966).

tality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same "papers and effects" may be "mere evidence" in one case and "instrumentality" in another. See Comment, 20 U. Chi. L. Rev. 319, 320–322 (1953).

In *Gouled* v. *United States,* 255 U. S. 298, 309, the Court said that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding . . . ." The Court derived from *Boyd* v. *United States, supra,* the proposition that warrants "may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken," 255 U. S., at 309; that is, when the property is an instrumentality or fruit of crime, or contraband. Since it was "impossible to say, on the record . . . that the Government had any interest" in the papers involved "other than as evidence against the accused . . . ," "to permit them to be used in evidence would be, in effect, as ruled in the *Boyd Case,* to compel the defendant to become a witness against himself." *Id.,* at 311.

The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to be-

come a witness against himself in violation of the Fifth Amendment. *Schmerber* v. *California*, 384 U. S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

The Fourth Amendment ruling in *Gouled* was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals. The common law of search and seizure after *Entick* v. *Carrington*, 19 How. St. Tr. 1029, reflected Lord Camden's view, derived no doubt from the political thought of his time, that the "great end, for which men entered into society, was to secure their property." *Id.*, at 1066. Warrants were "allowed only where the primary right to such a search and seizure is in the interest which the public or complainant may have in the property seized." Lasson, The History and Development of the Fourth Amendment to the United States Constitution 133–134. Thus stolen property—the fruits of crime—was always subject to seizure. And the power to search for stolen property was gradually extended to cover "any property which the private citizen was not permitted to possess," which included instrumentalities of crime (because of the early notion that items used in crime were forfeited to the State) and contraband. Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474, 475. No separate governmental interest in seizing evidence to apprehend and convict criminals was recognized; it was required that some property interest be asserted. The remedial structure also reflected these dual premises. Trespass, replevin, and the other means of

redress for persons aggrieved by searches and seizures, depended upon proof of a superior property interest. And since a lawful seizure presupposed a superior claim, it was inconceivable that a person could recover property lawfully seized. As Lord Camden pointed out in *Entick* v. *Carrington, supra,* at 1066, a general warrant enabled "the party's own property [to be] seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal."

The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. See *Jones* v. *United States,* 362 U. S. 257, 266; *Silverman* v. *United States,* 365 U. S. 505, 511. This shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform. The remedial structure at the time even of *Weeks* v. *United States,* 232 U. S. 383, was arguably explainable in property terms. The Court held in *Weeks* that a defendant could petition *before* trial for the return of his illegally seized property, a proposition not necessarily inconsistent with *Adams* v. *New York,* 192 U. S. 585, which held in effect that the property issues involved in search and seizure are collateral to a criminal proceeding.[10] The remedial structure finally escaped the bounds of common law property limitations in *Silverthorne*

[10] Both *Weeks* and *Adams* were written by Justice Day, and joined by several of the same Justices, including Justice Holmes.

Lumber Co. v. *United States,* 251 U. S. 385, and *Gouled* v. *United States, supra,* when it became established that suppression might be sought during a criminal trial, and under circumstances which would not sustain an action in trespass or replevin. Recognition that the role of the Fourth Amendment was to protect against invasions of privacy demanded a remedy to condemn the seizure in *Silverthorne,* although no possible common law claim existed for the return of the copies made by the Government of the papers it had seized. The remedy of suppression, necessarily involving only the limited, functional consequence of excluding the evidence from trial, satisfied that demand.

The development of search and seizure law since *Silverthorne* and *Gouled* is replete with examples of the transformation in substantive law brought about through the interaction of the felt need to protect privacy from unreasonable invasions and the flexibility in rulemaking made possible by the remedy of exclusion. We have held, for example, that intangible as well as tangible evidence may be suppressed, *Wong Sun* v. *United States,* 371 U. S. 471, 485–486, and that an actual trespass under local property law is unnecessary to support a remediable violation of the Fourth Amendment, *Silverman* v. *United States, supra.* In determining whether someone is a "person aggrieved by an unlawful search and seizure" we have refused "to import into the law . . . subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." *Jones* v. *United States, supra,* 362 U. S., at 266. And with particular relevance here, we have given recognition to the interest in privacy despite the complete absence of a property claim by suppressing the very items which at

common law could be seized with impunity: stolen goods, *Henry* v. *United States*, 361 U. S. 98; instrumentalities, *Beck* v. *Ohio*, 379 U. S. 89; *McDonald* v. *United States*, *supra;* and contraband, *Trupiano* v. *United States*, 334 U. S. 699; *Aguilar* v. *Texas*, 378 U. S. 108.

The premise in *Gouled* that government may not seize evidence simply for the purpose of proving crime has likewise been discredited. The requirement that the Government assert in addition some property interest in material it seizes has long been a fiction,[11] obscuring the reality that government has an interest in solving crime. *Schmerber* settled the proposition that it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals. The requirements of the Fourth Amendment can secure the same protection of privacy

[11] At common law the Government did assert a superior property interest when it searched lawfully for stolen property, since the procedure then followed made it necessary that the true owner swear that his goods had been taken. But no such procedure need be followed today; the Government may demonstrate probable cause and lawfully search for stolen property even though the true owner is unknown or unavailable to request and authorize the Government to assert his interest. As to instrumentalities, the Court in *Gouled* allowed their seizure, not because the Government had some property interest in them (under the ancient, fictitious forfeiture theory), but because they could be used to perpetrate further crime. 255 U. S., at 309. The same holds true, of course, for "mere evidence"; the prevention of crime is served at least as much by allowing the Government to identify and capture the criminal, as it is by allowing the seizure of his instrumentalities. Finally, contraband is indeed property in which the Government holds a superior interest, but only because the Government decides to vest such an interest in itself. And while there may be limits to what may be declared contraband, the concept is hardly more than a form through which the Government seeks to prevent and deter crime.

whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. Cf. *Kremen* v. *United States,* 353 U. S. 346. But no such problem is presented in this case. The clothes found in the washing machine matched the description of those worn by the robber and the police therefore could reasonably believe that the items would aid in the identification of the culprit.

The remedy of suppression, moreover, which made possible protection of privacy from unreasonable searches without regard to proof of a superior property interest, likewise provides the procedural device necessary for allowing otherwise permissible searches and seizures conducted solely to obtain evidence of crime. For just as the suppression of evidence does not entail a declaration of superior property interest in the person aggrieved, thereby enabling him to suppress evidence unlawfully seized despite his inability to demonstrate such an interest (as with fruits, instrumentalities, contraband), the refusal to suppress evidence carries no declaration of superior property interest in the State, and should thereby enable the State to introduce evidence lawfully seized despite its inability to demonstrate such an interest. And, unlike the situation at common law, the owner of property would not be rendered remediless if "mere evidence" could lawfully be seized to prove crime. For just as the suppression of evidence does not in itself necessarily entitle the aggrieved person to its return (as, for example, contraband), the introduction of "mere evidence" does not in

itself entitle the State to its retention. Where public officials "unlawfully seize *or hold* a citizen's realty or chattels, recoverable by appropriate action at law or in equity . . . ," the true owner may "bring his possessory action to reclaim that which is wrongfully withheld." *Land* v. *Dollar*, 330 U. S. 731, 738. (Emphasis added.) See *Burdeau* v. *McDowell*, 256 U. S. 465, 474.

The survival of the *Gouled* distinction is attributable more to chance than considered judgment. Legislation has helped perpetuate it. Thus, Congress has never authorized the issuance of search warrants for the seizure of mere evidence of crime. See *Davis* v. *United States*, 328 U. S. 582, 606 (dissenting opinion of Mr. Justice Frankfurter). Even in the Espionage Act of 1917, where Congress for the first time granted general authority for the issuance of search warrants, the authority was limited to fruits of crime, instrumentalities, and certain contraband. 40 Stat. 228. *Gouled* concluded, needlessly it appears, that the Constitution virtually limited searches and seizures to these categories.[12] After *Gouled*, pressure

[12] *Gouled* was decided on certified questions. The only question which referred to the Espionage Act of 1917 stated: "Are papers of . . . evidential value . . . , when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected,—seized and taken in violation of the 4th amendment?" *Gouled* v. *United States*, No. 250, Oct. Term, 1920, Certificate, p. 4. Thus the form in which the case was certified made it difficult if not impossible "to limit the decision to the sensible proposition of statutory construction, that Congress had not as yet authorized the seizure of purely evidentiary material." Chafee, *op. cit. supra*, at 699. The Government assumed the validity of petitioner's argument that *Entick* v. *Carrington*, *Boyd* v. *United States*, and other authorities established the constitutional illegality of seizures of private papers for use as evidence. *Gouled* v. *United States*, *supra*, Brief for the United States, p. 50. It argued, complaining of the absence of a record, that the papers introduced in evidence were instrumentalities of crime. The Court ruled that the

to test this conclusion was slow to mount. Rule 41 (b) of the Federal Rules of Criminal Procedure incorporated the *Gouled* categories as limitations on federal authorities to issue warrants, and *Mapp* v. *Ohio*, 367 U. S. 643, only recently made the "mere evidence" rule a problem in the state courts. Pressure against the rule in the federal courts has taken the form rather of broadening the categories of evidence subject to seizure, thereby creating considerable confusion in the law. See, *e. g.*, Note, 54 Geo. L. J. 593, 607–621 (1966).

The rationale most frequently suggested for the rule preventing the seizure of evidence is that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States* v. *Poller*, 43 F. 2d 911, 914 (C. A. 2d Cir. 1930). But privacy "would be just as well served by a restriction on search to the even-numbered days of the month. . . . And it would have the extra advantage of avoiding hair-splitting questions . . . ." Kaplan, *op. cit. supra*, at 479. The "mere evidence" limitation has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of "a neutral and detached magis-

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record before it revealed no government interest in the papers other than as evidence against the accused. 255 U. S., at 311.

Significantly, *Entick* v. *Carrington* itself has not been read by the English courts as making unlawful the seizure of all papers for use as evidence. See *Dillon* v. *O'Brien*, 20 L. R. Ir. 300; *Elias* v. *Pasmore*, [1934] 2 K. B. 164. Although *Dillon*, decided in 1887, involved instrumentalities, the court did not rely on this fact, but rather on "the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice . . . ." 20 L. R. Ir., at 317.

trate . . . ." *Johnson* v. *United States*, 333 U. S. 10, 14. The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure "mere evidence" from intrusions to secure fruits, instrumentalities, or contraband.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACK concurs in the result.

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

While I agree that the Fourth Amendment should not be held to require exclusion from evidence of the clothing as well as the weapons and ammunition found by the officers during the search, I cannot join in the majority's broad—and in my judgment, totally unnecessary—repudiation of the so-called "mere evidence" rule.

Our Constitution envisions that searches will ordinarily follow procurement by police of a valid search warrant. Such warrants are to issue only on probable cause, and must describe with particularity the persons or things to be seized. There are exceptions to this rule. Searches may be made incident to a lawful arrest, and—as today's decision indicates—in the course of "hot pursuit." But searches under each of these exceptions have, until today, been confined to those essential to fulfill the purpose of the exception: that is, we have refused to permit use of articles the seizure of which could not be strictly tied to and justified by the exigencies which excused the warrantless search. The use in evidence of weapons seized in a "hot pursuit" search or search incident to arrest satisfies this criterion because of the need to protect the arresting officers from weapons to which the suspect might resort. The search for and seizure of fruits are, of course, justifiable on independent grounds: The fruits

are an object of the pursuit or arrest of the suspect, and should be restored to their true owner. The seizure of contraband has been justified on the ground that the suspect has not even a bare possessory right to contraband. See, *e. g., Boyd* v. *United States,* 116 U. S. 616, 623–624 (1886); *United States* v. *Kirschenblatt,* 16 F. 2d 202, 203 (C. A. 2d Cir. 1926) (L. Hand, J.).

Similarly, we have forbidden the use of articles seized in such a search unless obtained from the person of the suspect or from the immediate vicinity. Since a warrantless search is justified only as incident to an arrest or "hot pursuit," this Court and others have held that its scope does not include permission to search the entire building in which the arrest occurs, or to rummage through locked drawers and closets, or to search at another time or place. *James* v. *Louisiana,* 382 U. S. 36 (1965); *Stoner* v. *California,* 376 U. S. 483, 486–487 (1964); *Preston* v. *United States,* 376 U. S. 364, 367 (1964); *United States* v. *Lefkowitz,* 285 U. S. 452 (1932); *Go-Bart Co.* v. *United States,* 282 U. S. 344, 358 (1931); *Agnello* v. *United States,* 269 U. S. 20, 30–31 (1925); *United States* v. *Kirschenblatt, supra.*[1]

In the present case, the articles of clothing admitted into evidence are not within any of the traditional categories which describe what materials may be seized, either with or without a warrant. The restrictiveness of these categories has been subjected to telling criticism,[2] and

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[1] It is true that this Court has not always been as vigilant as it should to enforce these traditional and extremely important restrictions upon the scope of such searches. See *United States* v. *Rabinowitz,* 339 U. S. 56, 68–86 (1950) (Frankfurter, J., dissenting); *Harris* v. *United States,* 331 U. S. 145, 155–198 (1947) (dissenting opinions).

[2] See, *e. g., People* v. *Thayer,* 63 Cal. 2d 635, 408 P. 2d 108 (1965) (Traynor, C. J.), cert. denied, 384 U. S. 908 (1966); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474, 478 (1961).

although I believe that we should approach expansion of these categories with the diffidence which their imposing provenance commands, I agree that the use of identifying clothing worn in the commission of a crime and seized during "hot pursuit" is within the spirit and intendment of the "hot pursuit" exception to the search-warrant requirement. That is because the clothing is pertinent to identification of the person hotly pursued as being, in fact, the person whose pursuit was justified by connection with the crime. I would frankly place the ruling on that basis. I would not drive an enormous and dangerous hole in the Fourth Amendment to accommodate a specific and, I think, reasonable exception.

As my Brother DOUGLAS notes, *post*, opposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to "writs of assistance," were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. I fear that in gratuitously striking down the "mere evidence" rule, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court today needlessly destroys, root and branch, a basic part of liberty's heritage.

MR. JUSTICE DOUGLAS, dissenting.

We start with the Fourth Amendment which 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."

This constitutional guarantee, now as applicable to the States (*Mapp* v. *Ohio*, 367 U. S. 643) as to the Federal Government, has been thought, until today, to have two faces of privacy:

(1) One creates a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants.

(2) A second creates a zone of privacy that may be invaded either by the police in hot pursuit or by a search incident to arrest or by a warrant issued by a magistrate on a showing of probable cause.

The *first* has been recognized from early days in Anglo-American law. Search warrants, for seizure of stolen property, though having an ancient lineage, were criticized even by Coke. Institutes Bk. 4, pp. 176–177.

As stated by Lord Camden in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1067, even warrants authorizing seizure of stolen goods were looked upon with disfavor but "crept into the law by imperceptible practice." By the time of Charles II they had burst their original bounds and were used by the Star Chamber to find evidence among the files and papers of political suspects. Thus in the trial of Algernon Sidney in 1683 for treason "papers, which were said to be found in my [Sidney's] house, were produced as another witness" (9 How. St. Tr. 818, 901) and the defendant was executed. *Id.*, at 906–907. From this use of papers as evidence there grew up the practice of the Star Chamber empowering a person "to search in all places, where books were printing, in order to see if the printer had a licence; and if upon such search he found any books which he suspected to be libellous against the church or state, he was to seize them, and carry them before the proper magistrate." *Entick* v. *Carrington*, *supra*, at 1069. Thus the general warrant became a powerful instrument

in proceedings for seditious libel against printers and authors. *Ibid.* John Wilkes led the campaign against the general warrant. *Boyd* v. *United States,* 116 U. S. 616, 625. Wilkes won (*Entick* v. *Carrington, supra,* decided in 1765); and Lord Camden's opinion not only outlawed the general warrant (*id.,* at 1072) but went on to condemn searches "for evidence" with or without a general warrant:

> "There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.
>
> "In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.
>
> "Whether this procedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.
>
> "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty." *Id.,* at 1073.

Thus Lord Camden decided two things: (1) that searches for evidence violated the principle against self-incrimination; (2) that general warrants were void.

This decision, in the very forefront when the Fourth Amendment was adopted, underlines the construction that it covers something other than the form of the warrant [1] and creates a zone of privacy which no government official may enter.

The complaint of Bostonians, while including the general warrants, went to the point of police invasions of personal sanctuaries:

> "'A List of Infringements and Violations of Rights' drawn up by the Boston town meeting late in 1772 alluded to a number of personal rights which had allegedly been violated by agents of the crown. The list included complaints against the writs of assistance which had been employed by royal officers in their searches for contraband. The Bostonians complained that 'our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants.'" Rutland, The Birth of the Bill of Rights 25 (1955).

The debates concerning the Bill of Rights did not focus on the precise point with which we here deal. There was much talk about the general warrants and the fear of them. But there was also some reference to the sanctity of one's home and his personal belongings, even

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[1] The Virginia Declaration of Rights, June 12, 1776, in its Article 10 proclaimed only against "general warrants." See Rutland, The Birth of the Bill of Rights 232 (1955). And the definition of the general warrant included not only a license to search for everything in a named place but to search all and any places in the discretion of the officers. *Frisbie* v. *Butler*, 1 Kirby 213 (Conn.). See generally Quincy's Mass. Rep. 1761–1772 Appendix I for the forms of these writs.

including the clothes he wore. Thus in Virginia, Patrick Henry said:

> "The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds." 3 Elliot's Debates 448–449.

This indicates that the Fourth Amendment has the dual aspect that I have mentioned. Certainly the debates nowhere suggest that it was concerned only with regulating the form of warrants.

This is borne out by what happened in the Congress. In the House the original draft read as follows:

> "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized." 1 Annals of Cong. 754.

That was amended to read "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches," etc. *Ibid.* Mr. Benson, Chairman of a Committee of Three to arrange the amendments, objected to the words "by warrants issuing" and proposed to alter the amendment so as to read "and no warrant shall issue." *Ibid.* But Benson's amendment was defeated. *Ibid.* And if the

story had ended there, it would be clear that the Fourth Amendment touched only the form of the warrants and the manner of their issuance. But when the Benson Committee later reported the Fourth Amendment to the House, it was in the form he had earlier proposed and was then accepted. 1 Annals of Cong. 779. The Senate agreed. Senate Journal August 25, 1789.

Thus it is clear that the Fourth Amendment has two faces of privacy, a conclusion emphasized by Lasson, The History and Development of the Fourth Amendment to the United States Constitution 103 (1937):

> "As reported by the Committee of Eleven and corrected by Gerry, the Amendment was a one-barrelled affair, directed apparently only to the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc. That Benson interpreted it in this light is shown by his argument that although the clause was good as far as it went, *it was not sufficient*, and by the change which he advocated to obviate this objection. The provision as he proposed it contained *two* clauses. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment."

Lord Camden's twofold classification of zones of privacy was said by Cooley to be reflected in the Fourth Amendment:

> "The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offence actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction." Constitutional Limitations 431–432 (7th ed. 1903).

And that was the holding of the Court in *Boyd* v. *United States,* 116 U. S. 616, decided in 1886. Mr. Justice Bradley reviewed British history, including *Entick* v. *Carrington, supra,* and American history under the Bill of Rights and said:

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.* In the one case, the government is entitled to the possession of the property; in the other it is not." *Id.,* at 623.

What Mr. Justice Bradley said about stolen or forfeited goods or contraband is, of course, not accurate if read to mean that they may be seized at any time even without a warrant or not incident to an arrest that is lawful. The right to seize contraband is not absolute. If the search leading to discovery of an illicit article is

not incidental to a lawful arrest or not authorized by a search warrant, the fact that contraband is discovered does not make the seizure constitutional. *Trupiano* v. *United States*, 334 U. S. 699, 705; *McDonald* v. *United States*, 335 U. S. 451; *Henry* v. *United States*, 361 U. S. 98, 103; *Beck* v. *Ohio*, 379 U. S. 89; *Aguilar* v. *Texas*, 378 U. S. 108.

That is not our question. Our question is whether the Government, though armed with a proper search warrant or though making a search incident to an arrest, may seize, and use at the trial, testimonial evidence, whether it would otherwise be barred by the Fifth Amendment or would be free from such strictures. The teaching of *Boyd* is that such evidence, though seized pursuant to a lawful search, is inadmissible.

That doctrine had its full flowering in *Gouled* v. *United States*, 255 U. S. 298, where an opinion was written by Mr. Justice Clarke for a unanimous Court that included both Mr. Justice Holmes and Mr. Justice Brandeis. The prosecution was for defrauding the Government under procurement contracts. Documents were taken from defendant's business office under a search warrant and used at the trial as evidence against him. Stolen or forged papers could be so seized, the Court said; so could lottery tickets; so could contraband; so could property in which the public had an interest, for reasons tracing back to warrants allowing the seizure of stolen property. But the papers or documents fell in none of those categories and the Court therefore held that even though they had been taken under a warrant, they were inadmissible at the trial as not even a warrant, though otherwise proper and regular, could be used "for the purpose of making search to secure evidence" of a crime. *Id.*, at 309. The use of those documents against the accused might, of course, violate the Fifth Amendment. *Id.*, at 311. But whatever may be the intrinsic nature of the evidence,

the owner is then "the unwilling source of the evidence" (*id.*, at 306), there being no difference so far as the Fifth Amendment is concerned "whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers." *Ibid.*

We have, to be sure, breached that barrier, *Schmerber* v. *California*, 384 U. S. 757, being a conspicuous example. But I dissented then and renew my opposing view at this time. That which is taken from a person without his consent and used as testimonial evidence violates the Fifth Amendment.

That was the holding in *Gouled;* and that was the line of authority followed by Judge Simon Sobeloff, writing for the Court of Appeals for reversal in this case. 363 F. 2d 647. As he said, even if we assume that the search was lawful, the articles of clothing seized were of evidential value only and under *Gouled* could not be used at the trial against petitioner. As he said, the Fourth Amendment guarantees the right of the people to be secure "in their persons, houses, papers, and effects, against unreasonable searches and seizures." Articles of clothing are covered as well as papers. Articles of clothing may be of evidential value as much as documents or papers.

Judge Learned Hand stated a part of the philosophy of the Fourth Amendment in *United States* v. *Poller*, 43 F. 2d 911, 914:

> "[I]t is only fair to observe that 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. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily

> not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself . . . ."

The right of privacy protected by the Fourth Amendment relates in part of course to the precincts of the home or the office. But it does not make them sanctuaries where the law can never reach. There are such places in the world. A mosque in Fez, Morocco, that I have visited, is by custom a sanctuary where any refugee may hide, safe from police intrusion. We have no such sanctuaries here. A policeman in "hot pursuit" or an officer with a search warrant can enter any house, any room, any building, any office. The privacy of those *places* is of course protected against invasion except in limited situations. The full privacy protected by the Fourth Amendment is, however, reached when we come to books, pamphlets, papers, letters, documents, and other personal effects. Unless they are contraband or instruments of the crime, they may not be reached by any warrant nor may they be lawfully seized by the police who are in "hot pursuit." By reason of the Fourth Amendment the police may not rummage around among these personal effects, no matter how formally perfect their authority may appear to be. They may not seize them. If they do, those articles may not be used in evidence. Any invasion whatsoever of those personal effects is "unreasonable" within the meaning of the Fourth Amendment. That is the teaching of *Entick* v. *Carrington, Boyd* v. *United States,* and *Gouled* v. *United States.*

Some seek to explain *Entick* v. *Carrington* on the ground that it dealt with seditious libel and that any search for political tracts or letters under our Bill of Rights would be unlawful *per se* because of the First

Amendment and therefore "unreasonable" under the Fourth. That argument misses the main point. A prosecution for seditious libel would of course be unconstitutional under the First Amendment because it bars laws "abridging the freedom of speech, or of the press." The First Amendment also has a penumbra, for while it protects only "speech" and "press" it also protects related rights such as the right of association. See *NAACP* v. *Alabama*, 357 U. S. 449, 460, 462; *Bates* v. *Little Rock*, 361 U. S. 516, 523; *Shelton* v. *Tucker*, 364 U. S. 479, 486; *Louisiana* v. *NAACP*, 366 U. S. 293, 296; and *NAACP* v. *Button*, 371 U. S. 415, 430–431. So it could be held, quite apart from the Fourth Amendment, that any probing into the area of opinions and beliefs would be barred by the First Amendment. That is the essence of what we said in *Watkins* v. *United States*, 354 U. S. 178, 197:

> "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

But the privacy protected by the Fourth Amendment is much wider than the one protected by the First. *Boyd* v. *United States* was a forfeiture proceeding under the customs revenue law and the paper held to be beyond the reach of the Fourth Amendment was an invoice covering the imported goods. 116 U. S., at 617–619, 638. And as noted, *Gouled* v. *United States* involved a prosecution for defrauding the Government under procurement contracts and the papers held protected against

seizure, even under a technically proper warrant, were (1) an unexecuted form of contract between defendant and another person; (2) a written contract signed by defendant and another person; and (3) a bill for disbursement and professional services rendered by the attorney to the defendant. 255 U. S., at 306–307.

The constitutional philosophy is, I think, clear. The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a nondescript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing.[2] This is his preroga-

[2] This concept of the right of privacy protected by the Fourth Amendment is mirrored in the cases involving collateral aspects of the problem presented in this case:

"It has, similarly, been held that a defendant cannot complain of the seizure of books and papers neither his own, nor in his possession. It is also the well-settled rule that where the papers are public records the defendant's custody will not avail him against their seizure. Where papers are taken out of the custody of one not their owner, it seems that such person can object if there has been no warrant, or if the warrant was directed to him, but not if the warrant is directed to the owner. If the defendant's property is lawfully out of his possession it makes no difference by what means it comes into the Government's hands as there has been no compulsion exercised upon him. But the privilege extends to letters in the mails. The privilege extends to the office as well as the home.

"On the other hand, to enable a person to claim the privilege,

tive not the States'. The Framers, who were as knowledgeable as we, knew what police surveillance meant and how the practice of rummaging through one's personal effects could destroy freedom.

It was in that tradition that we held in *Griswold* v. *Connecticut*, 381 U. S. 479, that lawmakers could not, as respects husband and wife at least, make the use of contraceptives a crime. We spoke of the pronouncement in *Boyd* v. *United States* that the Fourth and Fifth Amendments protected the person against all governmental invasions "of the sanctity of a man's home and the privacies of life." 116 U. S., at 630. We spoke of the "right to privacy" of the Fourth Amendment upheld by *Mapp* v. *Ohio*, 367 U. S. 643, 656, and of the many other controversies "over these penumbral rights of 'privacy and repose.'" 381 U. S., at 485. And we added:

> "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
>
> "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral

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it is not necessary that he be a party to any pending criminal proceeding. He can object to the illegal seizure of his own property and resist a forcible production of it even if he is only called as a witness.

"Nor must a person be a citizen to be entitled to the protection of the Fourth Amendment. . . ." Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 375–376.

> loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 485–486.

This right of privacy, sustained in *Griswold,* is kin to the right of privacy created by the Fourth Amendment. That there is a zone that no police can enter—whether in "hot pursuit" or armed with a meticulously proper warrant—has been emphasized by *Boyd* and by *Gouled.* They have been consistently and continuously approved.[3] I would adhere to them and leave with the individual the choice of opening his private effects (apart from contraband and the like) to the police or keeping their contents a secret and their integrity inviolate. The existence of that choice is the very essence of the right of privacy. Without it the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid.

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[3] See, *e. g.*, *Carroll* v. *United States,* 267 U. S. 132, 149–150; *United States* v. *Lefkowitz,* 285 U. S. 452, 464–466; *Davis* v. *United States,* 328 U. S. 582, 590, n. 11; *Harris* v. *United States,* 331 U. S. 145, 154; *United States* v. *Rabinowitz,* 339 U. S. 56, 64, n. 6; *Abel* v. *United States,* 362 U. S. 217, 234–235.

EXHIBIT 43

SUPREME COURT OF THE UNITED STATES

NOS. 63 AND 74.—OCTOBER TERM, 1967.

63	Nelson Sibron, Appellant, *v.* State of New York.	On Appeals From the Court of Appeals of New York.
74	John Francis Peters, Appellant, *v.* State of New York.	

[June 10, 1968.]

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

These are companion cases to No. 67, *Terry* v. *Ohio*, *ante*, p. —, decided today. They present related questions under the Fourth and Fourteenth Amendments, but the cases arise in the context of New York's "stop-and-frisk" law, N. Y. Code Crim. Proc. § 180–a. This statute provides:

> "1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.
>
> "2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

The appellants, Sibron and Peters, were both convicted of crimes in New York state courts on the basis of evidence seized from their persons by police officers. The Court of Appeals of New York held that the evidence was properly admitted, on the ground that the searches which uncovered it were authorized by the statute. *People* v. *Sibron,* 18 N. Y. 2d 603, 219 N. E. 2d 196, 272 N. Y. S. 2d 374 (1966) (Memorandum); *People* v. *Peters,* 18 N. Y. 2d 238, 219 N. E. 2d 595, 273 N. Y. S. 2d 217 (1966). Sibron and Peters have appealed their convictions to this Court, claiming that § 180–a is unconstitutional on its face and as construed and applied, because the searches and seizures which it was held to have authorized violated their rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp* v. *Ohio,* 367 U. S. 643 (1961). We noted probable jurisdiction, 386 U. S. 954 (1967); 386 U. S. 980 (1967), and consolidated the two cases for argument with No. 67.

The facts in these cases may be stated briefly. Sibron, the appellant in No. 63, was convicted of the unlawful possession of heroin.[1] He moved before trial to suppress the heroin seized from his person by the arresting officer, Brooklyn Patrolman Anthony Martin. After the trial court denied his motion, Sibron pleaded guilty to the charge, preserving his right to appeal the evidentiary ruling.[2] At the hearing on the motion to suppress,

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[1] N. Y. Pub. Health Law § 3305 makes the unauthorized possession of any narcotic drug unlawful, and N. Y. Pen. Law §§ 1751 and 1751–a make the grade of the offense depend upon the amount of the drugs found in the possession of the defendant. The complaint in this case originally charged a felony, but the trial court granted the prosecutor's motion to reduce the charge on the ground that "the Laboratory report will indicate a misdemeanor charge." Sibron was convicted of a misdemeanor and sentenced to six months in jail.

[2] N. Y. Code Crim. Proc. § 813–c provides that an order denying a motion to suppress evidence in a criminal case "may be reviewed

Officer Martin testified that while he was patrolling his beat in uniform on March 9, 1965, he observed Sibron "continually from the hours of 4:00 P. M. to 12:00, midnight . . . in the vicinity of 742 Broadway." He stated that during this period of time he saw Sibron in conversation with six or eight persons whom he (Patrolman Martin) knew from past experience to be narcotics addicts. The officer testified that he did not overhear any of these conversations, and that he did not see anything pass between Sibron and any of the others. Late in the evening Sibron entered a restaurant. Patrolman Martin saw Sibron speak with three more known addicts inside the restaurant. Once again, nothing was overheard and nothing was seen to pass between Sibron and the addicts. Sibron sat down and ordered pie and coffee, and as he was eating, Patrolman Martin approach him and told him to come outside. Once outside, the officer said to Sibron, "You know what I am after." According to the officer, Sibron "mumbled something and reached into his pocket." Simultaneously, Patrolman Martin thrust his hand into the same pocket, discovering several glassine envelopes, which, it turned out, contained heroin.

The State has had some difficulty in settling upon a theory for the admissibility of these envelopes of heroin. In his sworn complaint Patrolman Martin stated:

> "As the officer approached the defendant, the latter being in the direction of the officer and seeing him, he did put his hand in his left jacket pocket and pulled out a tinfoil envelope and did attempt to throw same to the ground. The officer never losing sight of the said envelope seized it from the def[endan]t's left hand, examined it and found it to contain ten glascine [*sic*] envelopes with a white substance alleged to be Heroin."

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on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

This version of the encounter, however, bears very little resemblance to Patrolman Martin's testimony at the hearing on the motion to suppress. In fact, he discarded the abandonment theory at the hearing.[3] Nor did the officer ever seriously suggest that he was in fear of bodily harm and that he searched Sibron in self-protection to find weapons.[4]

The prosecutor's theory at the hearing was that Patrolman Martin had probable cause to believe that Sibron was in possession of narcotics because he had seen him conversing with a number of known addicts over an eight-hour period. In the absence of any knowledge on Patrolman Martin's part concerning the nature of the

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[3] Patrolman Martin stated several times that he put his hand into Sibron's pocket and seized the heroin before Sibron had any opportunity to remove his own hand from the pocket. The trial court questioned him on this point:

"Q. Would you say at that time that he reached into his pocket and handed the packets to you? Is that what he did or did he drop the packets?

"A. He did not drop them. *I do not know what his intentions were.* He pushed his hand into his pocket.

"MR. JOSEPH [Prosecutor]: You intercepted it; didn't you, Officer?

"THE WITNESS: Yes." (Emphasis added.)

It is of course highly unlikely that Sibron, facing the officer at such close quarters, would have tried to remove the heroin from his pocket and throw it to the ground in the hope that he could escape responsibility for it.

[4] The possibility that Sibron, who never, so far as appears from the record, offered any resistance, might have posed a danger to Patrolman Martin's safety was never even discussed as a potential justification for the search. The only mention of weapons by the officer in his entire testimony came in response to a leading question by Sibron's counsel, when Martin stated that he "thought he [Sibron] might have been" reaching for a gun. Even so, Patrolman Martin did not accept this suggestion by the opposition regarding the reason for his action; the discussion continued upon the plain premise that he had been looking for narcotics all the time.

intercourse between Sibron and the addicts, however, the trial court was inclined to grant the motion to suppress. As the judge stated, "All he knows about the unknown men: They are narcotics addicts. They might have been talking about the World Series. They might have been talking about prize fights." The prosecutor, however, reminded the judge that Sibron had admitted on the stand, in Patrolman Martin's absence, that he had been talking to the addicts about narcotics. Thereupon, the trial judge changed his mind and ruled that the officer had probable cause for an arrest.

Section 180–a, the "stop-and-frisk" statute, was not mentioned at any point in the trial court. The Appellate Term of the Supreme Court affirmed the conviction without opinion. In the Court of Appeals of New York, Sibron's case was consolidated with the *Peters* case, No. 74. The Court of Appeals held that the search in *Peters* was justified under the statute, but it wrote no opinion in Sibron's case. The dissents of Judges Fuld and Van Voorhis, however, indicate that the court rested its holding on § 180–a. At any rate, in its Brief in Opposition to the Jurisdictional Statement in this Court, the State sought to justify the search on the basis of the statute. After we noted probable jurisdiction, the District Attorney for Kings County confessed error.

Peters, the appellant in No. 74, was convicted of possessing burglary tools under circumstances evincing an intent to employ them in the commission of a crime.[5] The tools were seized from his person at the time of his arrest, and like Sibron he made a pretrial motion to suppress them. When the trial court denied the motion, he too pleaded guilty, preserving his right to appeal. Offi-

[5] N. Y. Pen. Law § 408 makes the possession of such tools under such circumstances a misdemeanor for first offenders and a felony for all those who have "been previously convicted of any crime." Peters was convicted of a felony under this section.

cer Samuel Lasky of the New York City Police Department testified at the hearing on the motion that he was at home in his apartment in Mount Vernon, New York, at about 1 p. m. on July 10, 1964. He had just finished taking a shower and was drying himself when he heard a noise at his door. His attempt to investigate was interrupted by a telephone call, but when he returned and looked through the peephole into the hall, Officer Lasky saw "two men tiptoeing out of the alcove toward the stairway." He immediately called the police, put on some civilian clothes and armed himself with his service revolver. Returning to the peephole, he saw "a tall man tiptoeing away from the alcove and followed by this shorter man, Mr. Peters, toward the stairway." Officer Lasky testified that he had lived in the 120-unit building for 12 years and that he did not recognize either of the men as tenants. Believing that he had happened upon the two men in the course of an attempted burglary,[6] Officer Lasky opened his door, entered the hallway and slammed the door loudly behind him. This precipitated a flight down the stairs on the part of the two men,[7] and

[6] Officer Lasky testified that when he called the police immediately before leaving his apartment, he "told the Sergeant at the desk that two burglars were on my floor."

[7] Officer Lasky testified that when he emerged from his apartment, "I slammed the door, I had my gun and I ran down the stairs after them." A sworn affidavit of the Assistant District Attorney, which was before the trial court when it ruled on the motion to suppress, stated that when apprehended Peters was "fleeing down the steps of the building." The trial court explicitly took note of the flight of Peters and his companion as a factor contributing to Officer Lasky's "reasonable suspicion" of them:

"We think the testimony at the hearing does not require further laboring of this aspect of the matter, unless one is to believe that it is legitimately normal for a man to tip-toe about in the public hall of an apartment house while on a visit to his unidentified girl-friend, and, when observed by another tenant, to rapidly descend by stairway in the presence of elevators."

Officer Lasky gave chase. His apartment was located on the sixth floor, and he apprehended Peters between the fourth and fifth floors. Grabbing Peters by the collar, he continued down another flight in unsuccessful pursuit of the other man. Peters explained his presence in the building to Officer Lasky by saying that he was visiting a girl friend. However, he declined to reveal the girl friend's name, on the ground that she was a married woman. Officer Lasky patted Peters down for weapons, and discovered a hard object in his pocket. He stated at the hearing that the object did not feel like a gun, but that it might have been a knife. He removed the object from Peters' pocket. It was an opaque plastic envelope, containing burglar's tools.

The trial court explicitly refused to credit Peters' testimony that he was merely in the building to visit his girl friend. It found that Officer Lasky had the requisite "reasonable suspicion" of Peters under § 180–a to stop him and question him. It also found that Peters' response was "clearly unsatisfactory," and that "under the circumstances Lasky's action in frisking Peters for a dangerous weapon was reasonable, even though Lasky was himself armed." It held that the hallway of the apartment building was a "public place" within the meaning of the statute. The Appellate Division of the Supreme Court affirmed without opinion. The Court of Appeals also affirmed, essentially adopting the reasoning of the trial judge, with Judges Fuld and Van Voorhis dissenting separately.

I.

At the outset we must deal with the question whether we have jurisdiction in No. 63. It is asserted that because Sibron has completed service of the six-month sentence imposed upon him as a result of his conviction, the case has become moot under *St. Pierre* v. *United*

States, 319 U. S. 41 (1943).[8] We have concluded that the case is not moot.

In the first place, it is clear that the broad dictum with which the Court commenced its discussion in *St. Pierre*—that "the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate" (319 U. S., at 42)—fails to take account of significant qualifications recognized in *St. Pierre* and developed in later cases. Only a few days ago we held unanimously that the writ of habeas corpus was available to test the constitutionality of a state conviction where the petitioner had been in custody when he applied for the writ, but had been released before this Court could adjudicate his claims. *Carafas* v. *LaVallee*, —— U. S. —— (1968). On numerous occasions in the past this Court has proceeded to adjudicate the merits of

[8] The first suggestion of mootness in this case came upon oral argument, when it was revealed for the first time that appellant had been released. This fact did not appear in the record, despite the fact that the release occurred well over two years before the case was argued here. Nor was mootness hinted at by the State in its Brief in Opposition to the Jurisdictional Statement in this Court—where it took the position that the decision below was so clearly right that it did not merit further review—or in its brief on the merits—in which it conceded that the decision below clearly violated Sibron's constitutional rights and urged that it was an aberrant interpretation which should not impair the constitutionality of the New York statute. Following the suggestion of mootness on oral argument, moreover, the State filed a brief in which it amplified its views as to why the case should be held moot, but added the extraordinary suggestion that this Court should ignore the problem and pronounce upon the constitutionality of a statute in a case which has become moot. Normally in these circumstances we would consider ourselves fully justified in foreclosing a party upon an issue; however, since the question goes to the very existence of a controversy for us to adjudicate, we have undertaken to review it.

criminal cases in which the sentence had been fully served or the probationary period during which a suspended sentence could be reimposed had terminated. *Ginsberg* v. *New York*, — U. S. — (1968); *Pollard* v. *United States*, 352 U. S. 354 (1957); *United States* v. *Morgan*, 346 U. S. 502 (1954); *Fiswick* v. *United States*, 329 U. S. 211 (1946). Thus mere release of the prisoner does not mechanically foreclose consideration of the merits by this Court.

St. Pierre itself recognized two possible exceptions to its "doctrine" of mootness, and both of them appear to us to be applicable here. The Court stated that "It does not appear that petitioner could not have brought his case to this Court for review before the expiration of his sentence," noting also that because the petitioner's conviction was for contempt and because his controversy with the Government was a continuing one, there was a good chance that there would be "ample opportunity to review" the important question presented on the merits in a future proceeding. 319 U. S., at 43. This was a plain recognition of the vital importance of keeping open avenues of judicial review of deprivations of constitutional right.[9] There was no way for Sibron to bring his case here before his six-month sentence expired. By statute he was precluded from obtaining bail pending appeal,[10] and by virtue of the inevitable delays of the New York court system, he was released less than a month after his newly appointed appellate counsel had been supplied with a copy of the transcript and roughly

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[9] Cf. *Fay* v. *Noia*, 372 U. S. 391, 424 (1963):
"[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."

[10] See N. Y. Code Crim. Proc. § 555 (2).

two months before it was physically possible to present his case to the first tier in the state appellate court system.[11] This was true despite the fact that he took all steps to perfect his appeal in a prompt, diligent and timely manner.

Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for "minor" offenses which carry only short sentences.[12] We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. A State may not cut off federal review of whole classes of such cases by the simple expedient of a blanket denial of bail pending appeal. As *St. Pierre* clearly recognized, a State may not effectively deny a convict access to the courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing.[13]

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[11] Sibron was arrested on March 9, 1965, and was unable to make bail before trial because of his indigency. He thus remained in jail from that time until the expiration of his sentence (with good time credit) on July 10, 1965. He was convicted on April 23. His application for leave to proceed *in forma pauperis* was not granted until May 14, and his assigned appellate counsel was not provided with a transcript until June 11. The Appellate Term of the Supreme Court recessed on June 7 until September. Thus Sibron was released well before there had been any opportunity even to argue his case in the intermediate state appellate court. A decision by the Court of Appeals of New York was not had until July 10, 1966, the anniversary of Sibron's release.

[12] Cf., *e. g., Thompson* v. *City of Louisville*, 362 U. S. 199 (1960).

[13] In *St. Pierre* the Court noted that the petitioner could have taken steps to preserve his case, but that "he did not apply to this Court for a stay or a supersedeas." 319 U. S., at 43. Here however, it is abundantly clear that there is no procedure of which Sibron could have availed himself to prevent the expiration of his

The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where "under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied." 319 U. S., at 43. Subsequent cases have expanded this exception to the point where it may realistically be said that inroads have been made upon the principle itself. *St. Pierre* implied that the burden was upon the convict to show the existence of collateral legal consequences. Three years later in *Fiswick* v. *United States,* 329 U. S. 211 (1946), however, the Court held that a criminal case had not become moot upon release of the prisoner, noting that the convict, an alien, might be subject to deportation for having committed a crime of "moral turpitude,"—even though it had never been held (and the Court refused to hold) that the crime of which he was convicted fell into this category. The Court also pointed to the fact that if the petitioner should in the future decide he wanted to

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sentence long before this Court could hear his case. A supersedeas from this Court is a purely ancillary writ, and may issue only in connection with an appeal actually taken. *Ex parte Ralston,* 119 U. S. 613 (1887); Sup. Ct. Rule 18; see R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 435, at 883 (R. Wolfson & P. Kurland, ed. 1951). At the time Sibron completed service of his sentence, the only judgment outstanding was the conviction itself, rendered by the Criminal Court of the City of New York, County of Kings. This Court had no jurisdiction to hear an appeal from that judgment, since it was not rendered by the "highest court of a State in which a decision could be had," 28 U. S. C. § 1257, and there could be no warrant for interference with the orderly appellate processes of the state courts. Thus no supersedeas could have issued. Nor could this Court have ordered Sibron admitted to bail before the expiration of his sentence, since the offense was not bailable, 18 U. S. C. § 3144; see n. 10, *supra.* Thus this case is distinguishable from *St. Pierre* in that Sibron "could not have brought his case to this Court for review before the expiration of his sentence." 319 U. S., at 43.

become an American citizen, he might have difficulty proving that he was of "good moral character." *Id.*, at 222.[14]

The next case which dealt with the problem of collateral consequences was *United States* v. *Morgan*, 346 U. S. 502 (1954). There the convict had probably been subjected to a higher sentence as a recidivist by a state court on account of the old federal conviction which he sought to attack. But as the dissent pointed out, there was no indication that the recidivist increment would be removed from his state sentence upon invalidation of the federal conviction, *id.*, at 516, n. 4, and the Court chose to rest its holding that the case was not moot upon a broader view of the matter. Without canvassing the possible disabilities which might be imposed upon Morgan or alluding specifically to the recidivist sentence, the Court stated:

> "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to show that this conviction is invalid." *Id.*, at 512–513.

Three years later, in *Pollard* v. *United States*, 352 U. S. 354 (1957), the Court abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed. With nothing more than citations to *Morgan* and *Fiswick*, and

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[14] Compare *Ginsberg*, v. *New York*, — U. S. —, —, n. 2 (1968), where this Court held that the mere possibility that the Commissioner of Buildings of the Town of Hempstead, New York, might "in his discretion" attempt in the future to revoke a license to run a luncheonette because of a single conviction for selling relatively inoffensive "girlie" magazines to a 16-year-old boy was sufficient to preserve a criminal case from mootness.

a statement that "convictions may entail collateral legal disadvantages in the future," *id.*, at 358, the Court concluded that "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." *Ibid.* The Court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.[15] The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominously in the limbo of mootness." *Parker* v. *Ellis*, 362 U. S. 574, 577 (1960) (dissenting opinion).

This case certainly meets that test for survival. Without pausing to canvass the possibilities in detail, we note that New York expressly provides by statute that Sibron's conviction may be used to impeach his character should he choose to put it in issue at any future criminal trial, N. Y. Code Crim. Proc. § 393–c, and that it must be submitted to a trial judge for his consideration in sentencing should Sibron again be convicted of a crime, N. Y. Code Crim. Proc. § 482. There are doubtless other collateral consequences. Moreover, we see no relevance in the fact that Sibron is a multiple offender. Morgan was a multiple offender, see 346 U. S. at 503–504, and so was Pollard, see 352 U. S., at 355–357. A judge or jury faced with a question of character, like a sentencing judge, may be inclined to forgive or at least discount a limited number of minor transgressions, particularly if they occurred at some time in the relatively distant past.[16] It is impossible for this Court to

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[15] See generally Note, 53 Va. L. Rev. 403 (1967).

[16] We do not know from the record how many convictions Sibron had, for what crimes, or when they were rendered. At the hearing he admitted to a 1955 conviction for burglary and a 1957 misdemeanor conviction for possession of narcotics. He also admitted that he had other convictions, but none were specifically alluded to.

say at what point the number of convictions on a man's record renders his reputation irredeemable.[17] And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated. We cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record. The question of the validity of a criminal conviction can arise in many contexts, compare *Burgett* v. *Texas*, 389 U. S. 107 (1967), and sooner the issue is fully litigated the better for all concerned. It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover, litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade. And it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action. Cf. *Peyton* v. *Rowe*, —— U. S. ——, —— (1968).[18]

None of the concededly imperative policies behind the constitutional rule against entertaining moot con-

[17] We note that there is a clear distinction between a general impairment of credibility, to which the Court referred in *St. Pierre*, see 319 U. S., at 43, and New York's specific statutory authorization for use of the conviction to impeach the "character" of a defendant in a criminal proceeding. The latter is a clear legal disability deliberately and specifically imposed by the legislature.

[18] This factor has clearly been considered relevant by the Court in the past in determining the issue of mootness. See *Fiswick* v. *United States*, 329 U. S. 211, 221–222 (1946).

troversies would be served by a dismissal in this case. There is nothing abstract, feigned or hypothetical about Sibron's appeal. Nor is there any suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation. We have before us a fully developed record of testimony about contested historical facts, which reflects the "impact of actuality" [19] to a far greater degree than many controversies accepted for adjudication as a matter of course under the Federal Declaratory Judgment Act, 28 U. S. C. § 2201.

St. Pierre v. *United States, supra,* must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. That certainly is not the case here. Sibron "has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick* v. *United States, supra,* at 222. The case is not moot.

II.

We deal next with the confession of error by the District Attorney for Kings County in No. 63. Confessions of error are, of course, entitled to and given great weight, but they do not "relieve this Court of the performance of the judicial function." *Young* v. *United States,* 315 U. S. 257, 258 (1942). It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained. For one thing, as we noted in *Young,* "our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the

[19] Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1006 (1924). See also *Parker* v. *Ellis,* 362 U. S. 574, 592–593 (1960) (dissenting opinion).

parties." 315 U. S., at 259. See also *Marino* v. *Ragen*, 332 U. S. 561 (1947). This consideration is entitled to special weight where, as in this case, we deal with a judgment of a State's highest court interpreting a state statute which is challenged on constitutional grounds. The need for such authoritative declarations of state law in sensitive constitutional contexts has been the very reason for the development of the abstention doctrine by this Court. See, *e. g.*, *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). Such a judgment is the final product of a sovereign judicial system, and is deserving of respectful treatment by this Court. Moreover, in this case the confession of error on behalf of the entire state executive and judicial branches is made, not by a state official, but by the elected legal officer of one political subdivision within the State. The District Attorney for Kings County seems to have come late to the opinion that this conviction violated Sibron's constitutional rights. For us to accept his view blindly in the circumstances, when a majority of the Court of Appeals of New York has expressed the contrary view, would be a disservice to the State of New York and an abdication of our obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution. We turn to the merits.

III.

The parties on both sides of these two cases have urged that the principal issue before us is the constitutionality of § 180–a "on its face." We decline, however, to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of § 180–a next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible. The constitutional valid-

ity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case. In this respect it is quite different from the question of the adequacy of the procedural safeguards written into a statute which purports to authorize the issuance of search warrants in certain circumstances. See *Berger* v. *New York,* 388 U. S. 41 (1967). No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, which lies at the heart of the Fourth Amendment. *E. g., Aguilar* v. *Texas,* 378 U. S. 108 (1964); *Giordenello* v. *United States,* 357 U. S. 480 (1958). This Court held last Term in *Berger* v. *New York, supra,* that N. Y. Code Crim Proc. § 813–a, which established a procedure for the issuance of search warrants to permit electronic eavesdropping, failed to embody the safeguards demanded by the Fourth and Fourteenth Amendments.

Section 180–a, unlike § 813–a, deals with the substantive validity of cetain types of seizures and searches without warrants. It purports to authorize police officers to "stop" people, "demand" explanations of them and "search [them] for dangerous weapon[s]" in certain circumstances upon "reasonable suspicion" that they are engaged in criminal activity and that they represent a danger to the policeman. The operative categories of § 180–a are not the categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations.[20] New York is, of course, free to develop its own

[20] It is not apparent, for example, whether the power to "stop" granted by the statute entails a power to "detain" for investigation or interrogation upon less than probable cause, or if so what sort of durational limitations upon such detention are contemplated. And while the statute's apparent grant of a power of compulsion

law of search and seizure to meet the needs of local law enforcement, see *Ker* v. *California*, 374 U. S. 23, 34 (1963), and in the process it may call the standards it employs by any names it may choose. It may not, how-

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indicates that many "stops" will constitute "seizures," it is not clear that all conduct analyzed under the rubric of the statute will either rise to the level of a "seizure" or be based upon less than probable cause. In No. 74, the *Peters* case, for example, the New York courts justified the seizure of appellant under § 180–a, but we have concluded that there was in fact probable cause for an arrest when Officer Lasky seized Peters on the stairway. See pp. —, *infra*. In any event, a pronouncement by this Court upon the abstract validity of § 180–a's "stop" category would be most inappropriate in these cases, since we have concluded that neither of them presents the question of the validity of a seizure of the person for purposes of interrogation upon less than probable cause. See pp. —, *infra*.

The statute's other categories are equally elastic, and it was passed too recently for the State's highest court to have ruled upon many of the questions involving potential intersections with federal constitutional guarantees. We cannot tell, for example, whether the officer's power to "demand" of a person an "explanation of his actions" contemplates either an obligation on the part of the citizen to answer or some additional power on the part of the officer in the event of a refusal to answer, or even whether the interrogation following the "stop" is "custodial." Compare *Miranda* v. *Arizona*, 384 U. S. 436 (1966). There are, moreover, substantial indications that the statutory category of a "search for a dangerous weapon" may encompass conduct considerably broader in scope than that which we approved in *Terry* v. *Ohio*, *ante*, p. —. See pp. —, *infra*. See also *People* v. *Taggart*, 20 N. Y. 2d 335, — N. E. 2d —, — N. Y. S. 2d — (1967). At least some of the activity apparently permitted under the rubric of searching for dangerous weapons may thus be permissible under the Constitution only if the "reasonable suspicion" of criminal activity rises to the level of probable cause. Finally, it is impossible to tell whether the standard of "reasonable suspicion" connotes the same sort of specificity, reliability, and objectivity which is the touchstone of permissible governmental action under the Fourth Amendment. Compare *Terry* v. *Ohio*, *supra*, with *People* v. *Taggart*, *supra*. In this connection we note that the searches and seizures in both *Sibron* and *Peters* were upheld by the Court of Appeals of New York as predicated upon "reasonable

ever, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure "it not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one." *Cooper* v. *California,* 386 U. S. 58, 61 (1967).

Accordingly, we make no pronouncement on the facial constitutionality of § 180–a. The constitutional point with respect to a statute of this peculiar sort, as the Court of Appeals of New York recognized, is "not so much . . . the language employed as . . . the conduct it authorizes." *People* v. *Peters,* 18 N. Y. 2d 238, 245, 219 N. E. 2d 595, 599, 273 N. Y. S. 2d 217, 222 (1966). We have held today in *Terry* v. *Ohio, ante,* p. ——, that police conduct of the sort with which § 180–a deals must be judged under the Reasonable Search and Seizure Clause of the Fourth Amendment. The inquiry under that clause may differ sharply from the inquiry set up by the categories of § 180–a. Our constitutional inquiry would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the searches and seizures which underlie these two convictions.

IV.

Turning to the facts of Sibron's case, it is clear that the heroin was inadmissible in evidence against him.

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suspicion," whereas we have concluded that the officer in *Peters* had probable cause for an arrest, while the policeman in *Sibron* was not possessed of any information which would justify an intrusion upon rights protected by the Fourth Amendment.

The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolman Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. So far as he knew, they might indeed "have been talking about the World Series." The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. *E. g., Henry* v. *United States,* 361 U. S. 98 (1959); *Johnson* v. *United States,* 333 U. S. 10, 16–17 (1948). Thus the search cannot be justified as incident to a lawful arrest.

If Patrolman Martin lacked probable cause for an arrest, however, his seizure and search of Sibron might still have been justified at the outset if he had reasonable grounds to believe that Sibron was armed and dangerous. *Terry* v. *Ohio, ante,* p. —. We are not called upon to decide in this case whether there was a "seizure" of Sibron inside the restaurant antecedent to the physical seizure which accompanied the search. The record is unclear with respect to what transpired between Sibron and the officer inside the restaurant. It is totally barren of any indication whether Sibron accompanied Patrolman Martin outside in submission

to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation. In any event, this deficiency in the record is immaterial, since Patrolman Martin obtained no new information in the interval between his initiation of the encounter in the restaurant and his physical seizure and search of Sibron outside.

Although the Court of Appeals of New York wrote no opinion in this case, it seems to have viewed the search here as a self-protective search for weapons and to have affirmed on the basis of § 180–a, which authorizes such a search when the officer "reasonably suspects that he is in danger of life or limb." The Court of Appeals has, at any rate, justified searches during field interrogation on the ground that "the answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great." *People* v. *Rivera,* 14 N. Y. 2d 441, 446, 201 N. E. 2d 32, 35, 252 N. Y. S. 2d 458, 463 (1964), cert. denied, 379 U. S. 978 (1965). But the application of this reasoning to the facts of this case proves too much. The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. *Terry* v. *Ohio, supra.* Patrolman Martin's testimony reveals no such facts. The suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest

for committing a crime. Nor did Patrolman Martin urge that when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense. His opening statement to Sibron—"You know what I am after"—made it abundantly clear that he sought narcotics, and his testimony at the hearing left no doubt that he thought there were narcotics in Sibron's pocket.[21]

Even assuming *arguendo* that there were adequate grounds to search Sibron for weapons, the nature and

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[21] It is argued in dissent that this Court has in effect overturned factual findings by the two courts below that the search in this case was a self-protective measure on the part of Patrolman Martin, who thought that Sibron might have been reaching for a gun. It is true, as we have noted, that the Court of Appeals of New York apparently rested its approval of the search on this view. The trial court, however, made no such finding of fact. The trial judge adopted the theory of the prosecution at the hearing on the motion to suppress. This theory was that there was probable cause to arrest Sibron for some crime having to do with narcotics. The fact which tipped the scales for the trial court had nothing to do with danger to the policeman. The judge expressly changed his original view and held the heroin admissible upon being reminded that Sibron had admitted on the stand that he spoke to the addicts about narcotics. This admission was not relevant on the issue of probable cause, and we do not understand the dissent to take the position that prior to the discovery of heroin, there was probable cause for an arrest.

Moreover, Patrolman Martin himself never at any time put forth the notion that he acted to protect himself. As we have noted, this subject never came up, until on re-direct examination defense counsel raised the question whether Patrolman Martin thought Sibron was going for a gun. See n. 4, *supra*. This was the only reference to weapons at any point in the hearing, and the subject was swiftly dropped. In the circumstances an unarticulated "finding" by an appellate court which wrote no opinion, apparently to the effect that the officer's invasion of Sibron's person comported with the Constitution because of the need to protect himself, is not deserving of controlling deference.

scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

V.

We think it is equally clear that the search in Peters' case was wholly reasonable under the Constitution. The Court of Appeals of New York held that the search was made legal by § 180–a, since Peters was "abroad in a public place," and since Officer Lasky was reasonably suspicious of his activities and, once he had stopped Peters, reasonably suspected that he was in danger of life or limb, even though he held Peters at gun point. This may be the justification for the search under state law. We think, however, that for purposes of the Fourth Amendment the search was properly incident to a lawful arrest. By the time Officer Lasky caught up with Peters on the stairway between the fourth and fifth floors of the apartment building, he had probable cause to arrest him for attempted burglary. The officer heard strange

noises at his door which apparently led him to believe that someone sought to force entry. When he investigated these noises he saw two men, whom he had never seen before in his 12 years in the building, tiptoeing furtively about the hallway. They were still engaged in these maneuvers after he called the police and dressed hurriedly. And when Officer Lasky entered the hallway, the men fled down the stairs. It is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity. As the trial court explicitly recognized,[22] deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea,* and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest. *Brinegar* v. *United States,* 338 U. S. 160 (1949); *Husty* v. *United States,* 282 U. S. 694 (1931); see *Henry* v. *United States,* 361 U. S. 98, 103 (1959).

As we noted in Sibron's case, a search incident to a lawful arrest, may not precede the arrest and serve as part of its justification. It is a question of fact precisely when, in each case, the arrest took place. *Rios* v. *United States,* 364 U. S. 253, 261–262 (1960). And while there was some inconclusive discussion in the trial court concerning when Officer Lasky "arrested" Peters, it is clear that the arrest had for purposes of constitutional justification already taken place before the search commenced. When the policeman grabbed Peters by the collar, he abruptly "seized" him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity. See *Henry* v. *United States, supra,* at 103. At that point he had the authority to search Peters, and the incident search was

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

obviously justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime." *Preston* v. *United States,* 376 U. S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons. While patting down his outer clothing, Officer Lasky discovered an object in his pocket which might have been used as a weapon. He seized it and discovered it to be a potential instrument of the crime of burglary.

We have concluded that Peters' conviction fully comports with the commands of the Fourth and Fourteenth Amendments, and must be affirmed. The conviction in No. 63, however, must be reversed, on the ground that the heroin was unconstitutionally admitted in evidence against the appellant.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 63.—October Term, 1967.

Nelson Sibron, Appellant, *v.* State of New York.	On Appeal From the Court of Appeals of New York.

[June 10, 1968.]

Mr. Justice Douglas, concurring.

Officer Martin testified that on the night in question he observed petitioner Sibron continually from 4 p. m. to 12 midnight and that during that eight-hour period, Sibron conversed with different persons each personally known to Martin as narcotics addicts. When Sibron entered a restaurant, Martin followed him inside where he observed Sibron talking to three other persons also personally known to Martin as narcotics addicts. At that point he approached Sibron and asked him to come outside. When Sibron stepped out, Martin said, "You know what I am after." Sibron then reached inside his pocket, and at the same time Martin reached into the same pocket and discovered several glassine envelopes which were found to contain heroin. Sibron was subsequently convicted of unlawful possession of heroin.

Consorting with criminals may in a particular factual setting be a basis for believing that a criminal project is underway. Yet talking with addicts without more rises no higher than suspicion. That is all we have here; and if it is sufficient for a "seizure" and a "search," then there is no such thing as privacy for this vast group of "sick" people.

SUPREME COURT OF THE UNITED STATES

No. 74.—October Term, 1967.

John Francis Peters, Appellant, *v.* State of New York.	On Appeal From the Court of Appeals of New York.

[June 10, 1968.]

Mr. Justice Douglas, concurring.

Officer Lasky testified that he resided in a multiple dwelling apartment house in Mount Vernon, New York. His apartment was on the sixth floor. At about 1 in the afternoon, he had just stepped out of the shower and was drying himself when he heard a noise at his door. Just then his phone rang and he answered the call. After hanging up, he looked through the peephole of his door and saw two men, one of whom was petitioner, tiptoeing out of an alcove toward the stairway. He phoned his headquarters to report this occurrence, and then put on some clothes and proceeded back to the door. This time he saw a tall man tiptoeing away from the alcove, followed by petitioner, toward the stairway. Lasky came out of his apartment, slammed the door behind him, and then gave chase, gun in hand, as the two men began to run down the stairs. He apprehended petitioner on the stairway between the fourth and fifth floors, and asked what he was doing in the building. Petitioner replied that he was looking for a girl friend, but refused to give her name, saying that she was a married woman. Lasky then "frisked" petitioner for a weapon, and discovered in his right pants pocket a plastic envelope. The envelope contained a tension bar, 6 picks and 2 Allen wrenches with the short leg filed down to a screwdriver edge. Petitioner was subsequently convicted for possession of burglarly tools.

I would hold that at the time Lasky seized petitioner, he had probable cause to believe that petitioner was on some kind of burglary or housebreaking mission.* In my view he had probable cause to seize petitioner and accordingly to conduct a limited search of his person for weapons.

*See N. Y. Pen. Code §§ 140.20, 140.25 (McKinney 1967).

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 74.—OCTOBER TERM, 1967.

Nelson Sibron, Appellant, 63 *v.* State of New York.	On Appeals From the Court of Appeals of New York.
John Francis Peters, Appellant, 74 *v.* State of New York.	

[June 10, 1968.]

MR. JUSTICE WHITE, concurring.

I join Parts I–IV of the Court's opinion. With respect to appellant Peters, I join the affirmance of his conviction, not because there was probable cause to arrest, a question I do not reach, but because there was probable cause to stop Peters for questioning and thus to frisk him for dangerous weapons. See my concurring opinion in *Terry* v. *Ohio, ante,* p. ——. While patting down Peters' clothing the officer "discovered an object in his pocket which might have been used as a weapon." *Ante,* p. ——. That object turned out to be a package of burglar's tools. In my view those tools were properly admitted into evidence.

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 74.—OCTOBER TERM, 1967.

63	Nelson Sibron, Appellant, *v.* State of New York.	On Appeals From the Court of Appeals of New York.
74	John Francis Peters, Appellant, *v.* State of New York.	

[June 10, 1968.]

MR. JUSTICE FORTAS, concurring.

1. I would construe *St. Pierre* v. *United States*, 319 U. S. 41 (1943), in light of later cases, to mean that a criminal case is moot if it appears that no collateral legal consequences will be imposed on the basis of the challenged conviction. (Cf. majority opinion, p. 15.)

2. I join without qualification in the Court's judgment and opinion concerning the standards to be used in determinig whether § 180–a as applied to particular situations is constitutional. But I would explicitly reserve the possibility that a statute purporting to authorize a warrantless search might be so extreme as to justify our concluding that it is unconstitutional "on its face," regardless of the facts of the particular case. To the extent that the Court's opinion may indicate the contrary, I disagree. (Cf. majority opinion, p. 17.)

3. In Sibron's case (No. 63), I would conclude that we find nothing in the record of this case or pertinent principles of law to cause us to disregard the confession of error by counsel for Kings County. I would not discourage admissions of error nor would I disregard them. (Cf. majority opinion, pt. II, pp. 16–17.)

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 74.—OCTOBER TERM, 1967.

63	Nelson Sibron, Appellant, *v.* State of New York.	On Appeals From the Court of Appeals of New York.
74	John Francis Peters, Appellant, *v.* State of New York.	

[June 10, 1968.]

MR. JUSTICE HARLAN, concurring in the results.

I fully agree with the results the Court has reached in these cases. They are, I think, consonant with and dictated by the decision in *Terry* v. *Ohio, ante,* p. —. For reasons I do not understand, however, the Court has declined to rest the judgments here upon the principles of *Terry*. In doing so it has, in at least one particular, made serious inroads upon the protection afforded by the Fourth and Fourteenth Amendments.

The Court is of course entirely correct in concluding that we should not pass upon the constitutionality of the New York stop-and-frisk law "on its face." The statute is certainly not unconstitutional on its face: that is, it does not plainly purport to authorize unconstitutional activities by policemen. Nor is it "constitutional on its face" if that expression means that any action now or later thought to fall within the terms of the statute is, *ipso facto,* within constitutional limits as well. No statute, state or federal, receives any such *imprimatur* from this Court.

This does not mean, however, that the statute should be ignored here. The State of New York has made a deliberate effort to deal with the complex problem of on-the-street policework. Without giving *carte blanche*

to any particular verbal formulation, we should, I think, where relevant, indicate the extent to which that effort has been constitutionally successful. The core of the New York statute is the permission to stop any person reasonably suspected of crime. Under the decision in *Terry* a right to stop may indeed be premised on reasonable suspicion and does not require probable cause, and hence the New York formulation is to that extent constitutional. This does not mean that suspicion need not be "reasonable" in the constitutional as well as the statutory sense. Nor does it mean that this Court has approved more than a momentary stop or has indicated what questioning may constitutionally occur during a stop, for the cases before us do not raise these questions.[1]

Turning to the individual cases, I agree that the conviction in No. 63, *Sibron*, should be reversed, and would do so upon the premises of *Terry*. At the outset, I agree that sufficient collateral legal consequences of Sibron's conviction have been shown to prevent this case from being moot, and I agree that the case should not be reversed simply on the State's confession of error.

The considerable confusion that has surrounded the "search" or "frisk" of Sibron that led to the actual recovery of the heroin seems to me irrelevant for our purposes. Officer Martin repudiated his first statement, which might conceivably have indicated a theory of "abandonment," see *ante*, pp. 3–4. No matter which of the other theories is adopted, it is clear that there was at least a forcible frisk, comparable to that which occurred in *Terry*, which requires constitutional justification.

Since carrying heroin is a crime in New York, probable cause to believe Sibron was carrying heroin would

[1] For a thoughtful study of many of these points, see ALI Model Code of Pre-Arraignment Procedure, Tentative Draft No. 1, §§ 2.01, 2.02, and the commentary on these sections appearing at pp. 87–105.

also have been probable cause to arrest him. As the Court says, Officer Martin clearly had neither. Although Sibron had had conversations with several known addicts, he had done nothing, during the several hours he was under surveillance, that made it "probable" that he was either carrying heroin himself or engaging in transactions with these acquaintances.

Nor were there here reasonable grounds for a *Terry*-type "stop" short of an arrest. I would accept, as an adequate general formula, the New York requirement that the officer must "reasonably suspect" that the person he stops "is committing, has committed or is about to commit a crime." N. Y. Code Crim. Proc. § 180–a. "On its face," this requirement is, if anything, more stringent than the requirement stated by the Court in *Terry:* "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . ." *Ante*, p. 28. The interpretation of the New York statute is of course a matter for the New York courts, but any particular stop must meet the *Terry* standard as well.

The forcible encounter between Officer Martin and Sibron did not meet the *Terry* reasonableness standard. In the first place, although association with known criminals may, I think, properly be a factor contributing to the suspiciousness of circumstances, it does not, entirely by itself, create suspicion adequate to support a stop. There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended. That was the case in *Terry*, but it palpably was not the case here. For eight continuous hours, up to the point when he interrupted Sibron eating a piece of pie, Officer Martin apparently observed not a single suspicious action and heard not a single suspicious word on the part of Sibron himself or any person with

whom he associated. If anything, that period of surveillance pointed away from suspicion.

Furthermore, in *Terry*, the police officer judged that his suspect was about to commit a violent crime and that he had to assert himself in order to prevent it. Here there was no reason for Officer Martin to think that an incipient crime, or flight, or the destruction of evidence would occur if he stayed his hand; indeed, there was no more reason for him to intrude upon Sibron at the moment when he did than there had been four hours earlier, and no reason to think the situation would have changed four hours hence. While no hard-and-fast rule can be drawn, I would suggest that one important factor, missing here, that should be taken into account in determining whether there are reasonable grounds for a forcible intrusion is whether there is any need for immediate action.

For these reasons I would hold that Officer Martin lacked reasonable grounds to introduce forcibly upon Sibron. In consequence, the essential premise for the right to conduct a self-protective frisk was lacking. See my concurring opinion in *Terry, ante*, p. —. I therefore find it unnecessary to reach two further troublesome questions. First, although I think that, as in *Terry*, the right to frisk is automatic when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed, it is not clear that suspected possession of narcotics falls into this category. If the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so. Second, I agree with the Court that even where a self-protective frisk is proper, its scope should be limited to what is adequate for its purposes. I see no need here to resolve the question whether this frisk exceeded those bounds.

Turning now to No. 74, *Peters,* I again agree that the conviction should be upheld, but here I would differ strongly and fundamentally with the Court's approach. the Court holds that the burglar's tools were recovered from Peters in a search incident to a lawful arrest. I do not think that Officer Lasky had anything close to probable cause to arrest Peters before he recovered the burglar's tools. Indeed, if probable cause existed here, I find it difficult to see why a different rationale was necessary to support the stop and frisk in *Terry* and why States such as New York have had to devote so much thought to the constitutional problems of field interrogation. This case will be the latest in an exceedingly small number of cases in this Court indicating what suffices for probable cause. While, as the Court noted in *Terry,* the influence of this Court on police tactics "in the field" is necessarily limited, the influence of a decision here on hundreds of courts and magistrates who have to decide whether there is probable cause for a real arrest or a full search will be large.

Officer Lasky testified that at 1 o'clock in the afternoon he heard a noise at the door to his apartment. He did not testify, nor did any state court conclude, that this "led him to believe that someone sought to force entry." *Ante,* p. 24. He looked out into the public hallway and saw two men whom he did not recognize, surely not a strange occurrence in a large apartment building. One of them appeared to be tip-toeing. Lasky did not testify that the other man was tip-toeing or that either of them was behaving "furtively." *Ibid.* Lasky left his apartment and ran to them, gun in hand. He did not testify that there was any flight," *ante,* p. 24,[2] though flight at the approach of gun-carrying

[2] It is true, as the Court states, that the New York courts attributed such a statement to him. The attribution seems to me unwarranted by the record.

strangers (Lasky was apparently not in uniform) is hardly indicative of *mens rea.*

Probable cause to arrest means evidence that would warrant a prudent and reasonable man (such as a magistrate, actual or hypothetical) in believing that a particular person has committed or is committing a crime.[3] Officer Lasky had no extrinsic reason to think that a crime had been or was being committed, so whether it would have been proper to issue a warrant depends entirely on his statements of his observations of the men. Apart from his conclusory statement that he thought the men were burglars, he offered very little specific evidence. I find it hard to believe that if Peters had made good his escape and there were no report of a burglary in the neighborhood, this Court would hold it proper for a prudent neutral magistrate to issue a warrant for his arrest.[4]

In the course of upholding Peters' conviction, the Court makes two other points that may lead to future

[3] *E. g., Beck* v. *Ohio,* 379 U. S. 89; *Rios* v. *United States,* 364 U. S. 253; *Henry* v. *United States,* 361 U. S. 98. In *Henry, supra,* at 100, the Court said that 18 U. S. C. § 3052 "states the Constitutional standard" for felony arrests by FBI agents without warrant. That section at that time authorized agents to "make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person has committed or is committing such a felony." Under *Ker* v. *California,* 374 U. S. 23, a parallel standard is applicable to warrantless arrests by state and local police.

[4] Compare *Henry* v. *United States,* 361 U. S. 98, in which the Court said there was "far from enough evidence . . . to justify a magistrate in issuing a warrant." *Id.,* at 103. Agents knew that a federal crime, theft of whisky from an interstate shipment, had been committed "in the neighborhood." Petitioner was observed driving into an alley, picking up packages, and driving away. I agree that these facts did not constitute probable cause, but find it hard to see that the evidence here was more impressive.

confusion. The first concerns the "moment of arrest." If there is an escalating encounter between a policeman and a citizen, beginning perhaps with a friendly conversation but ending in imprisonment, and if evidence is developing during that encounter, it may be important to identify the moment of arrest, *i. e.*, the moment when the police were not permitted to proceed further unless they by then had probable cause. This moment-of-arrest problem is not, on the Court's premises, in any way involved in this case: the Court holds that Officer Lasky had probable cause to arrest at the moment he caught Peters, and hence probable cause clearly preceded anything that might be thought an arrest. The Court implies, however, that although there is no problem about whether the arrest of Peters occurred *late* enough, *i. e.*, after probable cause developed, there might be a problem about whether it occurred *early* enough, *i. e.*, before Peters was searched. This seems to me a false problem. Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

This fact is important because, as demonstrated by *Terry*, not every curtailment of freedom of movement is an "arrest" requiring antecedent probable cause. At the same time, an officer who does have probable cause may of course seize and search immediately. Hence while certain police actions will undoubtedly turn an encounter into an arrest requiring antecedent probable cause,

the prosecution must be able to date the arrest as *early* as it chooses following the obtaining of probable cause.

The second possible source of confusion is the Court's statement that "Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects." *Ante*, p. 25. Since the Court found probable cause to arrest Peters, and since an officer arresting on probable cause is entitled to make a very full incident search,[5] I assume that this is merely a factual observation. As a factual matter, I agree with it.

Although the articulable circumstances are somewhat less suspicious here than they were in *Terry*, I would affirm on the *Terry* ground that Officer Lasky had reasonable cause to make a forced stop. Unlike probable cause to arrest, reasonable grounds to stop do not depend on any degree of likelihood that a crime *has* been committed. An officer may forcibly intrude upon an incipient crime even where he could not make an arrest for the simple reason that there is nothing to arrest anyone for. Hence although Office Lasky had small reason to believe that a crime had been committed, his right to stop Peters can be justified if he had a reasonable suspicion that he was about to attempt burglary.

It was clear that the officer had to act quickly if he was going to act at all, and, as stated above, it seems to me that where immediate action is obviously required, a police officer is justified in acting on rather less objectively articulable evidence than when there is more time for consideration of alternative courses of action. Perhaps more important, the Court's opinion in *Terry* emphasized the special qualifications of an experienced police officer. While "probable cause" to arrest or search has always depended on the existence of hard evidence

[5] The leading case is *United States* v. *Rabinowitz*, 339 U. S. 56.

that would persuade a "reasonable man," in judging on-the-street encounters it seems to me proper to take into account a police officer's trained instinctive judgment operating on a multitude of small gestures and actions impossible to reconstruct. Thus the statement by an officer that "he looked like a burglar to me" adds little to an affidavit filed with a magistrate in an effort to obtain a warrant. When the question is whether it was reasonable to take limited but forcible steps in a situation requiring immediate action, however, such a statement looms larger. A court is of course entitled to disbelieve the officer (who is subject to cross-examination), but when it believes him and when there are some articulable suporting facts, it is entitled to find action taken under fire to be reasonable.

Given Officer Lasky's statement of the circumstances, and crediting his experienced judgment as he watched the two men, the state courts were entitled to conclude, as they did, that Lasky forcibly stopped Peters on "reasonable suspicion." The frisk made incident to that stop was a limited one, which turned up burglar's tools. Although the frisk is constitutionally permitted only in order to protect the officer, if it is lawful the State is of course entitled to the use of any other contraband that appears.

For the foregoing reasons I concur in the results in these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 63 and 74.—October Term, 1967.

63	Nelson Sibron, Appellant, *v.* State of New York.	On Appeals From the Court of Appeals of New York.
74	John Francis Peters, Appellant, *v.* State of New York.	

[June 10, 1968.]

Mr. Justice Black, concurring and dissenting.

I concur in the affirmance of the judgment against Peters but dissent from the reversal of No. 63, *Sibron* v. *New York* and would affirm this conviction. Sibron was convicted of violating New York's anti-narcotics law on the basis of evidence seized from him by the police. The Court reverses on the ground that the narcotics were seized as the result of an unreasonable search in violation of the Fourth Amendment. The Court has decided today in *Terry* v. *Ohio* and in No. 74, *Peters* v. *New York*, that a policeman does not violate the Fourth Amendment when he makes a limited search for weapons on the person of a man whom the policeman has probable cause to believe has a dangerous weapon on him with which he might injure the policeman or others or both, unless he is searched and the weapon is taken away from him. And, of course, under established principles it is not a violation of the Fourth Amendment for a policeman to search a person whom he has probable cause to believe is committing a felony at the time. For both these reasons I think the seizure of the narcotics from Sibron was not unreasonable under the Fourth Amendment. Because of a different emphasis on the facts, I find it necessary to restate them.

About 4 p. m. Patrolman Martin saw appellant Sibron in the vicinity of 742 Broadway. From then until 12 o'clock midnight Sibron remained there. During that time the policeman saw Sibron talking with six or eight persons whom the policeman knew from past experience to be narcotics addicts. Late along toward 12 o'clock, Sibron went into a restaurant and there the patrolman saw Sibron speak with three more known addicts. While Sibron was eating in the restaurant the policeman went to him and asked him to come out. Sibron came out. There the officer said to Sibron, "You know what I am after." Sibron mumbled something and reached into his left coat pocket. The officer also moved his hand to the pocket and seized what was in it, which turned out to be heroin. The patrolman testified at the hearing to suppress use of the heroin as evidence that he "thought he [Sibron] might have been reaching for a gun."

Counsel for New York for some reason that I have not been able to understand, has attempted to confess error—that is, that for some reason the search or seizure here violated the Fourth Amendment. I agree with the Court that we need not and should not accept this confession of error. But, unlike the Court, I think, for two reasons, that the seizure did not violate the Fourth Amendment and that the heroin was properly admitted in evidence.

First. I think there was probable cause for the policeman to believe that when Sibron reached his hand to his coat pocket, Sibron had a dangerous weapon which he might use if it were not taken away from him. This, according to the Court's own opinion, seems to have been the ground on which the Court of Appeals of New York justified the search, since it "affirmed on the basis of § 180–a, which authorizes such a search when the officer 'reasonably suspects that he is in danger of

life or limb.'" *Ante*, p. ——. And it seems to me to be a reasonable inference that when Sibron, who had been approaching and talking to addicts for eight hours, reached his hand quickly to his left coat pocket, he might well be reaching for a gun. And as the Court has emphasized today in its opinions in the other stop and frisk cases, a policeman under such circumstances has to act in a split second; delay may mean death for him. No one can know when an addict may be moved to shoot or stab, and particularly when he moves his hand hurriedly to a pocket where weapons are known to be habitually carried, it behooves an officer who wants to live to act at once as this officer did. It is true that the officer might also have thought Sibron was about to get heroin instead of a weapon. But the law enforcement officers all over the Nation have gained little protection from the courts through opinions here if they are now left helpless to act in self defense when a man associating intimately and continuously with addicts, upon meeting an officer, shifts his hand immediately to a pocket where weapons are constantly carried.

In appraising the facts as I have I realize that the Court has chosen to draw inferences different from mine and those drawn by the courts below. The Court for illustration draws inferences that the officer's testimony at the hearing continued upon the "plain premise that he had been looking for narcotics all the time." *Ante*, p. ——, n. 4. But this Court is hardly, at this distance from the place and atmosphere of the trial, in a position to overturn the trial and appellate courts on its own independent finding of an unspoken "premise" of the officer's inner thoughts.

In acting upon its own findings and rejecting those of the lower state courts, this Court, sitting in the marble halls of the Supreme Court Building in Washington, D. C., should be most cautious. Due to our

holding in *Mapp* v. *Ohio*, 367 U. S. 643, we are due to get for review literally thousands of cases raising questions like those before us here. If we are setting ourselves meticulously to review all such findings our task will be endless and many will rue the day when *Mapp* was decided. It is not only wise but imperative that where findings of the facts of reasonableness and probable cause are involved in such state cases, we should not overturn state court findings unless in the most extravagant and egregious errors. It seems fantastic to me even to suggest that this is such a case. I would leave these state court holdings alone.

Second, I think also that there was sufficient evidence here on which to base findings that after recovery of the heroin, in particular, an officer could reasonably believe there was probable cause to charge Sibron with violating New York's narcotics laws. As I have previously argued, there was, I think, ample evidence to give the officer probable cause to believe Sibron had a dangerous weapon and that he might use it. Under such circumstances the officer had a right to search him in the very limited fashion he did here. Since, therefore, this was a reasonable and justified search, the use of the heroin discovered by it was admissible in evidence.

I would affirm.

EXHIBIT 44

SUPREME COURT OF THE UNITED STATES

No. 67.—OCTOBER TERM, 1967.

John W. Terry, Petitioner, v. State of Ohio. | On Writ of Certiorari to the Supreme Court of Ohio.

[June 10, 1968.]

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

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary.[1] Following the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton,[2] by Cleveland Police Detective Martin

[1] Ohio Rev. Code § 2923.01 (1953) provides in part that "No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person." An exception is made for properly authorized law enforcement officers.

[2] Terry and Chilton were arrested, indicted, tried, and convicted together. They were represented by the same attorney, and they made a joint motion to suppress the guns. After the motion was denied, evidence was taken in the case against Chilton. This evidence consisted of the testimony of the arresting officer and of Chilton. It was then stipulated that this testimony would be applied to the case against Terry, and no further evidence was introduced in that case. The trial judge considered the two cases together, rendered the decisions at the same time and sentenced the two men at the same time. They prosecuted their state court appeals together

McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policemen for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."

His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men. "I get more purpose to watch them when I seen their movements," he testified. He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the

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through the same attorney, and they petitioned this Court for certiorari together. Following the grant of the writ upon this joint petition, Chilton died. Thus, only Terry's conviction is here for review.

corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun." Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approach the three men, identified himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry

between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, retrieved a .38 caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz's outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendant's motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, whom he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime.

The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed. *State* v. *Terry,* 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). The Supreme Court of Ohio dismissed petitioner's appeal on the ground that no "substantial constitutional question" was involved. We granted certiorari, 387 U. S. 929 (1967), to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourthteenth. *Mapp* v. Ohio, 367 U. S. 643 (1961). We affirm the conviction.

I.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." This inestimable right of personal security belongs as much to the citizen on the streets of our great cities as to the homeowner closeted in his study to dispose of his secret affairs. For as this Court has always recognized,

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference, unless by clear and unquestionable authority of law." *Union Pac. R. Co.* v. *Botsford,* 141 U. S. 250, 251 (1891).

We have recently held that "the Fourth Amendment protects people, not places," *Katz* v. *United States,* 389 U. S.

347, 351 (1967), and wherever an individual may harbor a reasonable "expectation of privacy," *id.*, at 361 (MR. JUSTICE HARLAN, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins* v. *United States*, 364 U. S. 206, 222 (1960). Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. *Beck* v. *Ohio*, 379 U. S. 89 (1964); *Rios* v. *United States*, 364 U. S. 253 (1960); *Henry* v. *United States*, 361 U. S. 98 (1959); *United States* v. *Di Re*, 332 U. S. 581 (1948); *Carroll* v. *United States*, 267 U. S. 132 (1925). The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"—as it is sometimes euphemistically termed—suspicious persons.

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and

between a "frisk" and a "search." [3] Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of the person. This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity," [4] which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.[5]

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[3] Both the trial court and the Ohio Court of Appeals in this case relied upon such a distinction. *State* v. *Terry*, 5 Ohio App. 2d 122, 125–130, 214 N. E. 2d 114, 117–120 (1966). See also, *e. g.*, *People* v. *Rivera*, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied, 379 U. S. 978 (1955); Aspen, Arrest and Arrest Alternatives: Recent Trends, 1966 U. Ill. L. F. 241, 249–254; Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942); Note, Stop and Frisk in California, 18 Hastings L. J. 623, 629–632 (1967).

[4] *People* v. *Rivera, supra,* n. 3, at 447, 201 N. E. 2d, at 36, 252 N. Y. S. 2d, at 464.

[5] The theory is well laid out in the *Rivera* opinion:

". . . [T]he evidence needed to make the inquiry is not of the same degree or conclusivenss as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. . . .

"And as the right to stop and inquire is to be justified for a cause less conclusive than that which would sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment.[6] It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution. Acquiescence by the courts in the compulsion inherent in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in "the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 14 (1948). This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities.[7]

In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which police

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the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police cusomarily act." *People* v. *Rivera,* 14 N. Y. 2d 441, 445, 447, 201 N. E. 2d 32, 34, 35, 252 N. Y. S. 2d 458, 461, 463 (1964), cert. denied, 379 U. S. 978 (1965).

[6] See, *e. g.,* Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?, 51 J. Crim. L. C. & P. S. 402 (1960).

[7] See n. 11, *infra.*

men and citizens confront each other on the street. The State has characterized the issue here as "the right of a police officer . . . to make an on-the-street stop, interrogate and pat down for weapons (known in the street vernacular as 'stop and frisk')." [8] But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibiilty against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. See *Weeks* v. *United States,* 232 U. S. 383, 391–393 (1914). Thus its major thrust is a deterrent one, see *Linkletter* v. *Walker,* 381 U. S. 618, 629–635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp* v. *Ohio,* 367 U. S. 643, 655 (1961). The rule also serves another vital function—"the imperative of judicial integrity." *Elkins* v. *United States,* 364 U. S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

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[8] Brief for Respondent, p. 2.

The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.[9] Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an impor-

[9] See Tiffany, McIntyre & Rotenberg, Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment 18–56 (1967). This sort of police conduct may, for example, be designed simply to help an intoxicated person find his way home, with no intention of arresting him unless he becomes obstreperous. Or the police may be seeking to mediate a domestic quarrel which threatens to erupt into violence. They may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.

tant objective of the police,[10] it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain,[11] will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to

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[10] See Tiffany, McIntyre & Rotenberg, *supra*, n. 9, at 100–101; Note, 47 Nw. U. L. Rev. 493, 497–499 (1952).

[11] The President's Commission on Law Enforcement and Administration of Justice found that "in many communities, field interrogations are a major source of friction between the police and minority groups." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967). It was reported that the friction caused by "misuse of field interrogations" increases "as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." *Id.*, at 184. While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, see Tiffany, McIntyre & Rotenberg, *supra*, n. 9, at 47–48, it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets." *Id.*, at 47–48.

prevent crime. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest. Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

II.

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he con-

ducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution.[12] We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." [13] It is a serious intrusion upon the sanctity of the person, which may inflict great

[12] In this case, for example, the Ohio Court of Appeals stated that "we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the Fourth Amendment and probable cause is essential." *State* v. *Terry*, 5 Ohio App. 2d 122, —, 214 N. E. 2d 114, — (1966). See also, *e. g.*, *Ellis* v. *United States*, 264 F. 2d 372, 374 (C. A. D. C. Cir. 1959); Note, 65 Col. L. Rev. 848, 860 & n. 81 (1965).

[13] Consider the following apt description:

"[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." Priar & Martin, Searching and Disarming Criminals, 45 J. Crim. L. C. & P. S. 481 (1954).

indignity and arouse strong resentment, and it is not to be undertaken lightly.[14]

The danger in the logic which proceeds upon distinctions between a "stop" and an "arrest," or "seizure" of the person, and between a "frisk" and a "search" is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact beween the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.[15] This Court has held in

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[14] See n. 11, *supra*, and accompanying text.

We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.

[15] These dangers are illustrated in part by the course of adjudication in the Court of Appeals of New York. Although its first decision in this area, *People* v. *Rivera*, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied, 379 U. S. 978 (1965), rested squarely on the notion that a "frisk" was not a "search," see nn. 3–5, *supra*, it was compelled to recognize in *People* v. *Taggart*, 20 N. Y. 2d 335, 342, — N. E. 2d —, —, — N. Y. S. 2d —, — (1967), that what it had actually authorized in *Rivera* and subsequent decisions, see, *e. g.*, *People* v. *Pugach*, 15 N. Y. 2d 65, 204 N. E. 2d 176, 255 N. Y. S. 2d 833 (1964), cert. denied, 380 U. S. 936 (1965), was a "search" upon less than probable cause. However, in acknowledging that no valid distinction could be maintained on the basis of its cases, the Court of Appeals continued to distinguish between the two in theory. It still defined "search" as it had in *Rivera*—as an essentially unlimited examination of the person for any and all seizable items—and merely noted that the cases had upheld police intrusions which went far beyond the original limited

the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *Kremen* v. *United States*, 353 U. S. 346 (1957); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 356–358 (1931); see *United States* v. *Di Re*, 332 U. S. 581, 586–587 (1948). The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring); see, *e. g.*, *Preston* v. *United States*, 376 U. S. 364, 367–368 (1964); *Agnello* v. *United States*, 269 U. S. 20, 30–31 (1926).

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conception of a "frisk." Thus, principally because it failed to consider limitations upon the scope of searches in indivdual cases as a potential mode of regulation, the Court of Appeals in three short years arrived at the position that the Constitution must, in the name of necessity, be held to permit unrestrained rummaging about a person and his effects upon mere suspicion. It did apparently limit its holding to "cases involving serious personal injury or grave irreparable property damage," thus excluding those involving "the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like." *People* v. *Taggart*, *supra*, at 340, — N. E. 2d, at —, — N. Y. S. 2d, at —.

In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. Cf. *Brinegar* v. *United States*, 338 U. S. 160, 183 (1949) (Mr. Justice Jackson, dissenting). Compare *Camara* v. *Municipal Court*, 387 U. S. 523, 537 (1967). This seems preferable to an approach which attributes too much significance to an overly technical definition of "search," and which turns in part upon a judge-made hierarchy of legislative enactments in the criminal sphere. Focusing the inquiry squarely on the dangers and demands of the particular situation also seems more likely to produce rules which are intelligible to the police and the public alike than requiring the officer in the heat of an unfolding encounter on the street to make a judgment as to which laws are "of limited public consequence."

The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did.[16] And in determining whether the seizure and search were "unreasonable" our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

III.

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would

[16] We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, see, *e. g., Katz* v. *United States,* 389 U. S. 347 (1967); *Beck* v. *Ohio,* 379 U. S. 89, 96 (1964); *Chapman* v. *United States,* 365 U. S. 610 (1961), or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances, see, *e. g., Warden* v. *Hayden,* 387 U. S. 294 (1967) (hot pursuit); cf. *Preston* v. *United States,* 376 U. S. 364, 367–368 (1964). But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.[17]

Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara* v. *Municipal Court,* 387 U. S. 523, 534, 536–537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which,

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[17] See generally, Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L. C. and P. S. 393, 396–403 (1963).

taken together with rational inferences from those facts, reasonably warrant that intrusion.[18] The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[19] And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Cf. *Carroll* v. *United States*, 267 U. S. 132 (1925); *Beck* v. *Ohio*, 379 U. S. 89, 96–97 (1964).[20] Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to

[18] This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence. See *Beck* v. *Ohio*, 379 U. S. 89, 96–97 (1964); *Ker* v. *California*, 374 U. S. 23, 34–37 (1963); *Wong Sun* v. *United States*, 371 U. S. 471, 479–484 (1963); *Rios* v. *United States*, 364 U. S. 253, 261–262 (1960); *Henry* v. *United States*, 361 U. S. 98, 100–102 (1959); *Draper* v. *United States*, 358 U. S. 307, 312–314 (1959); *Brinegar* v. *United States*, 338 U. S. 160, 175–178 (1949); *Johnson* v. *United States*, 333 U. S. 10, 15–17 (1948); *United States* v. *Di Re*, 332 U. S. 581, 593–595 (1948); *Husty* v. *United States*, 282 U. S. 694, 700–701 (1931); *Dumbra* v. *United States*, 268 U. S. 435, 441 (1925); *Carroll* v. *United States*, 267 U. S. 132, 159–162 (1925); *Stacey* v. *Emery*, 97 U. S. 642, 645 (1878).

[19] See, *e. g.*, *Katz* v. *United States*, 389 U. S. 347, 354–357 (1967); *Berger* v. *New York*, 388 U. S. 41, 54–60 (1967); *Johnson* v. *United States*, 333 U. S. 10, 13–15 (1948); cf. *Wong Sun* v. *United States*, 371 U. S. 471, 479–480 (1963). See also *Aguilar v. Texas*, 378 U. S. 108, 110–115 (1964).

[20] See also cases cited in n. 18, *supra*.

sanction. See, *e. g., Beck* v. *Ohio, supra; Rios* v. *United States,* 364 U. S. 253 (1960); *Henry* v. *United States,* 361 U. S. 98 (1959). And simple "'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck* v. *Ohio, supra,* at 97.

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is

followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.[21]

[21] Fifty-seven law enforcement officers were killed in the line of duty in this country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policemen. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41 of them inflicted by handguns easily secreted about the person. The remaining two murders were perpetrated by knives. See Federal Bureau of Investigation, Uniform

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be acepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

Crime Reports for the United States—1966, at 45–48, 152 and Table 51.

The easy availability of firearms to potential criminals in this country is well known and has provoked much debate. See, *e. g.*, President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 239–243 (1967). Whatever the merits of gun-control proposals, this fact is relevant to an assessment of the need for some form of self-protective search power.

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or "mere" evidence, incident to the arrest.

There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston* v. *United States,* 376 U. S. 364, 367 (1964), is also justified on other grounds, *ibid.,* and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden* v. *Hayden,* 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as

something less than a "full" search, even though it remains a serious intrusion.

A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.[22] The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the

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[22] See generally W. LaFave, Arrest—The Decision to Take a Suspect into Custody 1–13 (1965).

two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. See *Camara* v. *Municipal Court, supra.*

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. *Beck* v. *Ohio,* 379 U. S. 89, 91 (1964); *Brinegar* v. *United States,* 338 U. S. 160, 174–176 (1949); *Stacey* v. *Emery,* 97 U. S. 642, 645 (1878).[23] And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. *Brinegar* v. *United States supra.*

IV.

We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a "stick-up." We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed

[23] See also cases cited in n. 18, *supra.*

and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation. Compare *Katz* v. *United States,* 389 U. S. 347, 354–356 (1967). The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States* v. *Poller,* 43 F. 2d

911, 914 (C. A. 2d Cir. 1930); see, *e. g., Linkletter* v. *Walker,* 381 U. S. 618, 629–635 (1965); *Mapp* v. *Ohio,* 367 U. S. 643 (1961); *Elkins* v. *United States,* 364 U. S. 206, 216–221 (1960). Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation. *Warden* v. *Hayden,* 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring).

We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. See *Sibron* v. *New York, post,* p. ——, decided today. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See *Preston* v. *United States,* 376 U. S. 364, 367 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz's person beyond the outer surfaces of his clothes, since he discovered nothing in his pat down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered

the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

V.

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in *Katz* v. *United States* and the concurring opinion in *Warden* v. *Hayden*.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1967.

John W. Terry, Petitioner, v. State of Ohio. | On Writ of Certiorari to the Supreme Court of Ohio.

[June 10, 1968.]

Mr. Justice Harlan, concurring.

While I unreservedly agree with the Court's ultimate holding in this case, I am constrained to fill in a few gaps, as I see them, in its opinion. I do this because what is said by this Court today will serve as initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops.

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court. Since the question in this and most cases is whether evidence produced by a frisk is admissible, the problem is to determine what makes a frisk reasonable.

If the State of Ohio were to provide that police officers could, on articulable suspicion less than probable cause, forcibly frisk and disarm persons thought to be carrying concealed weapons, I would have little doubt that action taken pursuant to such authority could be constitutionally reasonable. Concealed weapons create an immediate and severe danger to the public, and though

that danger might not warrant routine general weapons checks, it could well warrant action on less than a "probability." I mention this line of analysis because I think it vital to point out that it cannot be applied in this case. On the record before us Ohio has not clothed its policemen with routine authority to frisk and disarm on suspicion; in the absence of state authority, policemen have no more right to "pat down" the outer clothing of passers-by, or of persons to whom they address casual questions, than does any other citizen. Consequently, the Ohio courts did not rest the constitutionality of this frisk upon any general authority in Officer McFadden to take reasonable steps to protect the citizenry, including himself, from dangerous weapons.

The state courts held, instead, that when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection. This holding, with which I agree and with which I think the Court agrees, offers the only satisfactory basis I can think of for affirming this conviction. The holding has, however, two logical corollaries that I do not think the Court has fully expressed.

In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person

addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

The facts of this case are illustrative of a proper stop and an incident frisk. Officer McFadden had no probable cause to arrest Terry for anything, but he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery. His justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him, and Officer McFadden did so. When he did, he had no reason whatever to suppose that Terry might be armed, apart from the fact that he suspected him of planning a violent crime. McFadden asked Terry his name, to which Terry "mumbled something." Whereupon McFadden, without asking Terry to speak louder and without giving him any chance to explain his presence or his actions, forcibly frisked him.

I would affirm this conviction for what I believe to be the same reasons the Court relies on. I would, however,

make explicit what I think is implicit in affirmance on the present facts. Officer McFadden's right to interrupt Terry's freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically.

Upon the foregoing premises, I join the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1967.

John W. Terry, Petitioner, v. State of Ohio. | On Writ of Certiorari to the Supreme Court of Ohio.

[June 10, 1968.]

Mr. Justice White, concurring.

I join the opinion of the Court, reserving judgment, however, on some of the Court's general remarks about the scope and purpose of the exclusionary rule which the Court has fashioned in the process of enforcing the Fourth Amendment.

Also, although the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. In my view, it is temporary detention, warranted by the circumstances, which chiefly justifies the protective frisk for weapons. Perhaps the frisk itself, where proper, will have beneficial results whether questions are asked or not. If weapons are found, an arrest will fol-

low. If none are found, the frisk may nevertheless serve preventive ends because of its unmistakable message that suspicion has been aroused. But if the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1967.

John W. Terry, Petitioner, v. State of Ohio. | On Writ of Certiorari to the Supreme Court of Ohio.

[June 10, 1968.]

Mr. Justice Douglas, dissenting.

I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards, unless there was "probable cause" [1] to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

[1] The meaning of "probable cause" has been developed in cases where an officer has reasonable grounds to believe that a crime has been or is being committed. See, *e. g., The Thompson,* 3 Wall. 155; *Stacey* v. *Emery,* 97 U. S. 642; *Director General* v. *Kastenbaum,* 263 U. S. 25; *Carroll* v. *United States,* 267 U. S. 132; *United States* v. *Di Re,* 332 U. S. 581; *Brinegar* v. *United States,* 338 U. S. 160; *Draper* v. *United States,* 358 U. S. 307; *Henry* v. *United States,* 361 U. S. 98. In such cases, of course, the officer may make an "arrest" which results in charging the individual with commission of a crime. But while arresting persons who have already committed crimes is an important task of law enforcement, an equally if not more important function is crime prevention and deterrence of would-be criminals. "[T]here is no war between the Constitution and common sense," *Mapp* v. *Ohio,* 367 U. S. 643, 647. Police officers need not wait until they see a person actually commit a crime before they are able to "seize" that person. Respect for our constitutional system and personal liberty demands in return, however, that such a "seizure" be made only upon "probable cause."

The opinion of the Court disclaims the existence of "probable cause." If loitering were an issue and that was the offense charged, there would be "probable cause" shown. But the crime here is carrying concealed weapons; [2] and there is no basis for concluding that the officer had "probable cause" for believing that crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again.[3]

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[2] 29 Page's Ohio Rev. Code § 2923.01.

[3] This Court has always used the language of "probable cause" in determining the constitutionality of an arrest without a warrant. See, *e. g., Carroll* v. *United States,* 261 U. S. 132, 156, 161–162; *Johnson* v. *United States,* 333 U. S. 10, 13–15; *McDonald* v. *United States,* 335 U. S. 451, 455–456; *Henry* v. *United States,* 361 U. S. 98; *Wong Sun* v. *United States,* 371 U. S. 471, 479–484. To give power to the police to seize a person on some grounds different from or less than "probable cause" would be handing them *more* authority than could be exercised by a magistrate in issuing a warrant to seize a person. As we stated in *Wong Sun* v. *United States,* 371 U. S. 471, with respect to requirements for arrests without warrants: "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." *Id.,* at 479. And we said in *Brinegar* v. *United States,* 338 U. S. 160, 176:

"These long-prevailing standards [for probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical,

In other words, police officers, up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause*. At the time of their "seizure" without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion." Moreover, the meaning of "probable cause" is deeply imbedded in our constitutional history. As we stated in *Henry* v. *United States*, 361 U. S. 98, 100–102:

> "The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required.
>
> . . . . . .
>
> "That philosophy [rebelling against these practices] later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant

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nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

And see *Johnson* v. *United States*, 333 U. S. 10, 14–15; *Wrightson* v. *United States*, 222 F. 2d 556, 559–560 (C. A. D. C. Cir. 1955).

for arrest. And that principle has survived to this day.

. . . . . .

"It is important, we think, that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent . . . . And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause . . . . This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen."

The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every-day life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States,* 338 U. S. 160, 175.

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.

Until the Fourth Amendment, which is closely allied with the Fifth,[4] is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his gib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

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[4] See *Boyd* v. *United States*, 116 U. S. 616, 633:

"For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of of the Fourth Amendment."

EXHIBIT 45

JUDICIAL RESTRAINT IN THE OPINIONS OF MR. JUSTICE FORTAS

A careful analysis of the opinions of Mr. Justice Fortas, written during three Terms of Court, reveals a deep-seated devotion to the principles of judicial restraint. This restraint manifests itself in a variety of forms. It finds expression in a meticulous concern that the Court confine itself to cases in which the issue for decision is properly presented; in a profound belief that the federal judiciary have no monopoly on wisdom and virtue and that the judiciary must show deference to the Congress, to the executive branch of the government, to independent administrative agencies, and to the states; and finally in a craftsman's aversion to logical absolutes—to the resolution of complex problems by the application of overly-simplistic legal rules.

A. The opinions of Mr. Justice Fortas reflect a meticulous concern that the Court confine itself to cases in which the issues for decision are properly presented

One of the classic criteria for measuring the extent to which a judge practices judicial restraint is his insistence that the record properly present the issue for decision and that the Court not reach for issues not so presented. Since coming to the Court, Mr. Justice Fortas has made a mark for himself as a consistent adherent to this principle.

Time after time Mr. Justice Fortas has voted to dismiss a case as improvidently grauted where oral argument and written briefs have revealed the unsatisfactory nature of the record. In *Miller* v. *California*, decided June 17, 1968, Mr. Justice Fortas cast the fifth and deciding vote for dismissing the case as improvidently granted. Chief Justice Warren and Justices Douglas, Brennan and Marshall would have reached out to decide the merits of that case and to reverse a murder conviction on the ground that a confession had been improperly obtained by placing an informer in the jail cell of the suspect.

In *Wainwright* v. *New Orleans*, decided June 17, 1968, Mr. Justice Fortas wrote to explain why he and a majority of the Court thought the record was inadequate to reach the difficult Constitutional question raised by that case. Chief Justice Warren and Justice Douglas expressed their view that the merits should have been reached. They would have held that the arrest in that case was unlawful, and that the petitioner had a Coustitutional right to resist it.

So, too, in *Hicks* v. *District of Columbia*, 383 U.S. 252, Mr. Justice Fortas voted to dismiss as improvidently granted an extremely important challenge to the District's vagrancy statute. Mr. Justice Douglas alone dissented.

Moreover, Mr. Justice Fortas has had the courage to insist that the issue be properly presented even when none of his colleagues has agreed. Thus, in *Rosenblatt* v. *Baer*, 383 U.S. 75, a case presenting the issue of whether the manager of a ski resort was a "public official" for purposes of the Court's rule governing libel suits against public officials, Mr. Justice Fortas alone found the record inadequate for the purposes of a proper decision, stating:

"Particularly in this type of case it is important to observe the practice of relating our decisions to factual records that serve to guide our judgment and to help us measure theory against the sharp outlines of reality."

In *Bank of Marin* v. *England*, 385 U.S. 99, Mr. Justice Fortas expressed his solitary view that the Court should not reach an extremely important qnestion relating to the administration of bankruptcy laws. Mr. Justice Fortas alone noted that because respondent lacked a financial interest in the outcome of the case, this had ceased to be an adversary proceeding within the requirements of the judiciary Article of the Constitution. Said the Justice:

"It is basic to our adversary system to insist that the courts have the benefit of the contentions of opposing parties who have a material, and not merely an abstract, interest in the conflict. Adverse parties—adverse in reality and not merely in positions taken—are absolutely necessary."

Even when the question was as important as the one in *Avery* v. *Midland County, Texas*, decided April 1, 1968, involving extension of the one man, one

vote rule to local government, Mr. Justice Fortas argued that the Court should decline to pass upon the question until the Texas courts had had an opportunity to present their "final product" for approval.

It seems fair to say that since Mr. Justice Fortas came to the Court three years ago, the Court has taken a more meticulous view of what cases are appropriate for decision, and that he has provided one of the most rigorous and consistent voices for self-restraint in this important area since the retirement of the late Justice Felix Frankfurter.

B. The opinions of Mr. Justice Fortas reveal a passionate belief that the Federal judiciary has no monopoly on wisdom and virtue, and that the judiciary must show a proper deference to the roles of Congress, the Executive, independent administrative agencies, and the States.

In his very first opinions for the Court, Mr. Justice Fortas revealed the conviction that the courts must not impose their solutions to questions of policy either where the question was suitable for legislative remedy or where Congress had manifested its will. In *Steelworkers* v. *Bouligny*, 382 U.S. 145, his first opinion, Mr. Justice Fortas expressed sympathy, indeed acceptance, of the view that the federal diversity jurisdiction should be amended to permit unincorporated associations to be treated like corporations. But he declined to accomplish that result by judicial fiat.

Said the Justice:

"Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument."

Similarly, in *United States* v. *Speers*, 382 U.S. 266, Mr. Justice Fortas declined to amend the bankruptcy laws to give the government a lien priority. He wrote:

"Whether this result is inadvisable need not detain us, for the question is one of policy which in our view bas been decided by Congress in favor of the trustee."

Consistent with this marked deference to the role of Congress, Mr. Justice Fortas sharply dissented when, in *Federal Trade Commission* v. *Dean Foods Company*, 384 U.S. 597, the Court accepted the view of the Commission that it should be empowered to petition a federal court of appeals to preliminarily enjoin consummation of a merger under investigation by the Commission. For himself and Justices Harlan, Stewart and White, he strenuously insisted that the Court should not grant what Congress had many times refused.

He said:

"The Commission should not be given such jurisdiction by fiat of this Court. It should do what Congress intended it to do. . . . The Act is abused where, as here, it is contorted to confer jurisdiction where Congress has plainly withheld it."

Just a few weeks ago in *Fortnightly* v. *United Artists*, decided on Jnne 17, 1968, Mr. Justice Fortas again dissented from what he regarded as the Conrt's usurpation of the rnle of Congress. The Court held that under the Copyright Act of 1909, a OATV system did not "perform" copyrigbted works transmitted to its subscribers. Mr. Justice Fortas objected to this "updating" of the legislation, saying:

"But the fact that the Copyright Act was written in a different day, for different factual situations, should lead us to tread cautiously here. Our major object, I suggest, should be to do as little damage as possible to traditional copyright principles and to business relationships, until the Congress legislates and relieves the embarrassment which we and the interested parties face."

A similar deference has been shown the careful policy decisions of branches of government other than the legislative. In the first *Penn Central Merger Cases*, 386 U.S. 372, joined by Justices Harlan, Stewart and White, he dissented from the Court's postponement of the greatest railroad merger in history, which merger had been approved by the I.C.C. He argued:

"The courts may be the principal guardians of the liberties of the people. They are not the chief administrators of its economic destiny."

He had the good fortune to see his views become law this past Term, writing the opiniou for the Court which finally approved the merger. See *Penn Central Merger Cases*, 389 U.S. 486.

The states, too, must, according to Mr. Justice Fortas, have room to pursue their legitimate interests and activities without interference by the federal government. In *United States* v. *Yazell*, 382 U.S. 331, Mr. Justice Fortas for a sharply divided Court held that the Small Business Administration's interest in enforcing its rules did not override a Texas rule of law which made that enforcement more difficult. Said Mr. Justice Fortas:

"Each state has its complex of family and family-property arrangements. There is presented in this case no reason for breaching them. We have no federal law relating to the protection of the separate property of married women. We should not here invent one and impose it upon the States, despite our personal disaste for coverture provisions such as those involved in this case. . . . Clearly, in the case of these SBA loans there is no 'federal interest' which justifies invading the peculiarity local jurisdiction of these States, in disregard of their laws, and of the subleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes."

A similar concern for the states' freedom to experiment led Mr. Justice Fortas in *Duncan* v. *Louisiana*, decided May 20, 1968, to argue to his colleagues, who had just extended the right of trial by jury to the states, that they should not carry forward all of the federal rules which had grown up about that right. He said:

"Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied . . . the Constitution's command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith."

And in *Avery* v. *Midland County, Texas*, decided April 1, 1968, Mr. Justice Fortas dissented from application of the one man, one vote rule to local government, arguing that the Court should give Texas an opportunity to fashion an acceptable system. He argued that:

"There is no reason why we should insist that there is and can be only one rule for voters in local governmental units."

C. Opinions of Mr. Justice Fortas reflect a craftsman's aversion for absolute rules, and a profound awareness of the need to accommodate legal rules to the complexities of actual life

Since his confirmation by the Senate three years ago, the work of Mr. Justice Fortas has given no comfort to those who hoped he would subscribe to the broad absolutes which have characterized many areas of the Court's work. Instead, Mr. Justice Fortas has revealed a subtlety and lawyer-like preference for moderate positions which have been wholesome additions to the Court.

One example of his aversion to absolutes and of his preference for moderation can be found in the previously cited case of *Avery* v. *Midland County, Texas*. He could not join the opinion of the Court extending the rule of one man, one vote to local government. He expressed a preference:

"For a system which takes into account a complex of values and factors, and not merely the arithmetic simplicity of one equals one. . . . [Previous cases] reflect a reasoned, conservative, empirical approach to the intricate problem of applying constitutional principle to the complexities of local government. . . . I believe there are powerful reasons why, while insisting upon reasonable regard for the population-suffrage ratio, we should reject a rigid, theoretical, and authoritarian approach to the problems of local government. In this complex and involved area, we should be careful and conservative in our application of constitutional imperatives, for they are powerful. . . . It is our duty to insist upon due regard for the value of the individual vote but not to ignore realities or to by-pass the alternatives that legislative alteration might provide."

Another area in which Mr. Justice Fortas has been unable to subscribe to what he regards as the overly simplistic rules fashioned by the majority is that

of libel and public officials. In *St. Amant* v. *Thompson*, decided April 29, 1968, he dissented from the reversal of a libel judgment obtained by a deputy sheriff. He noted that:

"The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open-season. The occupation of public officeholder does not forfeit one's membership in the human race."

This aversion to absolutes has found expression in Mr. Justice Fortas' preference for moderate positions in the area of criminal procedure. Thus, in *Berger* v. *New York*, 388 U.S. 41, and *Katz* v. *United States*, 389 U.S. 347, he voted with the majority to allow official wiretapping under carefully prescribed conditions. In *Terry* v. *Ohio*, decided June 10, 1968, he voted with the majority in upholding stop-and-frisk procedures by the police. In *United States* v. *O'Brien*, decided May 27, 1968, he voted with the majority to uphold prosecution of draft card burners, despite their First Amendment arguments. Other opinions which he joined in this area, even those reversing convictions, have carefully reserved for government the opportunity to protect legitimate interests by carefully drawn legislation. Thus, in *United States* v. *Robel*, 389 U.S. 258, a decision reversing a conviction under the Subversive Activities Control Act, the Court expressly recognized the need for legislation to protect sensitive defense facilities from "those who would use their positions to disrupt the nation's production facilities."

There are areas wherein Mr. Justice Fortas has been what some might consider "old fashioned." In *Dennis* v. *United States*, 384 U.S. 855, Mr. Justice Fortas held that Communists prosecuted for filing untruthful non-Communist affidavits in order to obtain for their unions the benefits of the NLRB, could not defend their false statements on the ground that the statute requiring such affidavits was unconstitutional. Declining to reach the Constitutional question urged by Justices Black and Douglas, Mr. Justice Fortas adhered to the view that perjury was perjury, and must be punished as such.

There are many other areas in which Mr. Justice Fortas' aversion to absolutes has been manifested. In the antitrust area, he has declined to accept novel theories of law advanced by the Antitrust Division. See, for example, *United States* v. *General Motors*, 384 U.S. 127, where he preferred to rest decision upon classic conspiracy grounds. Similarly, in *United States* v. *Sealy*, 388 U.S. 350, and in *United States* v. *Arnold, Schwinn & Company*, 388 U.S. 365, he advanced the laws regulating distribution one inch at a time, rather than by the substantial leap forward advocated by the government. In *United States* v. *Grinnell Corporation*, 384 U.S. 563, and in *United States* v. *Pabst Brewing Company*, 384 U.S. 546, he took a markedly more conservative view of the task of defining the "relevant market" in antitrust cases than did the majority. Said he in the latter case:

"Congress has been specific in at least this respect, and I cannot agree that this standard should be denigrated. Unless both the product and the geographical market are carefully defined, neither analysis nor result in antitrust is likely to be of acceptable quality."

* * * * * * *

No one, presumably, would agree with every decision written by Mr. Justice Fortas in three years or with every vote cast. The issues which face the Supreme Court are too complex for that. Moreover, it is difficult for one not on the Court, who has not studied the record and briefs or participated in oral argument, to speculate as to how he, himself would have voted had he been forced to decide the precise questions presented to the Court by the particular case. Nonetheless, it is clear from the more than seventy opinions written by Mr. Justice Fortas and from his hundreds of votes that he is in the tradition of Holmes, Brandeis, and Charles Evans Hughes. He will not reach for an issue not properly presented by a case. He has a proper respect for the roles and competences of Congress, other branches of the federal government, and of the states. He harbors an instinctive aversion to judicial absolutes, and he has declined to join his colleagues in their promulgation. In short, the judicial labors of Mr. Justice Fortas are characterized by an unusual degree of judicial restraint.

EXHIBIT 46

[From the Washington Post, May 22, 1946]

LAW INDUSTRY

(By Marquis Childs)

One of President Truman's recurring complaints is that he finds it more and more difficult to recruit able men for public office. Boom-time prosperity is luring them into private business.

Younger men have left the Government in droves. One goal is the law industry here in Washington. It is fast becoming nothing less than that—an "industry," with office space so scarce that houses are being remodeled and suites of offices rented even before the plaster is dry.

One of the recent recruits to the law industry is Abe Fortas, who was Undersecretary of the Interior for nearly four years. A few days after he left the Department of the Interior to join partnership with trust-buster Thurman Arnold, Fortas accepted a $12,000 retainer to represent the Government of Pureto Rico in this country.

A press release issued by the Office of Puerto Rico—a recent creation of the Territory's Gov. Rexford G. Tugwell—declared that Fortas would represent his important new client "in all future proceedings before the United States Supreme Court, the United States Circuit Court in Boston and agencies of the Federal Government." This announcement touched off a dispute which may affect the entire law industry in Washington.

It so happens that Puerto Rican legal matters in this country have been ably handled by the Department of the Interior and the Department of Justice at no cost to the government of Puerto Rico. In the past three years, 18 cases have been briefed and argued by Justice and Interior. Of the cases in which decisions have been rendered, only one was lost.

Therefore, Solicitor Warner W. Gardner of the Interior Department was considerably surprised by the announcement of Fortas' retainer. Gardner promptly called on Tugwell to explain just what the relationship was.

In the course of his letter to Tugwell, he quoted at length from a letter that Fortas had written less than a year before on this very same subject. Because it has so much bearing on the whole question of the propriety of those who leave the Government to take cases in which they have had a previous interest, the Fortas letter is worth quoting.

"I believe," said Fortas when, as Undersecretary in charge of territorial affiairs he wrote to Tugwell to protest against the same kind of arrangement, "that continuing representation of a Government or a governmental agency by private attorneys is unsound and unwise. I know that, from time to time, governmental agencies must and should retain private counsel on specific matters in order to assist Government counsel. But except for such specialized assistance, governments and governmental agencies should, in my opinion, be represented by lawyers who are public officials. In my opinion, it is neither seemly nor appropriate for governmental agencies to be represented by counsel who are not regularly constituted public officials."

Fortas went on to say that such a relationship "is apt to lead to embarrassment, regardless of the unimpeachable character of the private attorneys who might be concerned." "In the event," he said, "that the private lawyers obtained law business from private sources which involved dealing with the Governmnt, it is obvious that the situation would be embarrassing for both the lawyers and the Government."

That was good counsel. The interweaving of private and public business is dubious. No matter how good the intentions, the public customarily gets the short end of the bargain.

When New Dealers such as Fortas leave the Government, they do not mean to surrender their convictions or their objectives. They are convinced that they can help the cause of liberalism and at the same time make more money than the Government can pay them.

The prototype, of course, is Thomas G. Corcoran, who was so close to the New Deal and President Roosevelt. Leaving the Government, he went into a private law office and his fabulus fees are part of the Washington legend. His old friends in the Government gave invaluable aid.

The Washington law industry is taking on oppressive size. While former New Dealers flourish, the really big money goes to the old established firms, some of which have opened branch offices here. A dozen proposals before Congress would increase the legal barriers that the Government must face in doing its job. That means more fees, and the public finally foots the bill.

EXHIBIT 47

MEMORANDUM RE JUDICIAL PERFORMANCE OF MR. JUSTICE FORTAS

Several decisions of the Supreme Court during the three years in which Justice Fortas has served on the Court have been critically discussed during the course of these hearings. Pursuant to the tradition established by Felix Frankfurther in the hearings on his nomination by President Roosevelt to the Court, Justice Fortas himself has not participated in the discussion of these cases.

This memorandum contains a commentary indicating the scope and impact of these decisions. In addition, so that the record of these proceedings may reflect a more comprhensive analysis of the judicial performance of Mr. Justice Fortas, the memorandum includes references to other decisions in which he has participated in closely related areas.

CRIMINAL LAW

1. *Interrogation of Criminal Suspects.*—Much of the criticism of Justice Fortas has been directed at his vote in the Supreme Court's decision in the *Miranda* case. In the two years since that decision was rendered by the Court, it has been the subject of wide and intensive discussion in many forums, and no good purpose would be served by considering it in detail in this memorandum. Rather, it seems appropriate merely to point out four relevant considerations:

(a) The extent to which the *Miranda* decision was a departure from existing law has been much exaggerated. Essentially the same warnings required by the Supreme Court in *Miranda* were being employed by the FBI as long ago as 1952. As Chief Justice Warren, the author of the *Miranda* decision, stated in his opinion for the Court:

"Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement, while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in Court, that the individual may obtain the services of an attorney of his own choice, and, more recently, that he has a right to free counsel if he is unable to pay * * *"

Moreover, some state supreme courts, for example, that of California, had come to similar conclusions about what the Federal Constitution required well before the Supreme Court decided *Miranda*. And, in any event, when Justice Fortas came to the Court, *Mallory*, *Escobedo*, and other cases had already been decided, foreclosing some of the possibilities that might otherwise have been open to him.

(b) The deleterious impact of the *Miranda* decision on law enforcement has also been greatly exaggerated. Two major law schools—Yale and Pittsburgh—have each conducted extensive studies of the operation of *Miranda*. See "Interrogations in New Haven: The Impact of Miranda," 76 Yale L. J. 1519 (1967); "Miranda in Pittsburgh—A Statistical Study," 29 U. Pittsburgh L. Rev. 1 (1967). Although no final conclusion can yet be drawn, it is significant that both of these studies, which are clearly the most comprhensive conducted thus far, have come to the same conclusion—that the impact of *Miranda* on law enforcement has been small, and that the decision has had little effect, either on police practices or on the investigation and solution of crime. In light of the FBI experience and the longer English experience under requirements similar to those in *Miranda*, these findings are not surprising.

(c) The *Miranda* case itself and its three companion cases, *Westover*, *Vignera*, and *Stewart*, dramatically illustrate the over-statement of the "need" for confessions in law enforcement. All four of these defendants have been or will be retried, even though the confessions they made to the police are no longer admissible in evidence. Two of four defendants, Miranda and Westover, have already been retried and convicted of the same offense for which they were originally charged, and have received the same sentences originally imposed. The third defendant, Vignera, pleaded guilty to a lesser offense and received a substantial

prison term. The retrial of the fourth defendant, Stewart, has been scheduled for September 1968, on the same offense with which he was originally charged.

(*d*) The Supreme Court in the *Miranda* opinion specifically invited the Congress to enact appropriate legislation dealing with confessions and police interrogation. Although the Court reached its own decision on the issues in the case, it recognized the far broader range of alternatives available to Congress in dealing with these crucial questions. In this respect, of course, the Court was placing special emphasis on the appropriate role of Congress is our Federal system.

2. *Line-ups.*—Justice Fortas has also been strongly criticized for his votes in the *Wade*, *Gilbert*, and *Stovall* decisions, in which the Supreme Court held that under the Sixth Amendment, snspects in police line-ups are entitled to the assistance of counsel. As the opinions in these three cases make clear, the Court was deeply troubled by the grave potential for prejudice aud miscarriage of justice that may exist in line-up procedures. The Court emphasized that in many cases, in spite of precautions that may be taken by law enforcement officers, eyewitnesses to crime are notoriously subject to mistaken identification, and are highly susceptible to suggestion because of their emotional state. The Court held that only through the assistance of counsel at a line-up would it be possible to avoid the use of procedures that might, whether inteutionally or not, lead to mistaken identifications and the conviction of innocent persous.

The *Wade* decision is too recent for accurate studies to have been uade of its impact. It is unlikely, however, that its requirements will place a serious burdeu on law enforcement. The Court's opinion suggested a range of alternative procedures that may be used by the police to assure fair and impartial line-ups. The Court also suggested that appropriate alternative procedures could be used in any case where the presence of the suspect's counsel at the line-up would cause a serious delay or otherwise prejudice the confrontation with the eyewitness.

The relatively narrow scope of the *Wade* case is indicated by the Court's recent decision in *Simmons* v. *United States* (decided March 18, 1968), in which the Court refused to extend the *Wade* requirement of counsel to situations in which an eyewitness to a crime is shown a photograph of the suspect by the police. As the Court stated, in au opinion joined by Justice Fortas—

"Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's poteutial for error. We are unwilling to prohibit its employmeut within the exercise of our supervisory power or, still less, as a matter of coustitutional requiremeut."

3. *Blood tests.*—Justice Fortas has also been criticized for his dissenting opiuion in *Schmerber* v. *California*, 384 U.S. 757 (1966), in which a 5–4 majority of the Court held that neither the self-incrimination clause of the Fifth Amendment nor the Due Process Clause of the Fourteenth Amendment prohibited the extraction of a blood sample from a person suspected of driving while intoxicated.

The *Schmerber* case was one of extraordinary difficulty for the Court. It is doubtful that any of the Justices contemplated with equanimity the forcible injection of a needle iuto a suspect's vein iu order to extract a sample of his blood. Years earlier, a majority of the Court, in an opinion by Justice Fraukfurther, had held, in one of the great decisions under the Due Process Clause of the Constitution, that the police were not entitled to pump a suspect's stomach in order to obtain evidence against him. *Rochin* v. *California*, 342 U.S. 165 (1952). Justice Fortas' dissent in the *Schmerber* case was not based on a novel interpretatiou of the Constitution, but ou a deep-seated feeling as to the level of physical force that the State can legitimately bring to bear against a suspect in order to obtaiu evidence against him. As he said, "* * * the state has no right to comit any kind of violence upou the person, or to utilize the results of such a tort, and the extraction of blood, over protest, in an act of violence." 384 U.S. at 779.

One might disagree with Justice Fortas' position on this issue, but it cannot be said that it lacks force or a respectable basis in precedent.

4. *Capital punishment.*—In *Witherspoon* v. *Illinois*, decided June 3, 1968, Justice Fortas voted with the Court in holding that a sentence of death cannot constitutionally be imposed by a jury from which persons are excluded because they express conscieutious or religious scruples against such punishment. Al-

though the decision in *Witherspoon* has been criticized, its holding is far more narrow and precise than many of its critics have suggested. For example, it is clear that the Court's holding applies only to the penalty imposed by the jury, not to the jury's determination of guilt. It is incorrect, therefore, to suggest that the Court's holding will make *convictions* more difficult to obtain in capital cases—all that is affected by the decision is the penalty imposed by the jury. Thus, in the *Witherspoon* case itself, the defendant's conviction for murder was not reversed, even though the death penalty subsequently imposed by the jury was held invalid by the Court. Equally important, nothing in *Witherspoon* prohibits the State from excusing jurors whose scruples against the death penalty are so strong that they cannot return a verdict of death. All that the case holds is that jurors may not be excused *merely* because they may have scruples against such a verdict. In sum, as in many of the other areas discussed in this memorandum, analysis of decisions like *Witherspoon* reveals that the Court has provided substantial leeway for the development by Congress and the State legislatures of appropriate rules and procedures to achieve legitimate objectives within the framework of the Constitution.

5. *Recidivist Statutes.*—Justice Fortas has also been criticized for his dissenting vote in *Spencer* v. *Texas*, 385 U.S. 55 (1966). That case involved the validity of the Texas recidivist statute, under which the jury was permitted to hear evidence of a defendant's prior convictions solely for the purpose of sentencing him as a habitual offender if he were convicted, even though the jury was then engaged in determining the very question of the defendant's guilt or innocence under the pending charge. Both the majority and dissenting Justices applied traditional constitutional doctrines under the Due Process Clause in reaching their conclusions, and the differences between the two views were relatively minor. The majority held that the Texas procedure was valid, since it served the legitimate State interest of enforcing its habitual offender statute. The four dissenting Justices pointed out that under Texas procedure, the prosecutor had discretion to accept a stipulation by the defendant as to his prior convictions, so that evidence of the convictions would not reach the jury until after it had completed its determination of guilt. The dissenting Justices would have held only that the optional stipulation procedure—already available under Texas law—should have been made mandatory, since in this manner the potentially prejudicial impact of the prior convictions on the jury could be entirely avoided, at no cost whatever to any legitimate State interest. The extremely narrow ground taken by the dissenters in *Spencer* is highlighted by their express agreement with the majority that, apart from the habitual offender area, there were many issues in a criminal trial for which evidence of prior offenses was relevant and could be validly introduced against the defendant at the trial.

7. *Other law enforcement practices.*—In three other highly significant areas of the criminal law, Justice Fortas has voted with a majority of the Court in important decisions granting broad powers to law enforcement officers.

(*a*) *Electronic surveillance.*—In *Berger* v. *New York*, 388 U.S. 41, decided in June 1967, and *Katz* v. *United States*, 329 U.S. 347, decided in December 1967, Justice Fortas joined the Court's opinions holding that judicial warrants could be issued under the Fourth Amendment to authorize law enforcement officers to engage in wiretapping and electronic eavesdropping in the investigation of crimes. In these two decisions, the Court laid down a constitutional blueprint for legislation authorizing such activity. The *Berger* and *Katz* cases were, of course, strongly relied upon by the Congress in enacting Title III of the Omnibus Crime Bill, which authorizes electronic surveillance by court order under certain specified conditions.

(*b*) *Stop and frisk.* In *Terry* v. *Ohio*, decided June 10, 1968, Justice Fortas joined the Court's opinion holding that law enforcement officers may stop and frisk suspicious persons on the street when the search is reasonbly necessary to protect the safety of the officers, even though the officers do not have probable cause to arrest the suspect. There can be no doubt that the *Terry* case gives strong recognition to the needs of police officers in their frequently dangerous and unpredictable confrontations with potential criminals on the streets. As the Court stated—

"Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life."

In these circumstances, said the Court, "* * * we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective

victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."

In *Wainwright* v. *New Orleans*, decided June 17, 1968, Justice Fortas stated his strong personal adherence to these views. The constitutional question presented by the case was whether the defendant, a murder suspect, had used an unreasonable amount of force in resisting an attempt by the police to arrest him on the street and to search his person. The majority of the Court, including Justice Fortas, voted to dismiss the writ of certiorari in the case as improvidently granted, since the record was too unclear to determine either the legality of the arrest or the degree of resistance offered by the defendant. A companion memorandum introduced in these proceedings points out that Justice Fortas' refusal to decide the case on its inadequate record is a useful example of his strong sense of judicial restraint. In addition, however, Justice Fortas wrote a special concurring opinion in *Wainwright* to take issue with the dissents of Chief Justice Warren and Justice Douglas, who would have reached out to decide the case on a ground so broad that, for Justice Fortas, it failed to afford proper latitude to the needs of law enforcement. As Justice Fortas stated, "* * * I should regret any inference that might be derived from the opinions of my Brethren that this Court would or should hold that the police may not arrest and seek by reasonable means to identify a pedestrian whom, for adequate cause, they believe to be a suspect in a murder case. I do not believe that this Court would or should, without careful analysis, endorse the right of a pedestrian, accosted by the police because he fits the description of a person wanted for murder, to resist the officers so vigorously that they are "bounced from wall to wall physically' or to react 'like a football player going through a line.' "

c. *Search for Evidence.* In *Warden* v. *Hayden*, 387 U.S. 294 (1967), Justice Fortas concurred in the Court's decision that nothing in the Fourth Amendment prohibited the seizure of "mere evidence" of crime. Previously, it had been thought that a search could not be made for such evidence, but was limited by the Fourth Amendment to contraband, weapons and instruments of crime, or the fruits of crime. The Court's decision in *Hayden* thus enlarged the area of permissible searches by law enforcement officers, and subsequently we saw the enactment by Congress of Title VIII of the Omnibus Crime Bill, which authorized Federal judges to issue warrants for all types of evidence of crime.

CIVIL DISOBEDIENCE

In *United States* v. *O'Brien*, decided on May 27, 1968, Justice Fortas voted with a strong majority of the Supreme Court to uphold the constitutionality of the Federal statute prohibiting the willful destruction of draft cards. In its decision, the Court rejected the defendant's argument that his act of burning his draft card was a form of "symbolic speech" protected under the First Amendment. As the Court stated, "A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of driver's licenses, or a tax law prohibiting the destruction of books and records."

In the *O'Brien* case, the Court recognized the power of Congress and the States to enact carefully tailored and reasonable regulations of conduct in any area where an important governmental interest can be shown, even though the regulations might impose some minimal limitation on First Amendment rights. By his vote in the *O'Brien* case, Justice Fortas clearly expressed his view on one of the critical issues in the nation today, the limits of dissent in a free society.

The position of Justice Fortas on this issue is even more clearly stated in his recently published book "Concerning Dissent and Civil Disobedience." In the book, Justice Fortas asserts that no person in this country is entitled deliberately to violate the law in order to protest other evils in society, and that those who do assume not only the risk of punishment but a heavy moral burden. Protesters and changeseekers, he says, must adopt methods within the limits of the law, no matter how sincerely they adhere to the principles they espouse. In the words of Justice Fortas, "We are a government and a people under law. It is not merely government that must live under law. Each of us must live under

law. Just as our form of life depends upon the Government's subordination of law under the Constitution, so it also depends upon the individual's subservience to the laws duly prescribed. Both of these are essential."

Justice Fortas' opinion for the Court in *Brown* v. *Louisiana*, 383 U.S. 111 (1966), is not inconsistent with these views. In the *Brown* case, the Court reversed the convictions of five Negroes charged with violating the State breach of the peace statute by demonstrating in a public library. Contrary to the suggestion of his critics, Justice Fortas' opinion is a moderate one. The evidence in the case showed only that the defendants, after ordering a book and being asked to leave, stood silently in the library for about ten minutes, in protest against the operation of the facilities on a segregated basis. At the time of the "demonstration", there ws no one in the library except the defendans and a library assistant. In hold that the defendants could not constitutionally he punished for their actions, Justice Fortas emphasized that the defendants were being prosecuted for a breach of the peace, not for the violation of a specific regulation governing the use of the library. As Justice Fortas found, however, there was not "the slightest hint" of a breach of the peace in the actions by the defendants. Their conduct was brief and completely orderly. There was no disturbance to others in the library. There was no disruption of any library activity. In these narrow circumstances, Justice Fortas reasonably concluded that the statutes had been deliberately and discriminatorily invoked against the defendants solely for the purpose of terminating their protest against the unconstitutional segregation of the library.

Moreover, in the course of his opinion, Justice Fortas clearly stated his view that State and local governments can adopt reasonable regulations for the use of public buildings. As he said, "A State or its instrumentality, may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all. It may not do so as to some and as to all. It may not provide certain facilities for whites and others for Negroes. And it may not invoke regulations as to use—wbether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."

Although, as in other cases, one may disagree with Justice Fortas' resolution of the difficult questions presented by the facts of the case, it can hardly be said that his conclusion is a license for unbridled demonstrations in libraries and other public facilities.

In addition to their unhappiness with the Supreme Court's decisions in the area of criminal law and civil disobedience over the past three Terms, critics of Justice Fortas have also selected a random scattering of cases—in most of which Justice Fortas did not write—which allegedly illustrate either an excessive readiness to overturn past decisions or some other judicial defect.

SUBVERSIVE ACTIVITIES

United States v. *Robel*, 389 U.S. 258 (1967), does not, as has been suggested open the doors of our defense plants to subversion. In *Robel*, the Court held unconstitutional one section of the Subversive Activities Control Act of 1950, which made it unlawful for any member of a Communist action organization to engage in defense employment—the same result reached hy the Federal District Court in the State of Washington. Nevertheless, the Court did not deprive the government of the right to protect sensitive defense facilities from danger. It held only that the particular statutory section in question was drawn so broadly that it infringed upon the right of citizens to associate with others for political purposes. The Court expressly recognized the legitimate power of Congress to enact appropriate legislation in this area. Said the Court, in a decision from which only two Justices dissented.

"We are not unmindful of the congressional concern over the danger of sabotage and espionage in national defense industries, and nothing we hold today should be read to deny Congress the power under narrowly drawn legislation to keep from sensitive positions in defense facilities those who would use their positions to disrupt the Nation's production facilities. We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interest.

The attacks on Justice Fortas for his votes in *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), and *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966), are equally wide of the mark, and for the identical reason. In *Keyishian*, the Court concluded on the basis of a long series of past decisions that an incredibly complex New York statute regulating the loyalty of university teachers was so broad and difficult to understand that it unnecessarily threatened freedom of thought and association. In *Elfbrandt*, the Court held that an Arizona statute requiring a loyalty oath by all State employees suffered from the same constitutional infirmity, since by its vague terms the statute threatened to stifle fundamental personal liberties. Because of the manner in which these statutes were drawn, persons subject to their prohibitions might well be deterred from engaging in activity which uo government could prohibit. In reaching these decisions, the Court made it clear that the states can constitutionally enact carefully drawn legislation iu this area, so long as they proscribe only the conduct which the Constitution permits them to proscribe.The mere fact that legislation deals with loyalty oaths does not free it from the impact of the First Amendment.

Similarly, in *DeGregory* v. *New Hampshire*, 383 U.S. 825 (1966), the Court, in an opinion joined by Justice Fortas, held that the interest of the State of New Hampshire in protecting itself against subversion was too remote to justify the conviction of a witness for contempt in refusing to answer questions concerning activities and associations that were long past. The decision in *DeGregory* turned on the particular facts of the case. In the course of the State investigation, the witness had categorically denied any relationship with the Communist Party and any knowledge of Communist activities during the entire ten-year period immediately preceding the investiagtion. In addition, the State had failed to demonstrate any substantial relatonship between the information sought and any current condition or problem in the State. In these circumstances, the Court held that the information sought by the State was too stale to support the serious invasion of the privacy and freedom of association of the witness under the First Amendment. As the Court's opinion makes clear, the case in no way derogates from the right of a State to conduct legitimate and properly controlled investigations of subversion within its borders.

Finally, in *Albertson* v. *SACB*, 382 U.S. 7 (1965), Justice Fortas joined the opinion of the Court holding that the compulsory registration provisions of the Subversion Activities Control Act violated the privilege against self-incrimination under the Fifth Amendment. The most significant feature of the case is that the Court's decision was unanimous. The Justices agreed that persons compelled to register under the statute rendered themselves vulnerable to a substantial risk of criminal prosecution, since information disclosed in the registration forms could easily be used as evidence against them in prosecutions under various Federal criminal statutes. As the Court stated, "[The defendants'] claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, when response to any of the form's question in context might involve the [defendants] in the admission of a crucial element of a crime."

The *Albertson* decision does not prohibit Congress from establishing other methods, including a more limited registration procedure, for the control of the Communist Party and other subversive organizations. Congress could, for example, authorize continued enforcement of the registration provision by restricting the uses to which law enforcemeut officers could put the information obtained under the provision. See, for example, *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964). Thus, as the Court has made clear, Congress is free to obtain the information it desires on subversive groups, so long as the procedures employed are free of the taint of self-incrimination and other constitutional defects.

CIVIL RIGHTS AND THE FOURTEENTH AMENDMENT

Justice Fortas has also been criticized in these hearings for his votes in several recent cases interpreting the scope of the Fourteenth Amendment and the power of the Congress to enact legislation enforcing the guarantees of the Equal Protectiou Clause and the Due Process Clause of the Amendment. A close analysis of Justice Fortas' position in these decisions demonstrates that be has consistently taken a moderate and cautious approach to these difficult and complex problems.

In *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), Justice Fortas joined an opinion of the Court holding that by adopting a constitutional amendment repealing the State's fair housing laws, California had failed to maintain its neutrality in matters of racial discrimination. The *Reitman* decision was *sui generis*, turning primarily on the unique circumstances of the case. In arriving at its decision, the Court did not reach out to overturn a State statute or reverse the decision of a State court. Instead, it merely affirmed the decision of the Supreme Court of California, the highest court in the State, which had held that the ultimate impact of the constitutional amendment was to encourage and involve the State in prohibited forms of discrimination. In affirming this decision, the Supreme Court relied heavily on the conclusions of the State court and the State court's assessment of the State constitutional amendment in the context of the California environment. The Supreme Court held only that the conclusion reached by the California Supreme Court was reasonable. As the Court emphasized, the California decision was *not* based on the ground that a mere repeal of a fair housing law violated the Federal Constitution. As the Court said, "[The California Supreme Court] did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing; nor did the Court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations."

In *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), Justice Fortas joined the opinion of the Court sustaining the constitutionality of a provision of the Voting Rights Act of 1965, whose effect was to grant the right to vote to Puerto Rican citizens in New York who were literate in Spanish, whether or not they could pass a literacy test in English. The Court's decision was based on Section 5 of the Fourteenth Amendment, which authorizes Congress to enforce, by appropriate legislation, the Equal Protection Clause, the Due Process Clause, and the various other provisions of that Amendment. Although the *Morgan* decision grants substantial power to Congress to enforce the guarantees of the Fourteenth Amendment, the crucial point of the case is that it is for Congress itself—not the Supreme Court—to act to implement the guarantees of the Amendment. As the Court made clear, the *Morgan* decision did not overrule its prior cases holding that the use of literacy tests as a qualificatiou for voting was valid under the Equal Protection Clause itself, absent contrary action by Congress. All that *Morgan* held was that Congress has acted reasonably and within the proper scope of its authority in limiting the use of such tests. The *Morgan* decision is thus a case in which the Supreme Court has given generous deference to the exercise by Congress of the powers granted to it under the Fourteenth Amendment.

Justice Fortas has also been criticized for his dissenting vote in the companion case of *Cardona* v. *Power*, 384 U.S. 672 (1966). The sole question at issue in the case was whether the State of New York could validly distinguish, for the purpose of voting, between citizens literate in Spanish and those literate in English. The majority of the Court declined to decide the case, preferring to remand it to the State court for reconsideration in the light of the Voting Rights Act of 1965, which had been enacted by Congress after the State court's decision. Although Justice Fortas joined the dissenting opinion of Justice Douglas, their position was a limited one. They clearly recognized the right of a State to condition the use of the ballot on the ability to read and write. They held only that, in view of the crucial importance of the right to vote in our society and the ready availability of Spanish-language newspapers, periodicals, and radio broadcasts in New York, Spanish-speaking citizens were entitled to vote in the State on an equal basis with English-speaking citizens. The dissenting opinion required only that New York apply its literary test with an even hand. Although one may dispute his view that New York had no legitimate interest in requiring literacy in English, Justice Fortas' position in the case can hardly be characterized as novel or extreme.

In *United States* v. *Guest*, 383 U.S. 745 (1966), the Court dealt with the difficult issue of the applicability of the Fourteenth Amendment to the activities of private persons. The Justices were sharply divided—not two ways, but three. One group of Justices wrote an extremely narrow opinion holding that it was unnecessary to decide whether the Fourteenth Amendment was applicable to private persons, since at least a portion of the indictment could be read albeit

with difficulty, as alleging that State officials themselves had participated in the criminal conduct in the case.

Another group of Justices dissented, holding that Congress had ample power under section 5 of the Fourteenth Amendment to punish private discrimination, and that such power had been exercised by the Reconstruction Congress in a statute enacted in 1870. The dissenting Justices took the position that this Civil War statute itself was applicable to the private activities involved in the case.

The remaining group of Justices—including Justice Fortas—took a middle ground between the positions of the other two groups. They held that Congress did indeed have the power to punish at least certain types of private activity that interfered with Fourteenth Amendment rights, but they held that the Civil War statute enacted by the Reconstruction Congress was too vague and ambiguous to accomplish this result. The position taken by Justice Fortas in the *Guest* case was thus a moderate one. It adhered to a reasonable and viable middle ground that offered guidance to the Congress in the complicated area of legislation under the Fourteenth Amendment, yet refused to reach out and apply a vague and ambiguous century-old statute to achieve what the dissenting Justices undoubtedly regarded as a desirable result.

Another case fastened upon by the critics is *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), a 6–3 decision in which Justice Fortas joined five of his brethren. In *Harper*, the Court invalidated Virginia's poll tax, after district courts in Texas and Alabama had invalidated similar State poll taxes. In reaching its decision, the Court applied traditional doctrines under the Equal Protection Clause. The question was whether wealth or the ability to pay a poll tax was a "reasonable basis" upon which to distinguish those who could vote from those who could not. Needless to say, and especially in light of the Court's earlier decision in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the Court concluded that the Constitution did not permit any State to allow only the rich to vote.

In *Fortson* v. *Morris*, 385 U.S. 231, the Court held that there was no Constitutional obstacle to allowing the Georgia Legislature to select a Governor where no candidate for that office had received a majority of the votes cast by the people at a general election. Justice Fortas, joined by the Chief Justice and Justice Douglas, dissented, Justice Fortas agreed with the unanimous, per curiam decision of the three-judge district court sitting in Georgia—consisting of Judges Tuttle, Morgan, and Bell—which had concluded that the Supreme Court's earlier decision in *Gray* v. *Sanders*, 372 U.S. 368 (1963), controlled the question and prevented the concededly malapportioned Georgia Legislature from selecting the Governor of the state. In the *Gray* case, the Supreme Court had held that Georgia's county unit system deprived the voters of equal protection of the law, since it weighted the votes of some citizens more heavily than the votes of others. In *Toombs* v. *Fortson*, 384 U.S. 210 (1966), and *Fortson* v. *Toombs*, 379 U.S. 621 (1965), the Supreme Court had concluded that the Georgia Legislature was malappropriated, although it permitted the existing legislature to continue to function for certain purposes and for a limited period of time. The dispute between Justice Fortas and the majority concerned whether selection of a Governor was within the scope of the limited grant of authority given to the Georgia Legislature by the Supreme Court. One may or may not agree with the position taken by Justice Fortas, those who joined his opinion, and the three lower-court judges who reached the same conclusion. But the opinion shows on its face the conscientious effort to abide by what Justice Fortas and two of his colleagues thought was the thrust of previously decided cases.

Next, the critics point to the Court's recent decision in *Jones* v. *Mayer Co.*, decided on June 17, 1968. There, the Court in an opinion by Justice Stewart from which only two Justices dissented, held that a statute passed by this Congress in 1866 guaranteed to Negroes the right not to be denied housing on the basis of race. The Court reached that decision on the basis of the langnage of the statute and a careful analysis of its legislative history. The Court made it perfectly clear that if Congress wishes some other result it is free to amend or repeal that statute. There is nothing about the opinion of the Court to indicate anything but deference and respect for the legislative role of Congress.

LABOR RELATIONS

Justic Fortas has also been criticized for his votes with the Court in opinions in the area of labor relations. In *N.L.R.B.* v. *Allis-Chalmers Manufacturing Com-*

pany, 388 U.S. 175 (1967), Mr. Justice Brennan, writing for a Court split in three, held that in enacting the Taft-Hartley amendments to the National Labor Relations Act, Congress did not intend to prevent unions from fining members who crossed a picket line during an authorized strike by the union. Whether that result was inconsistent with the Act's guarantee to employees of their right to refrain from concerted activities is an extremely difficult questiton which had badly split the Court of Appeals for the Seventh Circuit. And it split the Supreme Court. There is no basis for criticizing Justice Fortas for voting with Justice Brennan, rather than with Justice White or with Justice Black's dissent. If the result in that case is contrary to the will of Congress, Congress can legislate a new result.

It should be noted, in passing, that in other cases Justice Fortas has been particularly sensitive to respect the will of Congress in fashioning the nation's labor legislation. Thus, in *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1967), Justice Fortas sharply dissented from the opinion of the Court which allowed parties to a labor dispute to resort to libel suits outside the framework of the machinery which Congress had fashioned for resolving those disputes. And in *Vaca* v. *Sipes*, 386 U.S. 171, Justice Fortas wrote a separate opinion to emphasize the fact that it was the will of Congress that claims by an employee that a union had breached its duty of fair representation should be confined to the National Labor Relations Board.

Auother case said to illustrate some claimed deficiency in the judicial performance of Justice Fortas is *Amalgamated Food Employees* v. *Logan Valley Plaza*, decided May 20, 1968. There the Court, in an opinion by Justice Marshall, held that entirely peaceful picketing in a shopping center parking lot could not be prohibited as a violation of the property rights of the shopping center. This case was a wholly reasonable applicatiou of a long series of decisions going back some thirty years which held that peaceful picketing for a lawful purpose could not be prohibited either in the business district of a town or in the business districts of company towns. Since the shopping center here was the eqnivalent of a company towu and picketing was limited to areas open to the public, those prior decisions controlled this case. Three Justices of the Pennsylvania Supreme Court had reached the same conclusion. Only two Justices in the United States Supreme Court dissented. On this basis, it is difficult to understand how Justice Fortas cau be criticized for voting with the majority.

The judicial performance of a Justice cannot properly be assessed by selecting a scattering of cases decided over three years, in most of which the Justice did not write, and in disputing with him over the result in those cases. As Justice Fortas told the Committee, all of the cases which come to the Court are difficult. The easy cases for which there are obvious answers never get to the highest Court in the land. The cases heard and decided by the Court present exceedingly difficult questions, sometimes involving the basic relationship of the citizen to his government, and sometimes involving a search for the will of Congress in areas where the legislators have been less than clear.

The proper measure by which to assess the performance of a Justice is to ask whether his work as a whole reveals intelligence, craftsmanship, insight, and an understanding of the Constitution and governnent. On this score, Justice Fortas deserves extremely high marks.

A companion memorandum introduced into the record of these proceedings illustrates how the work of Justice Fortas has been marked by an unusual degree of judicial restraint. This restraint has been manifested in his insistence that the Court decide cases only where the record is adequate to provide the proper tools for decisions, by his special concern that the Court show deference to the proper roles of other branches of government and the states, and by his obvious aversion to simplistic legal principles. Senator Montoya recently on the floor of the Senate provided a useful survey of Justice Fortas' opinions in the areas of antitrust law and economic regulation, showing how he has brought to those areas a rare experience with business reality and a concern that the Court's work be careful and prudent. Other Senators, too, have pointed to these same traits.

Notwithstanding the quibbles ahout particular votes and decisions, the verdict of the American Bar, both its practicing lawyers and its academics, is that Justice Fortas has performed remarkably well in three years, fulfilling the promise that one of the nation's greatest lawyers should become one of its greatest Justices.

EXHIBIT 48

BREEDLOVE *v.* SUTTLES, TAX COLLECTOR

BREEDLOVE *v.* SUTTLES, TAX COLLECTOR.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 9. Argued November 16, 17, 1937.—Decided December 6, 1937.

1. A Georgia statute exempts all persons under 21 or over 60 years of age, and all females who do not register for voting, from a poll tax of $1.00 per year, which is levied generally upon all inhabitants, and which, under the state constitution, must be paid by the person liable, together with arrears, before he can be registered for voting. *Held* that males who are not within the exemption are not denied the equal protection of the laws guaranteed by the Fourteenth Amendment. Pp. 281–282.

Statement of the Case.

2. On the basis of special consideration to which they are naturally entitled, women as a class may be exempted from poll taxes without exempting men. P. 282.
3. Since this discrimination is permissible in favor of all women, a man subject to the tax has no status to complain that, among women, the tax is levied only on those who register to vote, or that registration is allowed to them without paying taxes for previous years. P. 282.
4. Payment of the Georgia poll tax as a prerequisite to voting is not required for the purpose of denying or abridging the privilege of voting. P. 282.
5. Exaction of payment of poll taxes before registration as an aid to collection is a use of the State's power consistent with the Federal Constitution. P. 283.
6. Voting is a privilege derived not from the United States but from the State, which may impose such conditions as it deems appropriate, subject only to the limitations of the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution. P. 283.
7. A state law requiring payment of poll taxes as a condition to voting does not abridge any privilege or immunity protected by the Fourteenth Amendment. P. 283.
8. The Nineteenth Amendment, forbidding denial or abridgement of the right to vote, on account of sex, applies equally in favor of men and women, and by its own force supersedes inconsistent measures, whether federal or state. P. 283.
9. It was not the purpose of the Nineteenth Amendment to limit the taxing power of the State. P. 283.
10. The Georgia statute levying on inhabitants of the State a poll tax, payment whereof is made a prerequisite to voting, but exempting females who do not register for voting, does not abridge the rights of male citizens to vote, on account of their sex, and is not repugnant to the Nineteenth Amendment. P. 284.

183 Ga. 189; 188 S. E. 140, affirmed.

APPEAL from a judgment which affirmed the dismissal of appellant's petition for a writ of mandamus requiring the appellee to allow the appellant to register for voting for federal and state officers at primary and general elections, without payment of poll taxes.

Messrs. J. Ira Harrelson and *Henry G. Van Veen,* with whom *Mr. Arthur Garfield Hays* was on the brief, for appellant.

The appellant contends that the privilege of voting for federal officials is one to which he is entitled, unrestricted by a tax unreasonably imposed through state invasion of his rights as a citizen of the United States. As such citizen he is entitled to participate in the choice of electors of the President and the Vice President of the United States and of Senators and Representatives in Congress and no State may exercise its taxing power so as to destroy this privilege. If the tax imposed by Georgia were increased to a high degree, as it can be if valid, it could be used to reduce the percentage of voters in the population to even less than eight per cent. as at present, or to destroy the elective franchise altogether. Whatever property and other economic restrictions on the franchise may have been upheld in earlier periods of our history, the admission today that a State has the power to prevent its poorer inhabitants from participating in the choice of federal officials would be totally contrary to the contemporary spirit of American institutions, and inconsistent with the purposes announced in the Preamble to the United States Constitution.

Messrs. W. S. Northcutt and *E. Harold Sheats,* with whom *Mr. Chas. B. Shelton* was on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

A Georgia statute provides that there shall be levied and collected each year from every inhabitant of the State between the ages of 21 and 60 a poll tax of one dollar, but that the tax shall not be demanded from the

blind or from females who do not register for voting. Georgia Code, 1933, § 92–108. The state constitution declares that to entitle a person to register and vote at any election he shall have paid all poll taxes that he may have had opportunity to pay agreeably to law. Art. II, § I, par. III; Code, § 2–603. The form of oath prescribed to qualify an elector contains a clause declaring compliance with that requirement. § 34–103. Tax collectors may not allow any person to register for voting unless satisfied that his poll taxes have been paid. § 34–114. Appellant brought this suit in the superior court of Fulton county to have the clause of the constitution and the statutory provisions above mentioned declared repugnant to various provisions of the Federal Constitution and to compel appellee to allow him to register for voting without payment of poll taxes. The court dismissed his petition. The state supreme court affirmed. 183 Ga. 189; 188 S. E. 140.

The pertinent facts alleged in the petition are these. March 16, 1936, appellant, a white male citizen 28 years old, applied to appellee to register him for voting for federal and state officers at primary and general elections. He informed appellee he had neither made poll tax returns nor paid any poll taxes and had not registered to vote because a receipt for poll taxes and an oath that he had paid them are prerequisites to registration. He demanded that appellee administer the oath, omitting the part declaring payment of poll taxes, and allow him to register. Appellee refused.

Appellant maintains that the provisions in question are repugnant to the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment and to the Nineteenth Amendment.

1. He asserts that the law offends the rule of equality in that it extends only to persons between the ages of 21 and 60 and to women only if they register for voting

and in that it makes payment a prerequisite to registration. He does not suggest that exemption of the blind is unreasonable.

Levy by the poll has long been a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the Colonies and later in the States. To prevent burdens deemed grievous and oppressive, the constitutions of some States prohibit or limit poll taxes. That of Georgia prevents more than a dollar a year. Art VII, § II, par. III; Code § 2-5004. Poll taxes are laid upon persons without regard to their occupations or property to raise money for the support of government or some more specific end.[1] The equal protection clause does not require absolute equality. While possible by statutory declaration to levy a poll tax upon every inhabitant of whatsoever sex, age or condition, collection from all would be impossible for always there are many too poor to pay. Attempt equally to enforce such a measure would justify condemnation of the tax as harsh and unjust. See *Faribault* v. *Misener*, 20 Minn. 396, 398; *Thurston County* v. *Tenino Stone Quarries*, 44 Wash. 351, 355; 87 Pac. 634; *Salt Lake City* v. *Wilson*, 46 Utah 60, 66, *et seq.*; 148 Pac. 1104. Collection from minors would be to put the burden upon their fathers or others upon whom they depend for support.[2] It is not unreasonable to exclude them from the class taxed.

Men who have attained the age of 60 are often, if not always, excused from road work, jury duty and service

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[1] Dowell, History of Taxation and Taxes in England, Vol. III, c. 1. Bryce, the American Commonwealth, c. XLIII. Cooley, The Law of Taxation (4th ed.) §§ 40, 1773. *Hylton* v. *United States*, 3 Dall. 171, 175, 182. *Short* v. *Maryland*, 80 Md. 392, 397, *et seq.*; 31 Atl. 322. *Faribault* v. *Misener*, 20 Minn. 396.

[2] Section 74-105, Georgia Code, declares: "Until majority, [21 years] it is the duty of the father to provide for the maintenance, protection, and education of his child."

in the militia.[3] They have served or have been liable to be called on to serve the public to the extent that the State chooses to require. So far as concerns equality under the equal protection clause, there is no substantial difference between these exemptions and exemption from poll taxes. The burden laid upon appellant is precisely that put upon other men. The rate is a dollar a year, commencing at 21 and ending at 60 years of age.

The tax being upon persons, women may be exempted on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the State reasonably may exempt them from poll taxes. Cf. *Muller* v. *Oregon*, 208 U. S. 412, 421, *et seq.* *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 63. *Riley* v. *Massachusetts*, 232 U. S. 671. *Miller* v. *Wilson*, 236 U. S. 373, *Bosley* v. *McLaughlin*, 236 U. S. 385. The laws of Georgia declare the husband to be the head of the family and the wife to be subject to him. § 53–501. To subject her to the levy would be to add to his burden. Moreover, Georgia poll taxes are laid to raise money for educational purposes, and it is the father's duty to provide for education of the children. § 74–105. Discrimination in favor of all women being permissible, appellant may not complain because the tax is laid only upon some or object to registration of women without payment of taxes for previous years. *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447. *Rosenthal* v. *New York*, 226 U. S. 260, 270.

Payment as a prerequisite is not required for the purpose of denying or abridging the privilege of voting. It does not limit the tax to electors; aliens are not there permitted to vote, but the tax is laid upon them, if within

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[3] In Georgia, men are excused from road work at 50 (§ 95–401) from jury duty at 60 (§ 59–112) and from liability for service in the militia at 45 (§ 86–201; see also § 86–209).

the defined class. It is not laid upon persons 60 or more years old, whether electors or not. Exaction of payment before registration undoubtedly serves to aid collection from electors desiring to vote, but that use of the State's power is not prevented by the Federal Constitution. Cf. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44.

2. To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. *Minor* v. *Happersett,* 21 Wall. 162, 170 *et seq. Ex parte Yarbrough,* 110 U. S. 651, 664–665. *McPherson* v. *Blacker,* 146 U. S. 1, 37–38. *Guinn* v. *United States,* 238 U. S. 347, 362. The privileges and immunities protected are only those that arise from the Constitution and laws of the United States and not those that spring from other sources. *Hamilton* v. *Regents,* 293 U. S. 245, 261.

3. The Nineteenth Amendment, adopted in 1920, declares: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." It applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or state. *Leser* v. *Garnett,* 258 U. S. 130, 135. Its purpose is not to regulate the levy or collection of taxes. The construction for which appellant contends would make the amendment a limitation upon the power to tax. Cf. *Minor* v. *Happersett, supra,* 173; *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170, 173–174. The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many States and for more than a century in

Georgia.[4] That measure reasonably may be deemed essential to that form of levy. Imposition without enforcement would be futile. Power to levy and power to collect are equally necessary. And, by the exaction of payment before registration, the right to vote is neither denied nor abridged on account of sex. It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex. The challenged enactment is not repugnant to the Nineteenth Amendment.

Affirmed.

EXHIBIT 49

UNITED STATES *v.* TEXAS

UNITED STATES v. TEXAS

UNITED STATES of America,
Plaintiff,
v.
The STATE OF TEXAS et al., Defendants.
Civ. A. No. 1570.

United States District Court
W. D. Texas,
Austin Division.
Feb. 9, 1966.

Action by the United States challenging validity of Texas poll tax. The United States District Court for the Western District of Texas, Austin Division, sitting as a three-judge court, Thornberry, Circuit Judge, held that the Texas poll tax is not violative of equal protection clause or Fifteenth Amendment, but making payment thereof a precondition to voting is an unjustified restriction on rights guaranteed by due process clause.

Judgment in accordance with opinion.

1. Constitutional Law ⇐229(1), 274
Elections ⇐12, 18
Taxation ⇐55

The Texas poll tax is not violative of equal protection clause or Fifteenth Amendment, but making payment thereof a precondition to voting is an unjustified restriction on rights guaranteed by due process clause. U.S.C.A.Const. Amends. 14, 15, 24; V.A.T.S. Election Code, arts. 5.01, 5.02a; V.A.T.S. Tax.-Gen. art. 2.01; Vernon's Ann.St.Tex. Const. art. 6, § 2.

2. Taxation ⇐1

Although frequently thought of as tax on privilege of voting, "poll tax" is actually a head tax, "poll" meaning "head" rather than the term customarily used to describe a place of voting. V.A.T.S. Election Code, arts. 5.01, 5.02a; V.A.T.S. Tax.-Gen. art. 2.01; Vernon's Ann.St.Tex.Const. art. 6, § 2.

See publication Words and Phrases for other judicial constructions and definitions.

3. Elections ⇐12, 18

Primary purpose of 1902 Amendment to Texas Constitution making payment of poll tax a precondition to right to vote was desire to disenfranchise Negro and poor white supporters of Populist Party, but this fact was not alone sufficient reason for declaring the amendment unconstitutional over 50 years later. Vernon's Ann.St.Tex.Const. art. 6, § 2; V.A.T.S. Election Code, art. 5.02; U.S.C.A.Const. Amends. 14, 15, 24.

4. Constitutional Law ⇐215

Evidence established that dual structure of society developed in post-civil war Texas and resulted in denial of equal opportunities to the Negro. U.S.C.A.Const. Amend. 14.

5. Constitutional Law ⇐215

Evidence of discrimination in public education and of resulting economic disadvantages is a legitimate means to establish that poll tax was more of a burden upon Negro than upon white voter, but evidence adduced did not establish actual racial discrimination in Texas by overt use of poll tax to deprive Negro of right to vote.

6. Constitutional Law ⇐70(1)

Declaration by Legislature concerning public conditions that by necessity and duty it must know is entitled at least to great respect.

7. Elections ⇐12

Evidence before Congress warranted findings included in Voting Rights Act as to discriminatory purpose and effect of poll tax voting requirement, and such findings were worthy of great respect in determining validity of poll tax requirement as applied in state elections also. Voting Rights Act of 1965, § 10, 42 U.S.C.A. § 1973h.

8. Constitutional Law ⇐251

To determine whether a right is protected by due process clause, court must look to traditions and collective conscience of the people to determine whether a principle is so rooted there as to be ranked as fundamental. U.S.C.A.Const. Amend. 14.

9. Constitutional Law ⇐251

To determine whether a right is protected by due process clause, inquiry is whether the right is such that it cannot be denied without violating those fundamental principles of liberty and justice which lie at base of all our civil and political institutions. U.S.C.A.Const. Amend. 14.

10. Constitutional Law ⇐274

The right to vote is one of the fundamental personal rights included within concept of liberty as protected by due process clause. U.S.C.A.Const. Amend. 14.

11. Elections ⇐24

Poll tax voting requirement may not be sustained as method of purification and protection of ballot, in view of existence of other methods. U.S.C.A.Const. Amends. 14, 15, 24; V.A.T.S. Election Code, arts. 5.01, 5.02a; V.A.T.S. Tax.-Gen. art. 2.01; Vernon's Ann.St.Tex. Const. art. 6, § 2.

12. Elections ⇐19

Poll tax voting requirement in Texas may not be sustained as a substitute for a registration system. U.S.C.A.Const. Amends. 14, 15, 24; V.A.T.S. Election Code, arts. 5.01, 5.02a; V.A.T.S. Tax.-Gen. art. 2.01; Vernon's Ann.St.Tex. Const. art. 6, § 2.

13. Elections ⇐18

Poll tax voting requirement may not be sustained as a test of intelligence or competence of potential voters. U.S.C.A. Const. Amends. 14, 15, 24; V.A.T.S. Election Code, arts. 5.01, 5.02a; V.A.T.S. Tax.-Gen. art. 2.01; Vernon's Ann.St. Tex.Const. art. 6, § 2.

14. Taxation ⇐33

Poll tax voting requirement may not be sustained as legitimate method of collecting head tax, especially in view of state's voluntary abandonment of other methods of collections. U.S.C.A.Const. Amends. 14, 15, 24; V.A.T.S. Election Code, arts. 5.01, 5.02a; V.A.T.S. Tax.-Gen. art. 2.01; Vernon's Ann.St.Tex. Const. art. 6, § 2.

15. Elections ⇐18

Poll tax voting requirement is invalid as equivalent to imposition of charge or penalty on exercise of fundamental right. U.S.C.A.Const. Amends. 14, 15, 24; V.A.T.S. Election Code, arts. 5.01, 5.02a; V.A.T.S. Tax.-Gen. art. 2.01; Vernon's Ann.St.Tex.Const. art. 6, § 2.

Nicholas deB. Katzenbach, Atty. Gen., John Doar, Asst. Atty. Gen., Washington, D. C., Ernest Morgan, U. S. Atty., San Antonio, Tex., Stephen J. Pollak, 1st Asst. to Asst. Atty. Gen., Civil Rights Div., Washington, D. C., for plaintiffs.

John E. Clark, Trueman O'Quinn, Waggoner Carr, Atty. Gen. of Texas, Hawthorne Phillips, 1st Asst. Atty. Gen. of Texas, John Reeves, John H. Banks, Asst. Atty. Gen. of Texas, Doren R. Eskew, City Atty., Kenneth Jones, Asst. City Atty., Wallace Shropshire, Atty. for Travis County, Austin, Tex., for defendants.

Before BROWN and THORNBERRY, Circuit Judges, and SPEARS, District Judge.

THORNBERRY, Circuit Judge:

[1] In this action the Attorney General of the United States challenges the validity of the Texas poll tax,[1] pursuant to the provisions of Section 10(b) of the Voting Rights Act of 1965, 79 Stat. 437, and 42 U.S.C. 1971(c). The United States seeks to show that the requirement of the payment of a poll tax as a precondition for voting in Texas is a device conceived primarily to deprive Negroes of the franchise and that it has continued to have that effect because the inadequate and disparate educational opportunity given Negroes until recent years by the State has placed them at an economic disadvantage and made the payment of the $1.75 poll tax a heavier burden on the Negro than on whites, in violation of the Equal Protection Clause. The United States also alleges that the Texas poll tax deprives Negroes of the right to vote under the Fifteenth Amendment and that, irrespective of any discrimination, it is invalid under the Due Process Clause since it does not have any adequate state justification and is in fact a restraint and a charge on the exercise of the fundamental right to vote. Although we find that the Texas poll tax is not violative of the Equal Protection Clause or the Fifteenth Amendment, for reasons which we shall discuss at length, we hold that the payment of a poll tax as a precondition to voting must fall as an unjustified restriction on one of the most basic rights guaranteed by the Due Process Clause.

I.

The United States Attorney General filed a complaint invoking the jurisdiction of this three-judge District Court under the provisions of the Voting Rights Act of 1965, § 10, 79 Stat. 442-443.[2] Jurisdiction is also asserted under

1. Similar suits are being prosecuted in Alabama, Mississippi and Virginia. United States v. Alabama, M.D.Ala. 1965, No. 225-N; United States v. Mississippi, S.D.Miss.1965, No. 3791; Harper v. Virginia State Board of Elections (Butts v. Harrison), E.D.Va.1964, 240 F.Supp. 270, appeal pending, 382 U.S. 806, 86 S.Ct. 94, 15 L.Ed.2d 57 (brought prior to Voting Rights Act of 1965, United States as amicus curiae).

2. Sec. 10(a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons

42 U.S.C. 1971,[3] 28 U.S.C. 1345 [4] and 28 U.S.C. 2281.[5]

Standing to bring this suit is established by Section 10(b) of the Voting

the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

3. Sec. 1971(a) (1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

* * * * *

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any Federal election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

4. Sec. 1345. Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

5. Sec. 2281. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Rights Act of 1965 under which the Attorney General is "authorized and directed to institute forthwith * * * actions * * * against the enforcement of any requirement of the payment of a poll tax as a precondition to voting * * *" in areas where the requirement of such taxes denies or abridges the constitutional right of citizens to vote. The defendants are the State of Texas, the Judges of Election for Precinct Number 239 of Travis County, Texas, the Mayor of Austin, Texas, the Travis County Democratic and Republican Executive Committees and their Chairmen, and the Tax Assessor-Collector of Travis County, Texas.[6]

II.

[2] Although frequently thought of as a tax on the privilege of voting, the poll tax is actually a head tax. In this context, "poll" means "head" rather than the term customarily used to describe a place of voting.[7] The first poll tax in Texas, one dollar on white males from 21 to 55, was levied on June 12, 1837,[8] soon after Texas declared its independence from Mexico and became a Republic. From that time up until the Constitutional Amendment in 1902, there was no relation between the poll tax and the right to vote.[9] Negroes were enfranchised in Texas in 1869 [10] and became liable for the poll tax in 1870.[11] By 1870, there were 50,000 Negro and 60,000 white voters on the rolls. Proposals to make payment of the poll tax a qualification for voting were first raised in the 1875 Constitutional Convention [12] and frequently thereafter.[13] Finally, in 1901 the Texas Legislature, by Joint Resolution, proposed a constitutional amendment to make payment of the poll tax a prerequisite to voting,[14] and in 1902 the voters of Texas approved.[15]

We cannot improve on the following excellent summary of the Texas poll tax requirements found in the United States' brief: In order to vote in general, special and primary elections of the cities, counties and State, a person must be (1) twenty-one years old, (2) a citizen, (3) a resident of the State for one year and of the district or county in which the election is held for six months, and (4) a holder of a poll tax receipt, if liable for the tax.[16] The same preconditions apply to voting for federal officials except that the payment of poll taxes [17] has been pro-

6. The defendants other than the State of Texas were named because they typify officials throughout the State who have statutory duties in the enforcement of the poll tax.

7. Texas Legislative Council, Staff Research Report: A Survey of Taxation in Texas, Part IIB, 68 (1952) [hereinafter cited as Texas Legislative Council].

8. Laws of the Republic of Texas 1837, at 259, 262.

9. Texas Legislative Council, 71-73.

10. Tex.Const. art. III, § 1 (1869); Tex. Laws 1870, at 24.

11. Tex.Laws 1870, at 196.

12. Journal of the Constitutional Convention of 1875, at 238; Texas Legislative Council 72.

13. Texas Legislative Council 73. Proposals were introduced in the Texas Legislature in 1879 (Tex.Laws 1879, at 46; Tex.H.Jour. 1879, at 716); in 1883 (Tex. H.Jour. 1883, at 716); in 1889 (Tex.H. Jour. 1889, at 588); in 1891 (Tex.H.Jour. 1891, at 59); in 1895 (Tex.H.Jour. 1895, at 40); in 1899 (Tex.H.Jour.1899, at 445); and finally in 1901 as a proposed amendment to the Texas Constitution (Tex.H.Jour.1901, at 56, 59, 175; Tex.S.Jour. 1901, at 29).

14. Tex.S.Jour 1901, at 29; Tex.H.Jour. 1901, at 175.

15. Tex.S.Jour.1903, at 877.

16. Tex Const. art. VI, § 2, Tex. Election Code art. 5.02 (Supp.1965).

17. U.S.Const. amend. XXIV:

Sec. 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

A poll tax receipt for federal elections must be obtained during the same peri-

hibited by the adoption of the Twenty-Fourth Amendment. Insane persons, paupers supported by the county and persons convicted of a felony whose civil rights have not been restored are disqualified from voting.[18]

The poll tax is imposed on all residents of the State between the ages of twenty-one and sixty as of January 1 of the tax year.[19] The amount of the tax is $1.50,[20] but counties are authorized to require payment of an additional $.25 to defray the cost of collection. In addition, cities are authorized to impose a poll tax[21] of $1.00 as a precondition to voting in city elections. The tax must be paid between October 1 of the tax year and January 31 of the following year.[22] The deadline for payment precedes general elections in November by nine months. The Texas Constitution allocates one dollar of the tax to public education.[23]

Persons over the age of sixty on January 1 of the tax year are exempt from the tax,[24] but, if they live in a city of over 10,000 population, they must obtain "overage" certificates of exemption during the same four-month period that poll taxes are paid.[25] Persons over sixty who live in small towns or rural areas are allowed to vote without paying poll taxes or procuring a certificate of exemption. Persons who became 21 after the beginning of the tax year but before the election, regardless of the population of the area of residence, must obtain a certificate of exemption at least thirty days before the election.[26] The same rule applies to persons who become residents of the State after January 1 of the tax year.[27]

Poll taxes are paid to and certificates of exemption are issued by the County Tax Assessor-Collectors who are agents of the State for this purpose.[28] Payment of poll taxes may be tendered in person or mailed, and, in either case, payment may be made by the taxpayer himself or by certain close relatives.[29] The taxpayer must use his own money to pay the tax, since wilfully loaning or advancing money to another person for poll tax payment is punishable by a $500 fine.[30]

A County Tax Assessor-Collector "may at such places as shall in his discretion be necessary or advisable" appoint deputies for the purpose of accepting poll tax payments and issuing certificates of exemption.[31] In counties containing a city of 10,000 or more inhabitants, other than the county seat, provision is made by statute for a poll tax deputy to accept payments and issue exemption certificates in the city, but only during the month of January.[32] These statutes ap-

od that regular poll taxes are collected. The receipt, generally marked "Poll Tax Not Paid," is honored for federal elections only. Tex. Election Code art. 5.02a (Supp.1965).

18. Tex.Const. art. VI, § 1; Tex. Election Code art. 5.01 (Supp.1965).

19. Tex.Gen.Tax Code art. 2.01 (Supp. 1965); Tex. Election Code art. 5.02 (Supp.1965). Imposition of a poll tax by the legislature is expressly authorized by the Texas Constitution. Tex Const. art. VIII, § 1.

20. The tax is limited to $1.00 for insane and blind persons, persons suffering from certain permanent physical disabilities, and members of the active State militia. Tex.Gen.Tax Code art. 2.01 (Supp.1965); Tex. Election Code art. 5.02 (Supp.1965).

21. Tex.Rev.Civ.Stat. art. 1030 (1963).

22. Tex. Election Code art. 5.09 (Supp. 1965).

23. Tex.Const. art. VII, § 3. The remaining $.50 is allocated for general revenue purposes. Tex. Election Code art. 5.09 (Supp.1965).

24. Tex. Election Code art. 5.09 (Supp. 1965).

25. Tex. Election Code art. 5.16 (Supp. 1965).

26. Tex. Election Code art. 5.17 (Supp. 1965).

27. Ibid.

28. Tex. Election Code arts. 5.11-6.12 (Supp.1965).

29. Ibid.

30. Tex. Penal Code art. 204 (1952).

31. Tex. Election Code art. 5.11 (Supp. 1965).

32. Tex. Election Code art. 5.19 (1952).

pear to be the only provisions of Texas law related directly to procedures for the assessment and collection of poll taxes. The State Comptroller has broad statutory authority to prescribe forms and issue instructions to County Tax Assessor-Collectors,[33] and has issued a manual containing forms and instructions relating to assessment, collection and record-keeping procedures for various State taxes.

Texas does not have a separate system for registration of voters. At the time he pays his poll taxes, a prospective voter is required to show that he satisfies the voting preconditions of age, citizenship and residence. This information is recorded on his poll tax receipt, a copy of which is retained for use by the Tax Assessor-Collector in compiling lists of qualified voters.[34] Before April 1 of each year, the Tax Assessor-Collector of each county is required to compile and certify lists of the names of qualified voters, by election precinct, who have paid their poll taxes or received certificates of exemption during the statutory four-month period.[35] These lists are ultimately transmitted to the precinct judges of election.[36] With certain minor exceptions,[37] only persons whose names appear on such lists or on supplemental lists are allowed to vote.[38]

III.

The United States urges a number of theories as the basis of its attack on the constitutionality of the poll tax. It contends that the State of Texas by failing to provide Negroes with educational opportunities equivalent to those given to white students has limited their income-producing potential and that, as a result, the payment of the poll tax is a more difficult burden on the Negro than on the non-Negro. This disparity of educational and economic opportunity when coupled with a historical structure of social and political segregation is asserted to have deprived Negroes of the equal protection of the law guaranteed by the Fourteenth Amendment.

To establish this theory, the United States offered evidence of the relationship between educational level and income potential and statistics showing the inferior educational and vocational training formerly provided Negroes. Charts and figures were presented to show the disparity in annual instructional expenditures per pupil, in teacher salaries, in

33. Tex.Rev.Civ.Stat. art. 7201 (1960).

34. Tex. Election Code arts. 5.14, 5.16 (Supp.1965).

35. In addition, the County Tax Assessor-Collectors are required to file a monthly report with the State Comptroller during the four-month poll tax season (October through January). The form for this report is prescribed by the State Comptroller and reflects the number of poll taxes paid and certificates of exemption issued during the monthly reporting period.

36. Tex. Election Code art. 5.22 (Supp. 1965).

37. Persons who pay poll taxes in one county and thereafter move to another county or to another election precinct in the same county may, upon complying at the polls with certain conditions, vote in the precinct of their new residence, even though their names do not appear in the precinct list of qualified voters. This procedure does not apply to persons who move into or change election districts within a city of over 10,000 population. Such persons must present their poll tax receipts, certificates of exemption, or affidavits of loss thereof to the Tax Assessor-Collector and have their names added to the list of qualified voters. Tex. Election Code art. 5.15 (Supp.1965).

As noted supra, p. 239, persons over 60 who live in small towns and rural areas are not required to pay poll taxes or procure certificates of exemption.

38. If a judge of election allows a person to vote whose name is required to be listed but is not so listed, the judge is subject to a $500 fine. Tex. Penal Code art. 216 (1952).

number of pupils per teacher and in the value of school property and equipment.[39]

As evidence of the effect of the poll tax on Negroes, the United States submitted statistics on the number of whites and Negroes between the ages of 21 and 60 who actually paid the poll tax as compared to the total number of potentially eligible voters of each race. Their figures for 187 out of 254 counties showed that 57.3% of the eligible whites paid the poll tax in 1964, while 45.3% of the eli-

39:

TEXAS STATE TOTALS

Yearly Instructional Expenditures Per Pupil

	White	Negro
1930–31	$ 43	$ 20
1934–35	36	18
1940–41	47	26
1946–47	80	62
1952–53	175	133
1956–57	205	190

Teacher Salaries

1930–31	$1033	$ 623
1934–35	900	557
1940–41	1140	704
1946–47	1905	1521
1951–52	1707	1640

Number of Pupils Per Teacher—Average Daily Attendance

1930–31	$ 24	$ 31
1934–35	25	31
1940–41	24	27
1946–47	24	25
1954–55	22	22
1960–61	21	22

Number of Pupils Per Teacher—Enrollment

1930–31	$ 32	$ 44
1934–35	31	41
1940–41	–	–
1946–47	–	–
1954–55	25	26
1960–61	23	25

Value of School Property and Equipment Per Year Per Child

1930–31	Property	$ 149	$ 38
	Equipment	7.10	1.28
1935–36	Property	159	55
	Equipment	9	2
1940–41	Property	201	64
	Equipment	14	3
1945–46	Property	225	75
	Equipment	22	6

gible Negroes paid.[40] The United States contends that this variation of 12% demonstrates the discriminatory effect of the poll tax on Negroes whose income potential has been stymied by lack of educational opportunity.

The United States also argues that, aside from considerations of race, the poll tax necessarily discriminates against the poor, denying them equal protection of the law. To support this contention, the United States offered evidence that one purpose of the adoption of poll tax payment as a precondition for voting was to disenfranchise the poor who formed the backbone of the Populist Party.[41] The deposition of Mollie Orshansky, an expert on poverty, was introduced to show that, for persons living "below the poverty line,"[42] the poll tax fee must compete with the basic necessities of life, placing a substantial handicap upon the poor's exercise of the right to vote.[43]

As evidence that the purpose and effect of the Texas poll tax is to discriminate against Negroes in violation of the Fifteenth Amendment, the United States traced the historical development of the poll tax as a prerequisite to voting in the State of Texas. Although various theories have been advanced to explain the passage of the 1902 constitutional amendment making payment of the poll tax a prerequisite for voting, the United States submitted excerpts from speeches of proponents and opponents of the amendment, from newspaper articles and editorials and from the comments of historians to show its discriminatory objective.[44]

40. The State asserted that 55.9% of the white population over 21 had qualified to vote and that 50.2% of the Negroes over 21 years had so qualified. The discrepancy between these figures may be explained by the State's inclusion in its calculations of those who received free poll taxes and exemptions—*i.e.*, those who had just reached 21 years of age, those over 60 years of age and those who received the free Federal poll tax receipts.

41. See *infra*, p. 243.

42. The "poverty line" is defined in relation to calculations of a minimum adequate level of living.

43. Miss Orshansky estimated that at least 600,000 Texans between the ages of 21 and 59 are living below the poverty line.

44. Delegates to the Constitutional Convention:

Delegate Mills "said he understood this as a thrust against the colored men, and was a violation of their rights." State Gazette (Austin, Texas), Oct. 7, 1875, quoted in McKay, The Texas Constitutional Convention of 1875, at 168.

Delegate Weaver contended:

"Neither do I consider it an argument of any value, that it might deprive the colored man of the right of suffrage. This is not an argument to me. I believe in the supremacy of the Anglo-Saxon race above negroe * * * but * * * I believe that the negroes, as Mr. Mills has said, will sell their hats, boots, and shoes to pay their tax and qualify themselves for the polls and will struggle to the last. Nay, I do not know but that some of them would even steal to get enough to pay their poll tax and vote."
State Gazette (Austin, Texas), Oct. 14, 1875, quoted in McKay, The Texas Constitutional Convention of 1875, at 171.

According to Judge Ballinger, also a delegate to the Convention:

"They had proposed a poll tax, intending merely, whatever they might say to the contrary, to reach the colored people and make it a fundamental condition of suffrage * * *. Whatever argument might be used in its defense, the clause was simply a restriction on the right of suffrage of the poor people of the State."
State Gazette (Austin, Texas), Oct. 8, 1875, quoted in McKay, The Texas Constitutional Convention of 1875, at 181.
Newspaper articles and editorials:

"It remains to be seen what effect the adoption of this amendment will have on the suffragists of Texas. It is asserted by some that its obstensible object of increasing the revenues of the State will not be realized; that, in fact, the prime movers in this piece of legislation never had the object of adding to the revenues of the State in view and that their real purpose was to disfranchise the shiftless element of voters."
San Antonio Daily Express, Nov. 8, 1902, p. 1, col. 5.

"Are those who pay nothing toward the support of the government the peers of those who do? Has the drone the right to share equally the privileges of the industrious? Must the low groveling equal-

Insight into the motives of Texas voters can be gained, the United States contends, by viewing the Texas amendment as part of the Southern movement to use the poll tax rather than intimidation to disfranchise the Negro.[45] Between 1889 and 1902, ten Southern states made the poll tax a prerequisite for voting.[46] Florida led off in 1889,[47] followed by Mississippi [48] and Tennessee [49] in 1890, Arkansas [50] in 1892, South Carolina in 1895,[51] Louisiana in 1898,[52] North Carolina in 1900,[53] Alabama in 1901,[54] Virginia [55] and Texas in 1902, and Georgia [56] in 1908.

A 1952 Staff Report to the Texas Legislative Council [57] concluded that:

> No single factor accounts for acceptance of the poll tax as a prereq-

before-the-law, lazy, purchaseable negro, who pays no taxes, have the privilege of neutralizing the vote of a good citizen and taxpayer?"
Houston Telegraph, Oct. 10, 1875, quoted in McKay, Debates of the Texas Constitutional Convention of 1875, at 98.
Scholars and Historians:
Professor Frederic D. Ogden, the leading student of the poll tax, concluded that the "use of the poll tax in the South for suffrage restriction dates back primarily to the period from 1890 to 1908. * * * It is obvious that one reason why southern states adopted the poll tax and other suffrage restrictions in the period from 1890 to 1908 was to disfranchise the Negro. * * * In Mississippi, payment of the tax was made a voting prerequisite largely because of the belief that whites would be more apt to pay it than Negroes. The situation was similar in Texas."
Ogden, The Poll Tax in the South 2, 4–5, 7 (Univ. Ala. Press 1958) (footnotes omitted), cited in Harman v. Forssenius, 1965, 380 U.S. 528, 529, 539, 540, 85 S.Ct. 1177, 14 L.Ed.2d 50.

45. Ogden, op. cit. supra, note 44, at 5, 7–10, 30–31.

46. Texas Legislative Council 70.

47. Fla.Laws 1889, ch. 3859 at 31.

48. Miss.Const. §§ 241, 243 (1890); Miss. Code §§ 3160–63 (1942). The Supreme Court of Mississippi has explicitly acknowledged that the State's poll tax was intended to "obstruct the exercise of the franchise by the negro race." Ratliff v. Beale, 1896, 74 Miss. 247, 266–267, 268, 20 So. 865, 868, 34 L.R.A. 472.

49. Tenn.Acts 1890, ch. 26, at 67.

50. Ogden, op. cit. supra, note 44, at 2–3.

51. Ibid. Ogden relates that at the South Carolina Constitutional Convention of 1895 which adopted the tax, Benjamin R. Tillman decried Negro voting and stated the Convention's purpose to be "to put such safeguards around the ballot in the future to so restrict the suffrage and circumscribe it, that this infamy can never come about again." Id. at 5–6.

52. According to Ogden, the President of the Louisiana Constitutional Convention that adopted the tax commented of the new Constitution: "Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for? (applause)" Id. at 6 Footnotes omitted.).

53. Id. at 3.

54. The author described the debate on the tax at the Alabama Constitutional Convention of 1901:
"One of the delegates in the Alabama Convention stated that he believed that the poll tax would disfranchise ten Negroes to one white man. Another delegate, who approved using the revenue for educational purposes, thought that the tax would both disfranchise Negroes and educate white children. Other members of this convention regarded the poll tax as the primary solution for their suffrage problem, frequently stated to be that of disfranchising the Negro without at the same time disfranchising any whites." Id. at 6 (Footnotes omitted.).

55. Va.Const. §§ 18, 20–22, 35, 38, 173. Ogden also quotes a delegate-supporter of the poll tax at that convention: "It will not do away with the negro as a voter altogether, but it will have the effect of keeping numbers of the most worthy and trifling of that race from the polls. I do not know of anything better in view of the fifteenth amendment." Ogden, op. cit. supra, note 44, at 7.

56. Ga.Acts 1908, at 27.

57. The Texas Legislative Council is an organ of the State Legislature composed of fifteen legislators, the Speaker of the House and the President of the Senate and operates pursuant to State law with a professional staff. Tex.Rev.Civ.Stat. art. 5429b (1958).

uisite for voting. Obviously, the movement had been underway a long time, and such an issue, constantly pressed, has a way of eventually gaining public favor. However, it would appear that at least three important elements were involved. In the first place, there was the desire to purify the ballot. This was one of the reasons most often advanced by supporters of the proposed constitutional amendment. Apparently, they felt that "vote-buying" and other fraudulent election practices would be substantially reduced by adding to the cost of vote-purchasing and by having more carefully regulated election administration. Second, there was a desire to disfranchise the Negro. And third, there was the essentially defunct Populist Party. The Populist or People's Party was an important element in the politics of many sections of the United States during the 1890's. The party was radical in its views and received its main backing from struggling farmers and from labor. This organization was anathema to many of the politicians of that day. Thus some proponents of a poll tax requirement for voting saw in it a method of disfranchising the people who had formed the backbone of the Populist Party.[58]

The State of Texas contends that there is no evidence that the poll tax in Texas discriminates against anyone because of race or economic status. The State notes that the poll tax is imposed on everyone between the ages of 21 and 60 and that, according to the Attorney General of the United States and the Voting Rights Commission of 1961, no voting discrimination exists in Texas. In his testimony before the Senate Judiciary Committee, the Attorney General made the following statements:

> Could I say two things. One, that the Department of Justice and the Civil Rights Commission has never had one single complaint on voters' discrimination arising in the State of Texas. The point 2 that I want to make, a higher percentage of Negroes are registered in proportion to the Negro population of Texas than whites. 58 percent of the Negroes are registered; 56 percent of the whites are registered.
>
> * * * * * *
>
> Mexicans registered are even a higher percentage than the Negroes.[59]

The United States asserts that these figures should not be given weight since they were based on "estimates" made by the Southern Regional Council which have proved inaccurate in the light of the evidence assembled for this lawsuit.

The Civil Rights Commission of 1961 concluded that

> The right to vote without distinctions of race or color—the promise of the 15th amendment—continues to suffer abridgment. Investigations, hearings, and studies conducted by the Commission since its 1959 Report indicate, however, that discriminatory disfranchisement is confined to certain parts of the country—indeed that it does not exist in 42 States. But in about 100

58. Texas Legislative Council 73 (Footnotes omitted).

The United States asserts that the tax was not linked to voting for the purpose or with the effect of increasing the number of payers. The percentage of those liable who were paying was rising before the tie to voting and, with rare exceptions, has declined since. Thus, 53.8% of those liable paid in 1896, but only 33.5% in 1950 and 42.3% in 1960.

59. Hearing on S. 1564 Before the Senate Committee on the Judiciary (Executive Session), vol. 2, at 117 (April 7, 1965).

counties in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee, there has been evidence, in varying degree, of discriminatory disfranchisement.[60]

The United States claims that the definition of "discriminatory disfranchisement" did not include poll taxes and their effect, but was limited to overt and deliberate discrimination and that the Commission recommended that the Congress abolish the poll tax as a precondition to voting.

IV.

In the light of the evidence asser[illegible] by the United States and the defendants, this Court hereby makes the following findings and conclusions:

[3] (1) A primary purpose of the 1902 Amendment to the Texas Constitution making payment of a poll tax a precondition to the right to vote was the desire to disenfranchise the Negro and the poor white supporters of the Populist Party. The fact that the Amendment was conceived for this invidious purpose over half a century ago is not alone a sufficient reason today for declaring it unconstitutional.

[4] (2) This Court acknowledges that a dual structure of society developed in post-Civil War Texas and has resulted in a denial of equal opportunities to the Negro. The disparity in state support of white and Negro education until recent years stands as the most vivid example of this dual structure and leaves a substantial proportion of the present adult Negro population as products of its discrimination.

(3) Even though the poll tax was established as a prerequisite for voting in part to disenfranchise the Negro and even though the Negro has been relegated to a position of second-class opportunity by policies of segregation and inadequate education, the evidence does not establish that the poll tax in Texas discriminates against Negroes in violation of the Fifteenth Amendment or the Equal Protection Clause.

[5] The evidence clearly shows, and the United States does not dispute, that as least during the last twenty years there has not been any attempt to use the poll tax overtly to deprive the Negro of his right to vote. Despite unlimited pretrial discovery, no instances of outright discrimination have been shown or alleged. In fact, the United States has relied primarily on evidence of discrimination in public education and the resulting economic disadvantages to establish that the poll tax is more of a burden upon the Negro than upon the white voter. Although we consider the United States' method of proof a legitimate means for reaching such a conclusion, the facts will not support a finding of racial discrimination. The figures most favorable to the United States' position indicate that of the eligible persons between the ages of 21 and 60, 57.3% of the whites and 45.3% of the Negroes pay their poll tax. It is to be noted that both of these figures, although not commendable in terms of the total electorate, are subtantial and that the difference between them is only 12%. If the disparity had been larger, we might have been more inclined to accept the evidence of a historical background of discrimination and the result of the poll tax sales as sufficient to justify a finding that the poll tax discriminates against Negroes. The disparity, however, is not glaring. Indeed, it is relatively small. The evidence points to other possible reasons for this difference. In some counties, the percentage of both white and Negro voters paying the poll tax is substantially higher than the aver-

60. Civil Rights Commission, Report on Voting, book 1, at 133 (1961).

age,[61] while in others it is lower.[62] In a few counties, the percentage of Negro poll tax holders exceeds that of white poll tax holders.[63]

61:

Sample Counties Where Both White and Negro Poll Tax Payments are Higher Than the Average

County	Persons 21–59 (in 1960)		Poll Tax Payers (1964)		Percent of Persons 21–59 Paying Poll Tax	
	White	Negro	White	Negro	White	Negro
Angelina	15,492	2,976	11,316	1,837	73.0	61.7
Chambers	3,911	936	3,035	690	77.6	73.7
Hardin	9,351	1,605	6,579	948	70.4	59.1
Lee	3,026	705	1,984	422	65.6	59.9
Montgomery	9,407	2,347	7,243	1,449	77.0	61.7
Newton	2,935	1,204	2,040	766	69.5	63.6
Sabine	2,339	711	1,766	493	75.5	69.3
San Jacinto	1,245	1,055	1,056	781	84.8	74.0

62:

Sample Counties Where Both White and Negro Poll Tax Payments are Lower than the Average

County	Person 21–59 (in 1960)		Poll Tax Payers (1964)		Percent of Persons 21–59 Paying Poll Tax	
	White	Negro	White	Negro	White	Negro
Coryell	10,361	665	3,720	22	35.9	3.3
El Paso	139,752	5,430	50,376	817	36.0	15.0
Potter	51,362	3,589	20,499	1,417	39.9	39.5
Walker	7,407	3,208	2,924	1,239	39.5	38.6

63:

Sample Counties Where Negro Poll Tax Payers Exceed Whites

County	Persons 21–59 (in 1960)		Poll Tax Payers (1964)		Percent of Persons 21–59 Paying Poll Tax	
	White	Negro	White	Negro	White	Negro
Midland	31,155	2,975	18,526	2,059	59.5	69.2
Nacogdoches	9,232	2,903	5,113	1,821	55.4	62.7
Polk	4,125	1,575	2,571	1,324	62.3	84.1
Smith	30,668	9,755	17,232	5,744	56.2	58.9
Upshur	6,489	1,921	4,453	1,515	64.9	78.9

Perhaps this is merely a reflection of the general apathy level in different parts of the State. A mere 84,297 persons out of a possible 1,495,988 eligible took advantage of the free federal exemptions. The figures available from a number of counties with heavy Negro population show a meager response to this opportunity to vote without paying the poll tax.[64] In spite of all the evidence submitted by the United States, there are still too many unknown variables which may reasonably explain the relatively small discrepancy between white and Negro payment of the poll tax.

(4) The United States asserts that the poll tax discriminates against the poor as a class. Certainly, we may assume any non-progressive tax results in a greater hardship on the poor than on the non-poor. The question, however, is whether the poll tax is an unconstitutional discrimination against the poor because of the harder burden its lays on them. Since we have held that the Texas poll tax is invalid under the Due Process Clause, we find it unnecessary to consider this contention.

V.

Section 10(a) of the Voting Rights Act of 1965 states the Congressional finding that

> the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.[65]

The Attorney General of the State of Texas contends that the members of Congress had no evidence to substantiate their findings in relation to the Texas poll tax. In support of this allegation, he offered letters from fifty-nine legislators who answered his inquiry. Fifty-eight of the fifty-nine stated that no evidence had been offered to support the findings as to Texas. The United States, however, submitted excerpts from the legislative history of the Voting Rights Act of 1965, the Twenty-Fourth Amendment and earlier poll tax bills to refute the State's contention. In part, these records show that Congress had evidence that of the six states with the lowest voter

64:

County	Persons 21–59 (in 1960)		Percent of Persons 21–59 Paying Poll Tax (in 1964)		Persons Not Paying Poll Tax (in 1964)		Federal Exemption Certificates	
	White	Negro	White	Negro	White	Negro	White	Negro
Brazoria	33,111	4,562	70.5	35.1	9,783	2,960	135	0
Galveston	54,830	14,007	63.7	49.5	19,911	7,071	573	7
Harris	502,080	118,355	60.0	51.0	200,823	58,052	10,428	1,604
Harrison	12,225	7,482	64.6	36.9	4,328	4,721	59	23
Jefferson	94,278	25,894	63.6	48.1	34,292	13,435	495	116
McLennan	60,425	10,079	49.7	41.4	30,413	5,904	660	16
Tarrant	238,274	27,413	52.2	34.4	113,859	17,973	6,069	411
Travis	88,492	12,000	77.0	57.9	20,333	5,099	951	67

65. Voting Rights Act of 1965, § 10(a), 79 Stat. 442.

turnout in the 1964 elections, four have poll tax requirements;[66] Several Congressmen testified that poll taxes in Texas and in general were a burden on the poor and were discriminatory.[67] There was evidence before both the House and the Senate that the poll tax could not properly be justified as a qualification for voting [68] or as a revenue measure [69] and that historically it has been a device to disenfranchise the Negro.[70]

The Congress' experience with the poll tax was summarized recently by the Su-

66:

State	Voting Age Population	Total Vote Cast–1964 Presidential Election	Percentage of Voting Age Population
* Alabama	1,915,000	689,818	36
Georgia	2,636,000	1,139,352	43
* Mississippi	1,243,000	409,146	33
South Carolina	1,380,000	524,748	38
* Texas	5,922,000	2,626,811	44
* Virginia	2,541,000	1,042,267	41

* Poll tax states.

Hearings Before a Subcommittee of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, at 29 (1965).

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67. See, e. g., Senator Ralph Yarborough, Texas, 111 Cong.Rec. 9573 (1965); Senator Birch E. Bayh, 111 Cong.Rec. 9704 (1965); and Senator Joseph D. Tydings, 111 Cong.Rec. 9696–97 (1965).

68. Nothing in the payment of a poll tax evidences one's "qualification" to vote. A man with a million dollars in the bank cannot vote if he fails to pay the tax; a man who steals a couple of dollars to pay the tax has met this condition. A poll tax has nothing in common with true "qualifications": Age (reflecting maturity of judgment); residency (reflecting knowledge of local conditions), etc. Once it is demonstated that the poll tax cannot be justified as a qualification for voting fixed by the States under article I of the Constitution, good cause for this restriction on the right to vote is hard to find.

H.R.Rep. No. 439, 89th Cong., 1st Sess. 22 (1965); see S.Rep. No. 162, 89th Cong., 1st Sess., pt. 3, at 34 (1965), U.S. Code Cong. & Ad. News, p. 2437.

69. "No one seriously contends that it is a revenue measure. Forty-six states deem it unwise." H.R.Rep. No. 439, 89th Cong., 1st Sess. 22 (1965).

Senator Edward M. Kennedy of Massachusetts provided the following statistics on public education revenues, 111 Cong. Rec. 9577 (1965):

Further evidence to show that States could not be possibly reliant upon these taxes can be seen from the fact that in 1954, for example, Alabama spent almost $95 million for its schools and collected half a million dollars in poll taxes; in 1955 Mississippi spent $26 million on its schools and collected half a million dollars in poll taxes; while Texas, spending over $205 million for free schools and vocational education, received only $1,400,000 of poll tax revenue available for these schools; and Virginia in 1954 spent $67.7 million for schools, collecting only $972,000 from poll taxes.

70. The 1965 Senate Committee Report quoted the following statements from a 1943 Report of the Senate Judiciary Committee:

We think a careful examination of the so-called poll tax constitutional and statutory provisions, and an examination particularly of the constitutional conventions by which these amendments became a part of the State laws, will convince any disinterested person that the object of these State constitutional conventions, from which emanated mainly the poll tax laws, were motivated entirely and exclusively by a desire to exclude the Negro from voting.

S.Rep. No. 162, 89th Cong., 1st Sess., pt. 3, at 33 (1965).

preme Court in Harman v. Forssenius, 1965, 380 U.S. 528, 538–540, 85 S.Ct. 1177, 1184–1185, 14 L.Ed.2d 50:

> Prior to the proposal of the Twenty-fourth Amendment in 1962, federal legislation to eliminate poll taxes, either by constitutional amendment or statute, had been introduced in every Congress since 1939. The House of Representatives passed anti-poll tax bills on five occasions and the Senate twice proposed constitutional amendments. Even though in 1962 only five States retained the poll tax as a voting requirement, Congress reflected widespread national concern with the characteristics of the tax. Disenchantment with the poll tax was many-faceted. One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise. Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax. * * * Another objection to the poll tax raised in the congressional hearings was that the tax usually had to be paid long before the election—at a time when political campaigns were still quiescent—which tended to eliminate from the franchise a substantial number of voters who did not plan so far ahead. The poll tax was also attacked as a vehicle for fraud which could be manipulated by political machines by financing block payments of the tax. In addition, and of primary concern to many, the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner. (Footnotes omitted).

[6, 7] As the Supreme Court noted in Block v. Hirsh, 1921, 256 U.S. 135, 154, 41 S.Ct. 458, 459, 65 L.Ed. 865:

> No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law * * * may not be held conclusive by the Courts. * * * But *a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect.* (Emphasis added.)

In the light of the numerous bills affecting the poll tax during the last twenty-five years, the public attention focused on this controversial topic, the special acquaintance of legislators with all aspects of voting, and the fact that Congress is not confined to the type of evidence which would be admissible in a court, there can be little doubt that there was sufficient evidence before Congress from which it could make the findings found in Section 10(a) of the Voting Rights Act. "[T]he Legislature, acting within its sphere, is presumed to know the needs of the people of the state * * * and this presumption cannot be overthrown, as it has been sought to be overthrown, by testimony of individual legislators * * *" or by the letters submitted to this case. Townsend v. Yeomans, 1930, 301 U.S. 441, 451, 57 S.Ct. 842, 847, 81 L.Ed. 1210. See Clark v. Paul Gray, Inc., 1939, 306 U.S. 583, 594, 59 S.Ct. 744, 83 L.Ed. 1001. There being a rational basis for the Congressional findings, we deem them worthy of "great respect" in determining the validity of the poll tax requirement for voting.

We have also taken note of the mandate of Section 10(c) of the Voting Rights Act of 1965 that "it shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited" and, with the excellent cooperation of counsel on both sides, have endeavored to comply with it.

VII.

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle

of our constitutional system." Stromberg v. People of State of California, 1931, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed. 1117. Yet how ineffective is this "political discussion" protected by the First Amendment if its ultimate objective can be denied at the ballot box.

Even though not specifically mentioned in the Constitution, the right to vote clearly constitutes one of the most basic elements of our freedom—the "core of our constitutional system." Carrington v. Rash, 1965, 380 U.S. 89, 96, 85 S.Ct. 775, 13 L.Ed.2d 675. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Wesberry v. Sanders, 1964, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481. See Harman v. Forssenius, 1965, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50; Carrington v. Rash, supra; Reynolds v. Sims, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; Yick Wo v. Hopkins, 1886, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. It would be ironic, indeed, if the Constitution did not protect the right to vote, since that right has long been acknowledged to be "preservative of all rights." Yick Wo v. Hopkins, supra, at 370, 6 S.Ct. at 1071.

The Supreme Court "has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name." Griswold v. State of Connecticut, 1965, 381 U.S. 479, 486 n. 1, 85 S.Ct. 1678, 1683, 14 L.Ed.2d 510 (concurring opinion, Goldberg, J.). Among the many rights which have been found to be constitutionally protected though not expressly mentioned in the Constitution are: the right to marital privacy, Griswold v. State of Connecticut, supra; the right to travel, Kent v. Dulles, 1958, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204; Aptheker v. Secretary of State, 1964, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992; the right to educate one's children as one chooses, Pierce v. Society of Sisters, 1925, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, and the "freedom to associate and privacy in one's associations." NAACP v. State of Alabama, 1958, 357 U.S. 449, 462, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488. While some rights have been found to be implicit in one or more of the first nine amendments to the Constitution (see, e. g., Griswold v. State of Connecticut, supra; NAACP v. State of Alabama, supra), others have found protection within the concept of "liberty" in the due process clauses of the Fifth and Fourteenth Amendments (see, e. g., Kent v. Dulles, supra; Pierce v. Society of Sisters, supra).

[8, 9] To determine whether a right is protected by the due process clause, a court

> must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] * * * as to be ranked as fundamental." Snyder v. Com. of Massachusetts, 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 L.Ed. 674]. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' * * *." Powell v. State of Alabama, 287 U.S. 45, 67 [53 S.Ct. 55, 63, 77 L.Ed. 158]

Griswold v. State of Connecticut, supra, 381 U.S. at 493, 85 S.Ct. at 1686 (concurring opinion, Goldberg, J.).

[10] When measured against these standards and examined in the light of Supreme Court pronouncements describing it as our most "precious" right, Wesberry v. Sanders, 1964, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481, and as the "essence of a democratic society," Reynolds v. Sims, 1964, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506, it cannot be doubted that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.

VIII.

In Texas, the right to vote is denied to those who have not paid the poll tax or

obtained an exemption. As stated by the Supreme Court

> fundamental personal liberties * * * may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," Bates v. City of Little Rock, 361 U.S. 516, 524 [80 S.Ct. 412, 417, 4 L.Ed. 2d 480]. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. State of Florida, 379 U.S. 184, 196 [85 S.Ct. 283, 290, 13 L.Ed.2d 222]. See Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 161 [60 S.Ct. 146, 151, 84 L.Ed. 155].

Griswold v. State of Connecticut, 1965, 381 U.S. 479, 497, 85 S.Ct. 1678, 1688 (concurring opinion, Goldberg, J.). Thus, we must determine whether the Texas poll tax as a restraint on the right to vote may be upheld as "necessary * * * to the accomplishment of a permissible state policy."

The tying of the payment of a head tax to the exercise of the franchise has been rationalized in a number of ways since the days of its first proponents. As this Court has found, one of the prime purposes of the 1902 Amendment to the Texas Constitution was to disenfranchise the Negro and the poor white supporters of the Populist Party. Needless to say, that objective cannot now be used to justify the poll tax as a prerequisite to voting. Other advocates have suggested that the poll tax requirement (1) purifies and protects the ballot, (2) serves as a registration device, (3) limits the electorate to those interested enough to buy a poll tax and competent enough to accumulate the $1.75, and (4) is a legitimate method of enforcing an otherwise valid tax. In weighing these possible justifications, this Court must be sure that, when the State attempts to achieve a legitimate end, it does not use means "which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, ex rel. Flowers, 1964, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325; Griswold v. State of Connecticut, supra, 381 U.S. at 485, 498, 85 S.Ct. at 1682, 1689. "[I]n an area so closely touching our most precious freedoms," "precision of regulation must be the touchstone * * * ," NAACP v. Button, 1963, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed. 2d 405; Griswold v. State of Connecticut, supra, 381 U.S. at 498, 85 S.Ct. at 1689 and "the breadth of legislative abridgement must be viewed in the light less drastic means for achieving the same basic purpose." Shelton v. Tucker, 1960, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231.

[11] Under the stringent requirements of these constitutional standards, none of the suggested justifications may be sustained. Purification and protection of the ballot may be accomplished by other means as the State of Texas has recognized by the passage of numerous penal provisions.[71] Indeed, the continu-

71. Under the Texas Penal Code it is a crime for an election official to intimidate a votor (art. 220); to refuse to permit voters to vote (art. 217); to influence voters (art. 218); to permit alteration or premature removal of ballots (art. 219); to compare the executed ballot with the voter list (art. 221); to change a ballot (art. 223); to fail to secure the ballots (art. 226); to make a false canvass (art. 227); or to make a false certificate (arts. 228, 229). A person voting illegally is subject to a five-year penitentiary sentence (art. 232). It is a crime to instigate illegal voting (art. 233); to swear falsely as to qualifications to vote (art. 234); to procure a voter to swear falsely (art. 235); to procure an illegal vote (art. 237); to falsely impersonate another (art. 239); or to vote more than once (art. 241). A person altering or destroying ballots faces a five-year penitentiary sentence (art. 244). Riots, unlawful assembly and misconduct at elections are crimes (arts. 253–261).

ing occurrence of vote-buying prosecutions would indicate that the poll tax requirement has not even been an effective device for protecting the purity of the ballot.[72]

[12] Although the poll tax system in Texas does serve as a substitute for a registration system, it is difficult to comprehend the necessity of collecting $1.75 merely to register potential voters, especially since only a portion of those qualified are required to pay the tax. As the Supreme Court noted in Harman v. Forssenius, 1965, 380 U.S. 528, 543, 85 S.Ct. 1177, 1186, 14 L.Ed.2d 50, "the forty-six states which do not require the payment of poll taxes have apparently found no great administrative burden in insuring that the electorate is limited to bona fide residents." The availability of other registration devices which do not impede the right to vote undermines this basis for justifying the poll tax.

[13] The State in its brief asserts that "it appears ridiculous to state that anyone who is interested in the welfare and the conduct of the government * * * would or could not save the sum of $1.75 during the course of a year" and that "any person, white or colored, who was incapable of managing his affairs and acquiring during the course of one year the insignificant sum of $1.75 certainly is not intelligent enough or competent enough to manage the affairs of the government." Regardless of whether the ability to accumulate a sum of money is a valid criterion for determining qualification to vote,[73] the actual administration of the poll tax laws clearly indicates that no such standard has ever been applied in Texas. The ignorant and incompetent spouse, parent or child may vote if some member of his family remembers to purchase a poll tax for him.[74] Anyone who becomes 21 years old after the beginning of the tax year but before the election [75] or who is over 60 years old [76] may vote without paying a poll tax fee [77] or without showing the intelligence or competence necessary to accumulate $1.75 in one year. Thus, it is obvious that the poll tax in Texas is not a "test" of the intelligence or the competence of potential voters.

[14] The final basis of justification, and the only one seriously relied on by the State, is that the tying of the poll tax to the right to vote is a legitimate method of collecting the head tax which is imposed upon all Texans between the ages of 21 and 60. Over the years there have existed several means for enforcing the poll tax. An 1891 law, which was repealed in 1965, provided that delinquent

72. Vernon's Annotated Texas Statutes report numerous appellate actions of fraudulent vote buying involving the poll tax: e. g., Duncan v. Willis, 1957, 157 Tex. 316, 302 S.W.2d 627; Longoria v. State, 1934, 126 Tex.Cr.R. 362, 71 S.W.2d 268; Johnson v. State, 1915, 77 Tex.Cr.R. 25, 177 S.W. 490; Beach v. State, 1914, 75 Tex.Cr.R. 434, 171 S.W. 715; Solon v. State, 1908, 54 Tex.Cr.R. 261, 114 S.W. 349; Fugate v. Johnston, Tex.Civ. App.1952, 251 S.W.2d 792.

73. The proposition suggests the period in history when only the landed gentry were considered fit to participate in the affairs of government.

In the same vein the Senate Committee Report stated that

> the poll tax, in essence, puts a price on the ballot, and if you can pay this price you are "qualifed" to vote—if you cannot pay this sum you are somehow not a qualified citizen. This remnant from the days of property "qualifications" for voting purposes cannot stand. For the payment of a poll tax tells us nothing about a citizen's qualifications as an elector. This requirement, then, so heavily involved with various procedural devices for payment does only one thing —it is an effective barrier to voting.

S.Rep. No. 162, 89th Cong., 1st Sess., pt. 3, at 34 (1965).

74. Tex. Election Code arts. 5.11-5.12 (Supp.1965).

75. Tex. Election Code art. 5.17 (Supp. 1965).

76. Tex. Election Code art. 5.09 (Supp. 1965).

77. In 1960, 125,000 Texans turned 21 and 1,076,666 were 60 or over. U.S. Bureau of Census, U.S. Census of Population, 1960, Final Report, PC (1)-45B (Texas) Table 16.

poll tax payers would be liable to work three days per year on the roads.[78] The State Comptroller, among whose tasks is the supervision of poll tax collections, does not recall the use of this provision during his twenty-one years in the Comptroller's office.

Prior to 1947, poll taxes were assessed along with ad valorem taxes. Failure to pay the poll tax would result in the classification of the taxpayer as delinquent and make him liable to possible levy on his real or personal property. Assessment slips for ad valorem and poll taxes were mailed together to the taxpayer and could be paid at the same time. This convenient method of assessment was discontinued at the request of the State Comptroller and with the approval of the Attorney General. No reasons have been offered by the State to explain this action.[79] Since that time, assessment slips generally have not been mailed to taxpayers and poll taxes have been assessed only at the time of voluntary payment.[80] With the exception of setting up substations in some metropolitan areas for the collection of poll taxes, neither the State nor most of its Tax Assessors[81] make any other effort to increase the number of poll tax payers or to enforce its payment by non-voters.

Since the State has *voluntarily* abandoned the use of the most logical means for collecting the poll tax, *i. e.*, by assessing it along with the ad valorem taxes, and has made no attempt to enforce the tax except by use of the penalty of disenfranchisement, it is difficult to accept the State's contention that the tying of the poll tax to the right to vote is necessary for the collection of the tax.[82]

Even if we assume the validity of this position, we still would not find the poll tax as a prerequisite to voting to be justified as an encroachment on a fundamental right "necessary * * * to the accomplishment of a permissible State policy." The permissible state policy here is not the perpetuation of a head tax, as such, but the raising of revenue. When viewed in this perspective it is clear that the poll tax as a restriction on the right to vote is not "necessary" to insure the collection of revenue. The mere fact that 46 other states have been able to raise funds without such a requirement demonstrates this obvious conclusion. That poll tax receipts constitute only a minute percentage of the revenue of the State of Texas[83] does not prove that the poll tax is not a revenue measure, as the United States asserts, but it does indicate that the State of Texas has also been able to find adequate means of collecting revenue which do not restrict the right to vote.[84]

78. Tex.Laws 1891, ch. 97, § 23, 10 Gammel. Laws of Texas 153 (1898), Tex.Rev. Civ.Stat. art. 6758 (Supp.1965).

79. Three years prior to this change in method of assessment, the United States Supreme Court held that Negroes could not be excluded from primary elections. Smith v. Allwright, 1944, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987.

80. The Texas Legislative Council Report suggests the reinstatement of the pre-1947 assessment methods to increase payment of the poll tax. Texas Legislative Council 113.

81. It is true, however, that in many counties the Tax Assessors give numerous interviews to the news media to publicize and to encourage the sale of poll taxes. In addition, various private and civic organizations have been active in the promotion of poll tax sales.

82. Evidence has been offered to show that the rate of payment of the poll tax percentage-wise has decreased since its collection was tied to the exercise of the franchise. See note 57, supra.

83. The poll tax revenue constitutes .19% of the estimated 1965 general revenue fund and .76% of the available school fund. See Calvert, 1965–1967 Biennial Revenue Estimate 2, 10.

84. It is interesting to note that the poll tax is administratively the most expensive of all the taxes levied by the State of Texas. It costs 19.4 cents per dollar to collect the poll tax, while it costs 7.1 cents for the next most costly tax (the Motor Vehicle Sales Tax), 2.4 cents for the average tax, and only .1 cents for the largest revenue tax (the Oil and Natural Gas Tax). Deposition of Robert Calvert, State Comptroller, Table III-5.

The poll tax in Texas is indeed a very strange revenue tax, when compared with other admittedly legitimate taxes. It was tied to the franchise for a discriminatory reason. For unknown reasons, the State has abandoned the most reasonable means for its collection. Although the Texas Constitution requires all persons between 21 and 60 to pay the tax, only those who wish to vote ordinarily "volunteer" to pay it, and the State makes no other attempt to enforce it. Inasmuch as no acceptable basis for justifying the poll tax as a prerequisite for voting has been offered, the due process clause requires that this unnecessary restriction on the fundamental right to vote be eliminated.

IX.

[15] Since, in general, only those who wish to vote pay the poll tax, the tax as administered by the State is equivalent to a charge or penalty imposed on the exercise of a fundamental right. If the tax were increased to a high degree, as it could be if valid, it would result in the destruction of the right to vote. See Grosjean v. American Press Co., 1936, 297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660.

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Frost & Frost Trucking Co. v. Railroad Comm'n of California, 271 U.S. 583, [46 S.Ct. 605, 70 L.Ed. 110]. "Constitutional rights would be of little value if they could be * * * indirectly denied," Smith v. Allwright, 321 U.S. 649, 664 [64 S.Ct. 757, 765, 88 L.Ed. 987], or "manipulated out of existence." Gomillion v. Lightfoot, 364 U.S. 339, 345 [81 S.Ct. 125, 129, 5 L.Ed.2d 110].

Harman v. Forssenius, 1965, 380 U.S. 528, 540, 85 S.Ct. 1177, 1185.

The State asserts that "the Legislature, and people of Texas, have had the choice, insofar as the poll tax was concerned, of selecting the method of collection. The Legislature and the people choose to deny the right to vote to those who do not pay rather than some more onerous method of collection." It is clear, however, that the Legislature and the people may not choose to deny a fundamental constitutional right as a means of collecting revenue. "'One's right to life, liberty, and property * * * and other fundamental rights may not be admitted to vote; they depend on the outcome of no election.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." Lucas v. Forty-Fourth General Assembly, 1964, 377 U.S. 713, 736–737, 84 S.Ct. 1459, 1474, 12 L.Ed.2d 632. If the State of Texas placed a tax on the right to speak at the rate of one dollar and seventy-five cents per year, no court would hesitate to strike it down as a blatant infringement of the freedom of speech. Yet the poll tax as enforced in Texas is a tax on the equally important right to vote.

The Supreme Court has dealt with attempts to license or tax fundamental constitutional rights. In Grosjean v. American Press Co., 1936, 297 U.S. 233, 56 S. Ct. 444, 80 L.Ed. 660, a tax on gross receipts of newspapers with circulation in excess of 20,000 copies per week was found to be an abridgement of the freedom of the press as "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.*, at 250, 56 S.Ct. at 449.

An ordinance requiring a permit to distribute handbills was held invalid on its face in Lovell v. City of Griffin, 1937, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, as a restraint on the freedom of the press. In Murdock v. Com. of Pennsylvania, 1945, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, an ordinance requiring religious colporteurs to pay a license tax as a precondition to the pursuit of their activities was stricken down as a denial of first amendment rights. In answer to the contention that "the fact that the license tax can suppress or control this ac-

tivity is unimportant if it does not do so," the Court in *Murdock* stated:

> But that is to disregard the nature of this tax. It is a license tax—a flat tax imposed on the exercise of a right granted by the Bill of Rights. *A state may not impose a charge for the enjoyment of a right granted by the federal constitution.*

Id., at 112–113, 63 S.Ct. at 875. (Emphasis added.)

Since the poll tax in Texas is enforced only against those who wish to vote, it is, in effect, a penalty imposed on those who wish to exercise their right to vote. Even if the poll tax were seriously enforced as a revenue measure, the tying of its collection to the franchise would be invalid as a charge on a very precious constitutional right.

X.

The State of Texas contends that the 1937 Supreme Court case, Breedlove v. Suttles, 1937, 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252, controls the questions raised in this suit. The only issues, however, discussed by the Court in that case were whether the Georgia poll tax violated the equal protection clause, since it applied only to persons between the ages of 21 and 60 and to women who registered to vote; whether payment of the poll tax as a prerequisite of voting denied any privilege or immunity protected by the Fourteenth Amendment; and whether the poll tax requirements abridged the provisions of the Nineteenth Amendment. Although dicta may be found in the opinion supporting the validity of the poll tax as a prerequisite to voting, we do not believe that the holding in *Breedlove* applies to the issues raised here or that the dicta, in the light of more recent Supreme Court pronouncements concerning the right to vote (see *e. g.*, Wesberry v. Sanders, supra; Reynolds v. Sims, supra), should guide our decision.

For the reasons stated herein, we hold that the poll tax as a prerequisite to voting in the State of Texas infringes on the concept of liberty as protected by the Due Process Clause and constitutes an invalid charge on the exercise of one of our most precious rights—the right to vote. In view of the impending elections, appropriate declaratory and injunctive relief is being ordered by appropriate decree.

DECREE

This cause having come on for trial at which all parties were present by counsel; and the Court having heard the evidence and having considered the pleadings, evidence and argument of counsel and being of the view that a Decree should be entered in accordance with the opinion of the Court prepared for the Court by Judge Thornberry, which also constitutes the Court's findings of fact and conclusions of law under F.R.Civ.P. 52(a), filed this date, it is therefore ordered, adjudged and decreed:

First. That Article VIII, Section 1, and Article VI, Sections 2 and 3 of the Texas Constitution, Article 2.01 of the Texas General Taxation Code, Article 13.21 of the Texas Election Code and other Texas statutes implementing the poll tax are hereby declared unconstitutional and invalid insofar as they require the payment of a poll tax as a prerequisite to voting in general, special and primary elections, Federal, state or local, in the State of Texas.

Second. The defendants herein, their respective agents, servants, employees and successors, and all other persons having knowledge thereof who have any responsibility under election procedure laws of the State of Texas or its political subdivisions, are hereby enjoined and prohibited from requiring the payment of a poll tax as a prerequisite to voting in general, special and primary elections, Federal, State or local, in the State of Texas, and from applying or enforcing the provisions of the Texas Constitution and statutes referred to in paragraph FIRST hereof insofar as they require the payment of a poll tax as a prerequisite to voting in general, special and primary elections, Federal, state or local, in the State of Texas.

Third. This decree shall be effective immediately, but paragraph second hereof is stayed for the period of 14 days to enable the parties to submit an application for stay to the Circuit Justice, the Supreme Court, or a Justice thereof.

Fourth. The Court retains jurisdiction of this cause for such other and further orders as may be required.

EXHIBIT 50

U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS, WACO DIVISION

CIVIL ACTION NO. 67-63-W

University Committee To End The War in Viet Nam, James M. Damon, John E. Morby, and Zigmunt W. Smigaj, Jr., *v.* Lester Guun, Sheriff of Bell County, Texas; A. M. Turland, Justice of the Peace, Bell Couuty, Texas, Precinct No. 4; John T. Cox, County Attorney, Bell County, Texas

For Plaintiffs: Sam Houston Clinton, Jr., Austin, Texas.

For Defendants: Howard Fender, Assistant Attorney General of Texas, Austin, Texas.

Before: Homer Thornherry, Circuit Judge, Adrian A. Spears, Chief Judge, and Jack Roberts, District Judge.

Per Curiam: The University Committee to End the War in Viet Nam is an nn-incorporated voluntary association composed of young men and womeu who are residents of Austin, Texas, and its environs. The purpose of the University Committee is to protest the conduct of the war in Viet Nam by means of discussions, publications, demonstrations, and non-violent direct action, in an attempt to bring the war in Viet Nam to a quick non-military end. The individual plaintiffs include both members of the University Committee and persons sympathetic to its purposes who participate in its affairs. The defendants are duly elected officials of Bell County, Texas.

During Monday, December 11, 1967, and the morning of Tuesday, December 12, 1967, various news media in the Central Texas area reported that The President of the United States was to appear and speak at a dedicatory program at Central Texas College. Central Texas College is situated near Killeen, Bell County, Texas. Killeen is a city of some 30,000 population and serves nearby Fort Hood, a large United States military establishment, reported to be the largest United States armored post of civilian dependents. From Fort Hood military members of armed units of the United States Army are transferred to Viet Nam and from Viet Nam many veterans of military service there are transferred to Fort Hood. The President of the United States was also scheduled to make an inspection of Fort Hood on December 12, 1967. Accompanying the President and his official party on the occasion of his appearance at Central Texas College was the usual corps of so-called White House press correspondents, and other representatives of the news media including television commentators and cameramen. Some 25,000 military personnel, their dependents, and civilians from in and around the central Texas area were assembled to hear the President of the United States and other speakers on the dedicatory program.

The evidence indicates that the members of the University Committee learned of the President's scheduled appearance on the morning of Decemher 12, about three hours before the program was to hegin. As many Committee members and interested parties as possible were notified, and several carloads of persons desiring to attend the President's speech drove to Killeen. The President had hegun speaking when the group, which included the individual plaintiffs, arrived at the turnoff to the college. They parked the car some distance from the speaking area at the college. After choosing placards and signs, the group bégan walking in the direction of the college. The first people that the group met were friendly, waving and taking pictures of the group with their signs.

They then came upon the main speaking grounds which were filled with soldiers in uniform and civilians.[1]

The group soon was surrounded by soldiers, some friendly, some hostile. Several of the group were attacked by soldiers, who snatched away the placards and physically struck several persons in the group. At that point, several military police seized members of the group and carried them out of the crowd. They were taken to sheriff's deputies. After being handcuffed and frisked, three were taken to the Killeen, Bell County Jail. Apparently there was some disagreement as to whether the incident had occurred on property lying in Coryell County or on property within Bell County. When the decision was reached that the incident was within the jurisdiction of the Bell County authorities, complaints were filed against the three men, charging the offense of disturbing the peace. Although the maximum punishment under the Texas "Disturbing the Peace" statute, *Tex. pen. Code Ann.*, Art. 474 (1952) is a fine of $200., the Bell County Justice of the Peace set bail for each of the men at $500.

This suit, seeking interlocutory and permanent injunctions and a declaratory judgment, was filed on December 21, 1967. Subsequently, on February 13, 1968, the criminal charges in Bell County were dismissed, on the County Attorney's motion; the reason recited for the dismissal was that the alleged offenses had occurred on a federal enclave, to which criminal jurisdiction had been ceded by the State of Texas.

The dismissal of the criminal charges in Bell County caused the defendants in the present action to move this Court to dismiss this action for lack of jurisdiction. Defendants contend that the case is now moot for the reason that "no useful purpose could now be served by the granting of an injunction to prevent the prosecution of these suits because same no longer exists." It appears, in other words, that defendants' motion to dismiss is addressed to that part of the plaintiffs' complaint which seeks an injunction against the prosecution of the criminal charges in Bell County. We are clear that that part of plaintiffs' prayer is no longer before us. But we cannot fail to understand that, just as in *Dombrowski* v. *Pfister*, 380 U.S. 479, 483–492 (1965) and *Zwickler* v. *Koota*, 389 U.S. 241, 253–254 (1967), more is involved where the prayer for relief also requests a declaratory judgment that the statute under which the criminal charges were brought is unconstitutional on its face for being overly broad. The dispositive question at this point then is whether the additional prayer defeats the defendants' argument that this Court is presently without jurisdiction to determine the merits of the case.

Any discussion of plaintiffs' standing in this regard must begin with a consideration of *Dombroski* v. *Pfister*, *supra*. In that case the appellants brought suit for injunctive and declaratory relief to restrain the prosecution or threatening of prosecution under Louisiana's Subversive Activities law, which they alleged violated their rights of free expression. A three-judge court dismissed the complaint, holding that there was involved a proper case for abstention pending possible future narrowing of the state statute by state courts. The Supreme Court reversed, holding the abstention doctrine (i.e. waiting for a state court to clarify the state statute) inapplicable. The following language bears on our determination:

"When the statutes also have an overhoard sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases * * * For '*(t)he threat of sanctions may deter * * * almost as potently as the actual application of sanctions* * * *' Because of the sensitive nature of con-

[1] The signs used by the group were neither abusive nor obscene. Thereon were printed such slogans as "I Have but One Idol—Hitler, 'General Ky';" "The War in Vietnam May Be the Initial Phase of World War III, 'U Thant';" and "Wrong War, Wrong Time, Wrong Place, 'General Shoup'." However, members of the group knew that many of the servicemen were Viet Nam veterans; that the tremendous crowd at Fort Hood had peaceably assembled to hear their Commander-in-Chief; and that any untoward incident would likely cause the police, military and civilian, to react quickly to safeguard the President of the United States. As the group moved nearer to where the President was speaking, the epithets became angrier, and the general atmosphere of hostility was more pronounced. One member of the group stated that he had been dismayed at the sight of so many soldiers, but decided to proceed anyway. All of this, of course, lends credence to the argument that plaintiffs should have foreseen that a continuation of their protest, under the circumstances, would, in reasonable probability, provoke a disturbance, and possibly even end up in violence. See *Feiner* v. *New York*, 340 U.S. 315 But in our disposition of this case we do not reach and, therefore, do not decide this issue.

stitutionally protected expression, we have not required that all of those subject to overboard regulations risk protection to test their rights * * * For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. * * * We have fashioned this exception to the usual rules governing standing * * * because of the '* * * danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.'" (Emphasis added.)

380 U.S. at 486–487. The Court then drew its conclusion, containing the now famous metaphor: "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U.S. at 487. Indeed the Court went even further: "So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." 380 U.S. at 494.

The same kind of notion had been voiced earlier by the Fifth Circuit in *Baldwin* v. *Morgan*, 251 F.2d 780 (5th Cir. 1958). There a group of Negroes had brought a class action for injunction and declaratory relief against compulsory segregation in railroad waiting rooms. State charges had been filed against the Negroes but were dismissed because only the offending railroad or bus line could be criminally punished under the law. The Fifth Circuit held that the fact that criminal charges had been dismissed as against these particular plaintiffs did not bar the federal action:

"When the criminal proceeding was closed, it did not automatically take with it the charge made in this cause that state agencies, pretending to act for the state and exerting the power of their respective offices were, under the threat of arrest or other means, depriving Negroes of the right to be free of discrimination in railway public waiting rooms on account of race or color." (Emphasis added.) 251 F.2d at 787.

More recently, in *Carmichael* v. *Allen*, 267 F.Supp 985 (N.D. Ga. 1967), a three-judge court had occasion to consider the mootness contention. Among other charges against the appellant was one charging him with violation of the Georgia statute on inciting insurrections. The state Solicitor General had disavowed any intention to prosecute under that statute for the acts already done. In the following language the three-judge court granted an injunction prohibiting future prosecutions under the insurrection law:

"Although the Solicitor General, defendant in this case, disavows any intention of presenting a proposed bill of indictment against any of these plaintiff or any others for acts arising out of the past events), or otherwise to seek prosecution for such acts under these insurrection statutes, neither Mr. Slaton nor any other representative of the state of Georgia has disavowed any further intention to nse these statutes in the future. It is hardly necessary to point out the 'chilling' effect upon the exercise of the freedom of speech and assembly of a statute prescribing punishment by electrocution if a person, conscientiously seeking to exercise these rights, must pattern his speech with the ever present tbreat of such a sanction." 267 F.Supp. 994.

Is there then the requisite "chilling effect" here? The sworn evidence in support of the plaintiffs' prayer for relief indicates that these men have ceased efforts to carry out the purposes and objectives of the University Committee for fear of sanctions under the statute which is presently attacked, that they have "postponed further expression of (their) views through peaceful, non-violent activities lest (they) be arrested" for disturbing the peace. This in itself demonstrates a broad curtailment of activities which may include, and (as discussed in Part II) do include, protected behavior. Not only, as in *Carmichael*, *supra* at 994, can the presence of this statute cause a person to "pattern his speech with the ever present threat" of sanctions here, it appears to have induced suspension of expression altogether.

With this background, how then do we evaluate the defendants' argument that inasmuch as the state charges have been dismissed, the record is bare, there is no "case or controversy", there is nothing useful which can be accomplished. Of course, it ignores the reality that plaintiffs' prayer includes the request for a declaration that the statute is unconstitutional on its face. It ignores the notion, introduced in *Dombrowski* and reiterated in *Carmichael*, that the statute's simple presence on the books (which is what the plaintiffs are attacking) may have the requisite "chilling effect" on constitutionally protected behavior to warrant

close judicial scrutiny. It even ignores that at least twice in the area of First Amendment rights, the United States Supreme Court has felt compelled to decide the constitutionality of state statutes where no state criminal charges hereunder were pending.[2] We therefore overrule Defendant's Motion to Dismiss, and proceed to a consideration of the merits.

Before we discuss the issues presented as to the merits of this controversy, it may be wise to state what is not involved. This case does not involve in any way an appraisal of the constitutionality of the application of the statute to the plaintiffs; we do not evalute whether Article 474 was constitutionally applied to these plaintiffs' activities. Our sole concern is the determination of whether Article 474 on its face is, as plaintiffs argue, constitutionally defective as being overly broad.

Article 474 provides:

"Whoever shall go into or near any public place, or into or near any private house, and shall use loud and vociferous, or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200.)."

Our inquiry deals with the overbreadth attack as it relates to the part of the statute which prohibits the use of "loud and vociferous . . . language . . . in a manner calculated to disturb the person or persons present." Does that part of the statute "offend the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by meaus which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" *Zwickler* v. *Koota*, 389 U.S. at 250.

The United States Supreme Court some years ago in *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), outlined in broad terms the legitimate thrust of the breach of the peace offense:

"When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." 310 U.S. at 308. The Court vacated Cantwell's conviction because there had been no showing of violent or truculent conduct or assault or threatening of bodily harm.

In *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949), the petitioner was convicted for violation of a disorderly conduct ordinance. The trial court had charged that "the misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance * * *." The Court struck down the conviction saying—

"A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute * * * is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.* (Emphasis added.) 337 U.S. at 4.

The Supreme Court, in *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), had before it a state statute, which, like *Terminiello*, permitted conviction if the speech "stirred people to anger, invited public dispute, or brought about a condition of unrest." 372 U.S. at 238. The evidence was that the petitioner had engaged in conduct which was boisterous, loud, and flamboyant. 372 U.S. at 233. The Court struck down the conviction, utilizing the *Terminiello* reasoning. An Atlanta city ordinance, prohibiting disorderly conduct, came under similar condemnation in *Carmichael* v. *Allen*, *supra*. The ordinance prohibited acting "in a boisterous manner." The three-judge court declared the ordinance unconstitutional as an unwarranted restriction of First Amendment Rights.

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[2] *Dombrowski*, *supra*, and *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), as to the 1931 state loyalty oath. In addition, there was the determination of unconstitutionality after the disavowal of prosecution found in *Carmichael*.

Texas Article 474 suffers the same constitutional infirmity. It cannot be doubted that the provision regarding the use of loud and vociferous language would, on its face, prohibit speech which would stir the public to anger, would invite dispute, would bring about a condition of unrest, or would create a disturbance. In so doing, the statute on its face makes a crime out of what is protected First Amendment activity. This is impermissible.

The Texas statute is subject to attack for still another reason. As pointed out earlier, Article 474 prohibits the use of "loud and vociferous langauge * * * *in a manner calculated to disturb*" the public. (Emphasis added.) Similar provisions have been subject to judicial scrutiny in *Cantwell* v. *Connecticut*, 310 U.S. at 308; *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966); *Carmichael* v. *Allen*, 267 F. Supp. at 998–999; and *Baker* v. *Bindner*, 274 F. Supp. 658, 662–663 (1967). Despite the defendants' contention that the language of Article 474 is significantly different from those examined in the above cases, it is our opinion that Article 474 must be added to the list of statutes which "leave to the executive and judicial brauches too wide a discretion in the application of the law." It "leaves wide open the standard of responsibility," relying on "calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments per se." For this additional reason, Article 474 is vulnerable to constitutional attack.

The case which appears to present questions closest to our own is *Thomas* v. *City of Danville*, 207 Va. 656, 152 S.E. 2d 265 (1967). There the petitioners were appealing on constitutional grounds a restraining order issued by the local corporation court. Among other things the order restrained the petitioners:

"(4) From creating *unnecessarily loud*, objectionable, offensive and insulting noises, *which are designed to upset the peace and tranquility of the community;* and

"(5) From engaging in any act in a violent and tumultous manner or holding unlawful assemblies *such as to unreasonably disturb or alarm the public.* (Emphasis added.)

"Because of the modifying language in the order, the scope of the restraint there was narrower than under the Texas statute. However, the Supreme Court of Appeals of Virginia had no difficulty in striking down the above parts of the order, doing so on *Terminiello* grounds.

"We reach the conclusion that Article 474 is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Artcile 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statutes as will meet constitutional requirements."

Signed at Austin, Texas this — day of April 1968.

HOMER THORNBERRY,
United States Circuit Judge.
ADRIAN A. SPEARS,
Chief Judge, United States District Court.
JACK ROBERTS,
United States District Judge.

EXHIBIT 51

CITIZENS FOR DECENT LITERATURE INC., LOS ANGELES, CALIF.

I. CONGRESSIONAL ACTION

The document which you see before you is Public Law 90–100, passed by the Senate on September 12, by the House on September 21, and signed into law by President Johnson on October 3, 1967. In this action, Congress has created a Commission of 18 members, to be appointed by the President and to be known as the Commission on Obscenity and Pornography. As a part of its findings, the Ninetieth Sessiou of Congress declared that "the traffic in obscenity and pornography is a matter of national concern." Entrusted to this Commission by our Nation's representatives is the duty of ascertaining legislative, adminstrative, or other advisable and appropriate action which may be necessary to regulate effectively the flow of such material.

II. CHARLES KEATING

My name is Charles Keating. By profession I am an attorney. I have been an attorney for 19 years.

The bill which has just been explained to you represents the successful culmination of eight years of heroic effort, on the part of several concerned Senators and Congressmen, to initiate a congressional investigation into the smut racket, and the reasons for its pheuomenal growth during the past decade. Finally in the year 1967, Congress has, by its action here, declared that this corruptive element has reached such proportions that it is a matter of national concern.

Eleven years ago, I and a group of business and professional friends, all heads of families, took a look at the condition of the newsstands in Cincinnati, Ohio, and came to the same conclusion. At that time, we formed a community unit, Citizens for Decent Literature, more commonly referred to as CDL. Since that time this community organization has been functioning in two areas: (1) in the area of education, to alert the community to the problem of obscenity, and (2) in the area of law enforcement, to ask for its control through enforcement of the community's anti-obscenity laws.

It wasn't long before other communities throughout the Nation followed our lead. In 1962, these community organizations, some 300 in number, joined forces with headquarters in Cincinnati to fight this problem, in a coordinated CDL attack at the national level.

For eleven years now we in CDL have followed this problem in the communities and through its tortuous path in the courtrooms. As the problem continued to grow unabated, our attorneys found it necessary to enter the courtroom as "amicus curiae"—friends of the court on behalf of the people's cause. It is this experience, both in the community and in the courtroom which has led us to form certain conclusions of our own.

We feel we know where the source of this Nation's difficulties is. We also believe we know what has to be done, if the flow of obscene materials is to be effectively regulated.

That this has become a major problem in this Nation, is attested to by the fact that a total of 38 cases, involving obscenity matters, appeared on the docket at the last session of the United States Supreme Court. The community standards of 13 states were drawn in issue in those cases: New York, California, Kentucky, Arkansas, Michigan, Georgia, Rhode Island, Virginia, Kansas, Ohio, Texas, Oklahoma and Florida. Of these 38 cases, 26 involved determinations whether certain materials were obscene and their dissemination a criminal offense under State and Federal laws. In every one of those 26 cases the State and Federal courts had held the subject matter to be obscene and on appeal the appellate courts had agreed. In eight of these cases the determinations were made by juries chosen from the communities involved.

While our findings on the source of this Nation's difficulty are based upon a 10-year study it is our opinion that we can prove our case by laying before this audience the facts and historical events surrounding these 26 obscenity cases, all of which were ruled upon by the United States Supreme Court during the 1966 October Term of the Court, which extended from October, 1966 to June, 1967. It is in the Nation's best interest that these unpublicized facts should at this time be taken out of the Court's files and laid before the eyes of this Nation for an evaluation. After you have examined the facts, we will ask you the question, "Where do you think the difficulty lies?" In that connection we will have certain observations of our own to make.

But first—a brief introduction on the background of this problem and the rationale and development of governmental efforts to control it is necessary if the recent Supreme Court decisions are to be viewed in their proper perspective.

III. OBSCENITY: ITS HISTORICAL BACKGROUND

At the focal point of this issue is the obscenity crime, which in turn, has its roots in our Judeo-Christian culture, and the Common Law of our Anglo-Saxon heritage. How did this crime come into being and how is it related to the Judeo-Christian ethic? Well,—

The first obscene exhibition conviction came about in 1688 when an English community brought Sir Charles Sedley before the Common Law Courts for exposing himself in the nude on the balcony of a tavern in Covent Garden, Eng-

land, while urinating onto the courtyard below and delivering an obscene and blasphemous speech.

The English society in 1688, referred to in history as the "Gay Restoration Period of Charles the Second," was not unlike our present society today. Hedonism was rampant and the culture was becoming excessively sexual. Sir Charles Sedley himself was a rebel playwright, interested in bringing about this change in the social mores. Today, we have "rebels" in the same and other professions, who entertain the same idea. In place of the lewd exhibition on the balcony, we have the topless and bottomless performances in the bars throughout our communities.

Under the common law, the boundaries which described crimes were not set down in any written statutes or ordinances, but instead depended upon immemorial usage. Blackstone, the eminent jurist, in his famous commentary on the Common Law explains that the authority for Common Law doctrines rested entirely upon general reception and usage—that the only method of proving that this or that is a rule of the Common Law was by showing that it always had been the custom to observe it. In other words, th courts were the interpreters of the common conscienc of the community. In 1688, the Common Law Courts in England responded to the community's needs and declared Sedley's conduct to be a Common Law crime.

Less than forty years later, the English novel came into being and immediately became pornographic. To meet that new social problem, the House of Lords in 1727, in a case involving the distribution of an obscene publication by a printer named Curl, drew an analogy to the law in Sedley's case and declared this type of conduct also to be a Common Law crime—the so-called "obscene libel."

In its opinion, the House of Lords, which is England's equivalent of our United States Supreme Court, reflected upon the "reason" for establishng the offense. A comparison was made with the maintenance of a bawdy house which everyone, at that time, recognized as an offense against the morals of the commnnity. To permit a house of prostitution to exist in public would destroy public morality which, in turn, would destroy the "peace" of government, for government was nothing more than public order which, in turn, was dependent upon public morality. For the same reason, the dissemination of obscene materials was held to be a Common Law crime.

When the founding fathers settled in America shortly thereafter, they brought with them the Common Law of England, including the laws against lewd exhibitions and obscene publications. These priciples were immediately absorbed into our laws through recognition by the early American courts, and were later codified in the laws of Congress and each of the States of our Union. Based upon Judeo-Christian norms, and designed for the protection of the family structure, which is at the root of the community's well-being, these laws have governed and have the guiding beacons for this Nation for close to 200 years.

IV. OBSCENITY: THE MODERN SCENE

A modern attack on these Judeo-Christian principles was made in the United States Supreme Court in 1957, when two convicted retailers of obscenity, Samuel Roth and David Alberts, urged through their attorneys on appeal, that the principles expressed in the English Common Law cases of Sedley and Curl had been overruled by our founding fathers at the time the First Auendment to our Federal Constitution was adopted. Roth had been convicted of the federal offense of advertising and sending an obscene periodical, known as "American Aphrodite" through the mails. Alberts had been convicted on a state charge of possessing bizarre photographs of nude and scantily clad women, among which were many so-called bondage and flagellation photographs which he held for sale through the mails. By a 7–2 majority the 1957 Supreme Court rejected these arguments.

A closer look at these two cases is necessary because of several important principles which were involved and therein considered by the 1957 Court. They are important because they relate to the manner in which the Supreme Court handled the 26 cases being reviewed in 1966. First, how does one define obscenity and second, who is to make that determination? Is it a question of law, for the Court to decide, or is it a question of fact for the jury's determination?

Iu its opinion, the Court followed and adopted principles appearing in the prior case law, which had defined the test for obscenity as "Whether to the average person, applying contemporary community standards, the dominant theme of the

material, taken as a whole, appeals to prurient interest." Prurient interest was defined by the High Court as a "shameful or morbid interest in nudity, sex or excretion which goes substantially beyond customary limits of candor in description or representation."

The second question, "Who is to make the obscenity determination?" is of paramount importance because it frames a conflict which has an ancient origin in our government—the conflict between the powers of the judiciary and the powers of the community, as such. The most famous of such controversies occurred 50 years before this Nation's founding. In that instance, the American judiciary sought to reserve to themselves control of the determination of what in fact constituted a libel. The matter came to a head in the trial of John Peter Zenger for criminal libel in New York in 1735. There, trial judge Delancey instructed the jury that they need not resolve the "libel" issue since it was a "matter of law" for the judges to determine. Defense attorney Alexander Hamilton argued the contrary to the jury—that the matter was for *them* to decide. In freeing Zenger, the jury established the supremacy of the jury system on the American scene as a check and balance against an overbearing judiciary.

The right of the jury to determine questions of fact has, since this Nation's inception, held a favored position in the hearts of its people. Indeed, its deprivation was one of the causes for the American Revolution. That concept was to become one of the foundations of our Federal Constitution, appearing as a check and balance in Article 3, Section 2, which authorized Congress, acting for the people, to set the limits of the appellate jurisdiction of the United States Supreme Court, and in the provisions relating to jury trials in the Sixth and Seventh Amendments of the Federal Constitution. The preeminence of this right was made perpetual in the Bill of Rights, as the Seventh Amendment, being recognized by the signatory states as one of the fundamental rights of self-government. The Seventh Amendment reads:

"No fact tried by a jury, shall otherwise be reexamined *in any court of the United States*, than according to the rules of the Common Law." (Our emphasis.)

In the state trial of Alberts, a jury was waived by both parties, and the matter was tried to the judge. In the federal trial of Roth, however, the matter was tried to a jury which was instructed on the law governing obscenity by the trial judge. The jury instruction given by the judge is significant because (1) under our system of laws it represents the standard instruction which is given to any jury to govern its deliberations on questions of fact which are placed before them, and (2) it was approved by the United States Supreme Court in its decision in 1957. It read as follows:

"In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is * * * You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves, does it offend the commou conscience of the community by present-day standards."

The trial court's instruction said in effect that obscenity was a matter which developed upon the common conscieuce of the community, and this was a question of fact for the jury, i.e., the jury *not* the court was the arbiter of this issue.

In its historical context, the jury had always been regarded as synonymous with the conscience of the community. Maitland, in his History of English Law, says of the jury function:

"The identification of the jury with the community has been a characteristic of juries frou their earliest development in the Thirteenth Century as quasi-judicial finders of facts. The verdict of the jurors is not the verdict of twelve men; it is the verdict of the community * * * The royal justices seemed to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the country * * *"

Similarly, what is offensive to the community's conscience had always been regarded *in this country* as a question of fact for the jury. Judge Learned Hand, often called the father of modern obscenity law, pointed out in one landmark case that:

"Whatever be the rule in England, in this country the jury must determine under instructions whether the book is obscene. The court's only power is to decide whether the book is so clearly innocent that the jury should not pass upon it at all."

The statement recognized the distinction brought about by the result in Zenger's case and our Federal Constitution.

In its opinion upholding the prior precedents, the majority in the United States Supreme Court in 1957 pointed to the trial judge's instructions to the jury, that the determination of obscenity was a matter for the jury, and held those instructions to constitute a correct statement of the law.

V. THE 10 YEARS AFTER ROTH-ALBERTS

The smut industry, however, did not give up with the Roth-Alberts defeat in 1957. It increased its operations by geometric proportions and more than matched those efforts with its financial expenditures in the courtroom, during the next ten years. Their efforts in the courtroom did not fall upon deaf ears.

During this same period Justices Black and Douglas, the two dissenters in Roth-Alberts, continued their attack against the obscenity laws, refusing to follow or apply the law of the land laid down by the majority decision in 1957. Their unorthodoxy ran contrary to the prevailing rule in Constitutional Law, that, dissenting justices, having participated in a landmark constitutional consideration, are thereafter bound to abide by the majority opinion as are the rest of the jurists throughout the Nation. The founding fathers' distrust of an overreaching judiciary displayed remarkable insight.

In an interview in 1967, Justice Hugo Black was to remark that while he had never won the battle, he had about won the war. The accuracy of Black's statement is demonstrated by the High Court's later action in a Florida case where, after jury trial and an unsuccessful appeal, the sale of "Tropic of Cancer" was initially enjoined in that state by the state judiciary. In 1964 the United States Supreme Court reversed the judgment of the Florida court in a 5–4 decision. The basis of Justices Black's and Douglas' judgments, as members of the majority of five, was that there was no such thing as an obscenity law. Had their votes been disregarded as not in consonance with the law, the result would have been 4–3 to sustain the Florida judgment.

To add to this difficulty, the Court's membership after the Roth-Alberts decision was subjected to rapid change. With a change in membership came a change in philosophy. Liberal-turned-conservative Frankfurter was replaced by Goldberg, who, in turn, was replaced by the even more liberal Fortas, whose firm had several times represented the publisher whose books were to appear in 1966 before the Court—books like "Sin Whisper". Conservatives Whittaker and Burton were replaced by White and Stewart, neither of whom proved to be conservative in the area of public morals.

Justice Stewart ascended to the High Court in October 1958, from a seat on an intermediate federal appellate court, from which he had one year earlier ruled that, under our Federal Constitution, it was a question for the jury and not for the court whether or not photographs of nude females in provocative poses were obscene. Having attained the High Court, he changed his mind and adopted a more personal view in reviewing obscenity determinations on the ground that he knew obscenity when he saw it and "this is not that".

In the review of an Ohio movie case which had been before three Ohio courts and a total of 13 Ohio judges, Justice Brennan applied what he called a "national standards" test to hold the film "The Lovers" not obscene—a motion picture which depicted bed and bath scenes of sexual intercourse in the family home between the wife and a casual male house guest. A jury and the State of Ohio speaking through 12 of its Ohio justices, however, had held otherwise.

The Chief Justice in 1964 voted to reverse state obscenity determinations on procedural grounds and castigated the Attorney General of Kansas for employing judicial procedures specifically enacted by the State Legislature to cope with the problem. As a result, materials seized by the police and judged to be obscene in state courts were freed by the High Court on technical procedural grounds. While the Chief Justice in 1964 spoke out forcefully in favor of trying the conduct of the individual and committed himself to local standards, three years later he was to forget he had never advocated this view of the law.

In the cases following *Roth*, the Court and its individual members refused to analyze or consider the protests made on behalf of the communities regarding the people's right to a jury trial and the finality of a jury determination on questions of fact under the Bill of Rights of the Federal Constitution. In practice, the Court disregarded the application of that principle.

Each of the Justices was to demonstrate an inclination to follow his own personal view as to how the law should be applied. As new Justices mounted the Bench, those views grew wider apart.

As a consequence of this internal dissent, the High Court's opinions during the period, 1958 through 1965, read like masterpieces of confusion. If a ruling precedent is to be established, a majority of five justices are required to be in agreement on the principle involved. In almost all of these decisions, no such majority was to be found. In one such case, the Postmaster General was told by a much divided Court that he could not keep out of the mails material which was aimed at and appealed to the prurient interest of homosexuals—two Justices said the material was protected, three Justices said Congress had not authorized such administrative action.

Just when it appeared as though the Court was hopelessly deadlocked in its internal struggle, a group of decisions was handed down which gave hopes of a rational solution to the problem. On March 21, 1966, three and one-half months after briefing and oral arguments by the parties, a majority of six Justices managed to get together on principles to affirm the conviction of Edward Mishkin in New York for the printing and distribution of sado-masochistic material like "Bound in Rubber", "Swish Bottom", "Female Sultan", "Bondage Correspondent", etc. This was the same type of material distributed by Alberts and ruled upon by the Court in 1957 in *California* v. *Alberts*.

On the same date a majority of five managed to agree in principle that publisher Ginzburg was in violation of the Federal Postal Laws for his mailing of the periodical "Eros", a booked named "Housewives Handbook on Selective Promiscuity", and a newsletter named "Liaison". "Eros" was substantially the same type of publication as the periodical "American Aphrodite", mailed by and the subject of Roth's conviction in *U.S.* v. *Roth* in 1957.

In both of these cases, the majority appeared to be in complete agreement that the defendant's conduct was of primary importance and was determinative of whether the materials were obscene in the constitutional sense.

When the *Ginzburg* and *Mishkin* decisions became final on May 2, 1966, with the Court denying their petition for a rehearing, the stage was being set for the next term of Court. With the session drawing to a close, the Court ordered three retailer cases, which were before it, to be briefed and set for argument. The cases called for argument were *Redrup* v. *N.Y.*, *Austin* v. *Kentucky*, and *Gent* v. *Arkansas*.

VII. THE 1966 OCTOBER TERM

(*A*) *The Redrup, Austin & Gent Materials and Facts*

In the New York case, *Redrup*, a newsstand seller on 42nd Street in New York City, was arrested for selling two paperback books, "Lust Pool", and "Shame Agent" to a plainclothes officer. When the officer asked why he sold this "garbage", Redurp said, "There is worse stuff than that around * * *. I think these books here are worse," referring to girlie magazines that were on top of the counter. A three-judge trial court found him in violation of the New York obscenity statutes, which set the limits at hard-core pornography, and gave him a suspended sentence. A three-judge appellate court agreed and when Associate Justice Stanley H. Fuld of the New York Court of Appeals denied his application for an appeal to that court, Redrup brought his case to the United States Supreme Court.

In the Kentucky case, Austin, a wholesale distributor operating in several states and also the owner of a retail newsstand in Paducah, Kentucky, had been charged with violating Kentucky's obscenity statute in connection with the sale of the girlie magazines "Spree" and "High Heels" by his newsstand employee. Previous to the sale, several community organizations had complained to Austin about the sale of such girlie magazines in the community. His reaction was to move the rack behind the cashier's stand. At the trial, a jury in McCracken County Court found him in violation of the Kentucky statutes and upon his appeal, as was the custom in the Kentucky jurisdiction, he was given a complete new trial, this time in the higher McCracken Circuit Court. There, a second jury returned another "guilty" verdict. The Kentucky Court of Appeals, Kentucky's highest court, refused to reverse the conviction.

In the Gent case, the prosecuting attorney in Jefferson County, Arkansas, brought an action to halt the sale of eight girlie magazines: "Gent", "Swank", "Modern Man", "Bachelor", "Cavalcade, "Gentleman", "Ace", and "Sir". An advisory jury found all magazines to be obscene and the trial court concurred. On appeal, the Arkansas Supreme Court agreed, saying:

"In viewing the total contents of each of these publications, we think it can well be said that their dominant theme appeals only to the coarse and base in man's nature, and any literary merit is entirely coincidental. It is evident that the portrayal of sex in these magazines appeals to the prurient interest * * *. Perhaps we lack sophistication, but to us, articles which, for example, indicate that our colleges are simply playgrounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming feature. Of course, we are not cognizant of the standards of Washington, New York, Chicago or San Francisco, nor is there any way for us to know the 'standard' of the Nation at large, but we think the evidence clearly establishes that the contents of the magazines in question are not compatible with the contemporary community standards in Pine Bluff, Arkansas."

In each of the three cases, the party appealing asked the Supreme Court in its petition to examine and rule upon a multitude of issues. Among these was the claim that the subject matter involved was not obscene.

The Court in all three cases denied the petition as to that ground, limiting its inquiries in the Redrup and Austin cases to the matter of "scienter", i.e., the issue of the defendaut's "guilty knowledge", and in the Gent case to the validity of the injunctive statute. Thus, six members, a majority of the Court, ruled that insofar as these cases were concerned, the subject matter which they had examined was considered beyond the protection of the Federal Constitution and the cases were to be argued and decided on that basis. Justices Black, Douglas and Stewart dissented on the grounds that the obscenity of the subject matter should be briefed and argued for consideration by the Court.

The cases were set for oral argument on October 10th and 11th, the first cases to be heard at the beginning of the next term of Court.

The issue to be argued in Redrup and Austin was whether the Federal Constitution required a criminal intent which was something more than "knowledge of the contents" of what was being sold. The appellants were retailers who sold materials which were manufactured by other people, people like publisher Mishkin, whose jail sentence of three years had been approved by the High Court during the previous term. The United States Supreme Court had already ruled on this issue, but that was 70 years ago. At that time the 1896 Court had held that mere "knowledge of the contents" was sufficient, and that the public interest would not be served by permitting guilt or innocence to depend upon the subjective belief of the person who, with knowledge of the contents of what was before him, nevertheless distributed the same.

Pending the filing of briefs and oral argument in the three cases, the backlog of obscenity cases on the Court's calendar continued to grow. Three of the backlog cases had been filed witb the Court two terms previous, eight had been filed dnring and carried over from tbe previous term of the Court. Fifteen more, involving obscenity determinations, were to be filed before the end of the Court's new term. With one exception, the defendants in these cases were retailers, like Redrup and Austin.

The type of materials brought before the High Court in these cases was uni form. There were 20 sex paperback books. Their titles were: "Sex Life of a Cop", "Lust School", "Lust Web", "Sin Servant", "Lust Pool," "Shame Agent", "Lust Job", "Sin Whisper", "Orgy House", "Sin Hooked", "Bayoo Sinner", "Lust Huugry", "Shame Shop", "Flesh Pots", "Sinners Seance", "Passion Priestess", "Penthouse Pagans", "Shame Agent', "Sin Warden" and "Flesh Avenger"; 12 bondage books; a series of photograpbs of nude females in provocative poses with focus on the puhic area and suggested invitations to sexual relations; 8 motion picture films of the strip-tease type; 10 girlie magazines; one nudist magazine, and 2 home-made so-called "underground" films.

In 11 of these cases, the state courts (California, New York and Kansas) had used a hard-core pornography test in affirming the matter on appeal as being obscene.

(B). The subject matter and facts in the 23 other rulings being appealed

In *Keney* v. *New York*, two undercover policewomen purchased three paperback books: "Lust School," "Lust Weh" and "Sin Servant" from Keney's store in Rochester, New York. Prior to the purchase Keney had told them some "hot" books and "spicy" books wonld be coming in, and, at the time of the purchase, he referred to them as "hot" books and "spicy hot" books.

A Rochester jury convicted the defendant of violating the state obscenity law and on appeal, a three-judge court agreed, holding the hooks to be hard-core

pornography under New York law. Chief Judge Desmond of New York's highest court denied Keney's petition to appeal. Having exhausted his right of appeal under state law, Keney brought his case to the United States Supreme Court.

In *Friedman* v. *N.Y.*, the owner of a store in the Times Square area in New York City sold 9 bondage books to a plainclothes police officer. Their titles were: "Bondage Boarding School," "English Spanking School," "Bound and Spanked," "Sweeter Gwen," "Traveling Saleslady Gets Spanked," "Bound to Please," "Heat Wave," "Bizarre Summer Rivalry" and "Escape Into Bondage Book No. 2," published by Sattelite Publishing Co., 94 Montgomery Street, Jersey City, N.J. The arrest of Friedman by the New York police was based on the Mishkin conviction in New York—part of Mishkin's operations having been the reproduction of similar materials by another publisher—Nutrix Pnblishing Company at 35 Montgomery Street in Jersey City, N.J. The books were substantially the same as those involved in the *Alberts* case in 1957.

A three-judge trial court in the Criminal Court of the City of New York ruled that the books were hard-core pornography under New York law, and sentenced Friedman to 30 days in jail aad fined him $500. A three-judge Appellate Court agreed and Associate Justice Stanley H. Fnld of New York's highest court denied Friedman's petition to appeal.

Three bondage books: "Promenade Bondage Volume 4," "Bondage Annnal No. 1" and "Spanking Sisters," priced at $2.50 each, and packets of nude photos of females in provocative poses, priced at $1.50 per dozen, were involved in the three New York cases: *Sheperd* v. *N.Y.*, *Lewis* v. *N.Y.*, and *Bloomberg* v. *N.Y.* In their sales pitch, the defendants touted their wares. When the purchasing officer asked Bloomberg. "Are these books good?", he replied. "Well, I have got some better if you can read French." The arrests on the bondage materials were also based on the Mishkin conviction in New York, Mishkin's reproductions being of similar bondage books. The arrests on the sale of nnde photographs were predicated npon the conviction of one Harry Fried, who had previously been arrested for selling similar photos in New York and, whose conviction the United States Supreme Court had previously refused to reverse. In the *Fried* decision on Jnne 22, 1964, only Justices Black, Douglas and Stewart had voted to reverse. Fried served a 60-day jail sentence.

A three-judge court in the Criminal Conrt in the City of New York held the subject matter to be hard-core pornography and proscribed by the New York State Obscenity Statute. Lewis and Bloomberg were sentenced to 60 days and fined $500, and Sheperd was sentenced to 30 days. On appeal, the three cases were consolidated. A three-judge Appellate Court affirmed the judgments and Associate Justice Stanley H. Fuld of the Court of Appeals denied their consolidated application for leave to appeal.

The sale of nude photos and a bondage book titled, "Promenade Bondage Vol. 4" was the cause for five other New York cases: *Avansino* v. *N.Y.*, *Sessa* v. *N.Y.*, *Strombelline* v. *N. Y.*, *Gaggi* v. *N.Y.* and *Costanza* v. *N.Y.* In the five cases, several hnndred photos were entered into evidence, having been purchased by officers or seized at the time of the arrest. The defendants used the same sales pitches; such as, "Isn't that good enough"? "This is a little better—these are in color," and "These are the best in the whole Times Square area."

In separate trials, a 3-judge court in the Criminal Court of the City of New York held the photographs to be hard-core pornography, and the materials proscribed by the New York State Obscenity Statute. Avansino was sentenced to 60 days and fined $500, Costanza to three months and fined $500, Gaggi to 30 days and fined $500, and Sessa and Strombelline to 30 days and fined $500. On appeal a 3-judge Appellate Court consolidated the cases and affirmed the convictions and Associate Justice Stanley H. Fuld of the Court of Appeals denied the petitioners' application for leave to appeal.

The females in the nnde photos in the eight New York cases were posed in such a manner that attention is directed to a display of the bare breasts. Legs are spread to focus on the crotch and emphasize the pubic area with an illusion of nakedness in that area being suggested by the display of hands, a cloth, or a thin semi-transparent lace garment. The buttocks of many are elevated and thrnst toward the camera, as if in invitation to sexual intercourse or perversion (sodomy). Another perversion (lesbianism and group orgies) is suggested by gronp shots of naked females in physical contact or in positions suggesting intercourse.

The eight girlie strip-tease films, which were before the United States Supreme Court, were exhibits from four obscenity convictions: One in New York and

three in California. In all four cases the material was ruled to be hard-core pornography.

In the New York case, a plainclothes officer told the defeudant Cobert that he would like to get some "bachelor type films to show at an art party he was throwing". Thereafter, Cobert brought the officer six 50-foot rolls of 8 mm. color film. The officer purchased one 50-foot roll for $5.20 and seized the others which had been offered for sale. The container for the film which the officer purchased showed a black and white picture of a woman depicted in the film emphasizing her nakedness in a sexually suggestive pose. Total filming time for each of the 50-foot rolls was about three minutes. In two of the films the woman performed naked and although in much of the footage the pubic area was covered by the strategic placement of the hands and thighs, portions of that region were at times visible to the viewer. In the second film, the woman wore a brief covering over her pubic area.

A 3-judge court in the Criminal Court of the City of New York held three of the films: "June Palmer No. 2", "M Jordan" and "June Tracy" to be hard-core pornography and sentenced the defendant to a year in jail and a $500 fine. On appeal, a 3-judge Appellate Court upheld the judgment hut reduced the sentence to 60 days in jail and a $500 fine. The Court of Appeals affirmed in a 4–3 decision with Justices Dye, Fuld and Bergan dissenting.

In California, Ratner, a pornographer with one conviction and several Los Angeles arrests, moved to Redwood City in northern California where he opened a small shop selling sex books, magazines and films. Shortly thereafter, the city police purchased a 200-foot roll of 8 mm. black and white strip-tease film entitled, "Honey Bee", and charged him with a violation of the State Obscenity Statute. The 14-minute film opens with a well-endowed but clothed female sitting on the edge of a couch. She slowly proceeds to strip her sweater, skirts, bra, panties, garter belt, stockings and shoes until she is nude, after which she proceeds through several movements on the couch during which the camera is focused mainly on her breasts, huttocks, and pubic area with the female taking care to mask the shaved pubic area with her hands and thighs.

A Redwood City jury found Ratner to be in violation of the California State Obscenity Statute and a 3-judge Appellate Court in San Mateo County affirmed with the comment that, "We can deal in semantics at great length, however, the best expression is that of Justice Stewart 'when we see it, we know it'. In 'Honey Bee' we have seen it and we know it to be obscene and to be hard-core pornography." Ratner's appeal went directly to the United States Supreme Court.

A second California girlie film case involved Wenzler, the owner of the Oaks Theater in Pasadena, California, a theater catering to girlie films. In an across the counter transaction in 1961, an employee named Imlay sold a 200-foot reel of 8 mm. film to a Pasadena City plainclothes policeman who had asked for some film to show at a stag party. The 15-minute film, which cost $15.60, opened with a well-endowed brunette seated at a bar in a private residence clothed in a one-piece hip length opaque chemise-type garment that resembled leopard skin, tied on the left side like a sarong. Under the garment was a one-piece ballet-type black panties and stockings. As the camera focused on numerous close-ups of the legs, inner thigh and crotch, the female moved about seductively and lifted her dress to show her black panties. She then moved on to a couch where she continued her provocative motions during which time she lowered her dress to show a black lace bra from which she briefly displayed her right breast. She then removed her dress and lifted her right breast out of her bra shaking it at the audience. During all of these movements the camera focused on her breasts, buttocks, crotch and pubic area. The female then moved into a bedroom, beckoning the audience to follow her. There she resumed the same provocative movements on a bed first baring both breasts and squeezing them together, then slowly and seductively stripping her bra, garters, panties, net stockiugs and shoes until she was nude. Throughout her bed movements she beckons to the audience to come join her, shaking her breasts several times at the viewers. The film ends with a focus of her kneeling on the bed, her feet straddled wide and private parts pressed against the bed, showing her to have a shaved pubic area.

The trial court found Wenzler to be in violation of the California State Obscenity Statute, sentenced him to a 30-day jail sentence and the conviction was upheld by a 3-judge Appellate Court in Los Angeles County. The matter

was then appealed to the United States Supreme Court which, on June 21, 1964, refused to reverse the conviction. At that time only Justice Douglas voted to grant the hearing. Following this, Wenzler's attorney tried to upset the conviction by a different route. He moved into the Federal Court and asked for a habeas corpus writ, which was denied by the Federal District Court in Southern California and by the Court of Appeal for the Ninth Circuit, both of which held the film to be hard-core pornography. Five years after the date Wenzler was convicted, Wenzler's attorney petitioned the United States Supreme Court, bringing the case before the High Court for a second time.

In the third girlie film case from California, Shackman, the owner of a nudie film arcade on Main Street in downtown Los Angeles, exhibited three 16 mm. motion picture films, entitled "D–15", "O–7", and "O–12", in his peep show machines and sold 8 mm. versions of the same across the counter. Los Angeles Vice-Officers viewed the films in the machine, purchased three 200-foot rolls of the 8 mm. copies and arrested Shackman.

Prior to his trial in the State Criminal Court, Shackman's attorney brought an action in the Federal Court against the City Attorney in an unsuccessful attempt to stop the prosecution on the ground that the film was not obscene. After viewing the film, Federal District Judge Hauk denied the relief sought and made the following ruling on the three films:

"The film, O–12, * * * was viewed by the court. The film consists of a female model clothed in a white blouse opened in front, a half-bra which exposed the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, and lips and torso, all clearly indicative of engaging in sexual activity, including simulated intercourse and invitations to engage in intercourse. There is no music, sound, story-line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state, 'fuck you', 'fuck me'. The dominant theme of the film taken as a whole, obviously is designed to appeal to the prurient interest in the sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal areas clearly showing the pubic hair and the outline of the external parts of the female genital area. The film is entirely without artistic or literary significance and is utterly without redeeming social importance."

"The film O–7 is virtually the same as exhibit 1. The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia are clearly visible. For at least the last one-half of the film, the breasts are completely exposed. At one time the model pulls her panties down so that the pubic hair is exposed to view. Again, the focus of the camera is emphasized on the pubic and rectal region and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature. The dominant theme of the material, taken as a whole, appeals to a prurient interest in sex of the viewer and is patently offensive in its emphasis on the genital and rectal areas, clearly showing the pubic hair and external parts of the female genital area. The film is entirely without artistic or literary significance and is utterly without redeeming social importance."

"The parties stipulated that the film D–15, . . . is substantially the same in character and quality as the films introduced as exhibits one and two. The court therefore finds that as to exhibit 3, the dominant theme of the film, taken as a whole, appeals to a prurient interest in sex of the viewer and is patently offensive and is utterly without redeeming social importance."

Thereafter, in the State Criminal trial, a Los Angeles jury found the defendants to be in violation of the State Obscenity Statute, and a 3-judge Appellate Court in Los Angeles County affirmed, holding the films to be hard-core pornography under the State Obscenity Statute.

The 11 books you see before you—"Sin Hooked", "Bayou Sinner", "Lust Hungry", "Shame Shop", "Flesh Pot", "Sinners Seance", "Passion Priestess", "Penthouse Pagans", "Shame Market", "Sin Warden", "Flesh Avenger", came to the Court from the Kansas jurisdiction, where the Kansas Supreme Court in a decision handed down on July 14, 1966, ruled them to be hard-core pornography. In its unanimous opinion the seven members of the Kansas Supreme Court said of this material:

"The books are indistinguishable from those found to be 'hard-core pornography' by this Court in *State* v. *Quantity of Books.*"

The Kansas court was referring to 31 books which it had held to be hard-core pornography in a case decided by it two years earlier. Those books were: "Born For Sin", "No Longer a Virgin", "Sin Girls", "Sin Hotel", "Minmi Call Girl", "Lesbian Love", "Sex Jungle", "The Lustful Ones", "The Wife Swappers", "Sex Model", "The Lecher", "Lust Goddess", "Sin Camp", "$20 Lust", "Convention Girl", "The Isle of Sin", "Orgy Town", "Sex Spy", Trailer Trollop", "Flesh Is My Undoing", "Sex Circus", "Malay Mistress", "The Sinning Season", "Sin Song", "Passion Slaves", "The Sinful Ones", "Lover", "Love Nest", "Passion Trap", "Sin Cruise", and "Seeds of Sin". In 1964 the United States Supreme Court had reversed the earlier judgment on procedural grounds but had said nothing of the Kansas Supreme Court's ruling that they were hard-core pornography.

The Kansas Supreme Court went on to say as to the 11 books which were presently before them:

"The 11 books here considered relate to the exclusion of anything else, the illicit sexual capers of the principal figures, running the gamut in drawn out episodic form, chapter by chapter, of feats of sexual prowess and perversion in one form or another. Each is nothing more than a series of vulgar caricatures, patently offensive, with no appeal of any kind except to the prurient. We have little difficulty in concluding this material, weighed separated from the foregoing, is utterly without redeeming social importance * * * It is not that the books lack literary merit—which they do—they simply lack any redemptive features of social value or importance.

"Each of the 11 contain a frontispiece paragraph and one on the back cover blatantly pointing up the strong sex. No other appeal is made. The format is the same in all the books—paperback—obviously mass produced, exactly 190 pages in length, strong sex and perversion with repetitive regularity in each chapter, literally appealing to pruriency from cover to cover."

From this judgment, the distributor took an appeal to the United States Supreme Court.

A paperback entitled, "Sin Whisper" from the same mold as those ruled to be hard-core pornography by the Kansas Supreme Court was before the Georgia Supreme Court on December 18, 1966. That court described the material as:

"The book entitled 'Sin Whisper' is composed substantially of lengthy detailed, and vivid accounts of preparation for and acts of normal and abnormal sexual relations between and among its characters * * *. The book * * * considered as a whole has as its predominant appeal the arousing of prurient interest in the average man of our national community * * * has no redeeming literary or social value or importance and goes substantially beyond the customary limits of candor in description and representation of its subject matter and * * * judged as a whole by Georgia statutory standards * * * is obscene * * *. The book is filthy and disgusting. Further description is not necessary and we do not wish to sully the pages of the reported opinions of this court with it."

The publisher, Corinth Publications, Inc., a corporation wholly owned by William Hamling, once told investigating law enforcement officers that they should go back to chasing spies and that he could beat them anywhere in the United States; that he hired the best attorneys and that one of these was Abe Fortas in Washington, who could fix anything no matter who was in power. He further boasted that he had paid Fortas $11,000 to get his mailing permit for the girlie magazine "Rogue". Fortas' law firm had in 1957 filed an amicus brief on behalf of Greenleaf Publishing Co., publisher of "Rogue", urging the reversal of the Roth conviction. On December 14, 1966, Corinth Publications, Inc., filed its appeal in the United States Supreme Court. This time Hamling had a new attorney. His ex-attorney Abe Fortas had been appointed to the bench and was to sit in judgment on his former client's claims.

"Lust Job", another paperback from the same publisher, had been found to be obscene by a 12-member jury in the Federal District Court of Rhode Island, and its distributor, Books, Inc., convicted of the federal offense of sending the same across state lines into Massachusetts. On appeal, the 3-judge Court of Appeals for the First Circuit agreed. Of the book the Circuit Court of Appeals said:

"The pages set forth, in the form of a novel, a tale exclusively devoted to the sexual adventure of its principal characters. Adulterers, seductions, and orgies

are the only evidence of importance. The contacts described include not only sexual intercourse, bnt sodomy and other perversions * * *. There was adequate evidence in the text of the novel, without any reference to the covers, to warrant a factual determination that the dominant theme of the book taken as a whole appeals to a prurient interest in sex, that the hook is patently offensive because it affronts contemporary community standards relating to the description of sexual matters, and that the material is utterly without redeeming social importance."

The appeal on the paperback "Orgy House" had come from the State of Ohio. There a 12-member jury in Cincinnati convicted Lonis Mazes of commercially possessing an obscene book, "Orgy House", in violation of the Ohio State Obscenity Statnte. A 3-judge Appellate Court agreed, as did the 7-member Ohio Supreme Court in a unanimous decision. The crime took place in November 1962. Four years later, in December 1966, Mazes filed his appeal with the United States Supreme Court.

The lone "publisher" case before the Court was Aday and Maxie v. United States, convicted by a federal jury in Grand Rapids, Michigan, in 1963 of sending an obscene paperback book entitled, "Sex Life of a Cop" across state lines. James Jackson Kilpatrick in his book, "The Smnt Peddlers" describes Aday as an ex-convict who served 2½ years in San Qnentin from April 1946 to December 1948, on a conviction for pimping and pandering. Published by Aday in 1960, "Sex Life of a Cop" was immediately held to be obscene in a trial court in Mahoning County, Ohio. There Common Pleas Trial Judge Maiden in a 3,000 word outline of the plot said of the book:

"As to the story, it is difficult to purvey in a few words the sexual orgies had by the two principal characters * * *. Thirteen out of the 15 vividly display acts of illicit sexual relations with various women of the community including the mayor's wife, the wife of the chief of police, and the judge's wife * * *."

In agreeing with the trial judge the Mahoning County Court of Appeals said in 1962:

"It is the careful considered opinion of this court that this book, judged by the measuring stick of the Roth case, has a dominant theme of the material taken as a whole, applying contemporary community standards, which appeals to the prurient interest. We cannot see how any other conclusion can be drawn, after reading the book * * *."

The Ohio Supreme Court denied a hearing, but the publisher elected not to take the case to the United States Supreme Court at that time.

In California where the book was published, the State Supreme Court had the same opinion of the book. In 1961, the court unanimously held that there was probable cause to believe it obscene, aud again, in 1964, refused to overrule an indictment against Aday based upon his distrihutiou of the same book. The California prosecutor suspended prosecution of that case, as did at least ten other jurisdictions in the United States, awaiting the outcome of the appeal on Aday and Maxie on the federal conviction. On appeal, Circuit Judge O'Sullivan of the Circuit Court of Appeals, speakiug for the 3-judge court, said:

"Our task is lightened by our view that the challenged book is by any standard obscene. It was inevitable that in today's bold and flourishing business of poruography there would come along a writing so bad that uo amouut of sophisticated dialectics could absolve it from classificatiou as 'hard core'. Such is the book we deal with.

"The 147 pages of the alleged novel are generously faithful to the promise of the blurb. Without palliating interruption, the story moves quickly frou oue sexual encounter to another. So numerous are these events that eveu the practiced skill of the author runs out of fresh imagery and dully repeats his supply of dreary adjectives. The chief actors are a police sergeant and his fellow occupant of the appropriately-named prowl car. These officers, except for some needed rest from their amours, devote most of their on-duty and off-duty hours to successful sex encounters with whatever females come within their view. Their conquests range from a virgin to a $100 prostitute. The wives of the chief of police and the mayor of the town, the new female police dispatcher, friendly waitresses, two nurses who promptly take off their clothes when the busy officers otherwise unheralded, climb through their open window, a drunken 'society' lady who is first rescued from a corner lamp post and then raped in the back seat of the prowl car, and a miscellany of other willing ladies make up the cast. Every female identified in the story is easy prey for the officers. With their husbands away, some married ladies gain the officers' sexual services by false

night calls to the police dispatcher complaining of a prowler. Chivalrous response by the prowl car is rewarded by amorous reception. Even the wife of his fellow officer is not overlooked by Sergeant Thorne. The drama concludes with a smashing denouement when the sergeant discovers, as an eyewitness, his own beloved Alice has been enjoying his outranked prowl car pal's offerings * * *.

"We cannot believe that the First Amendment's great guarantees of freedom of expression can be elasticized to embrace 'Sex Life of a Cop'. We conclude this part of our opinion with imitation of the wise and time-saving succinctness employed by Mr. Justice Potter Stewart * * * may we then, exercising the common sense which we like to think is a mark of today's federal judges, say that we know hard-core pornography when we see it, and 'Sex Life of a Cop' is just that."

A group of nudist magazines, 107 in all, were before the Court having been seized by police on a search warrant in the arrest of Rosenbloom in Richmond, Va., for selling a nudist magazine "Solis" in violation of the state obscenity statute. The magazine which was purchased and which was the basis of the charge was printed entirely in German. Rosenbloom was convicted in the Richmond police court and on appeal, retried in the Hustings Court where the trial judge characterized the defendant's arguments that the magazines were designed to foster the emotional benefits to be obtained from nudism as "so much manure and so little grass". On appeal, the Supreme Court of Appeals of Virginia refused to upset the conviction, holding the trial judge's ruling to be "plainly right".

One other girlie magazine was before the Court as an exhibit in a New York case involving the Special New York Minor's Statute, Section 484(i) and a sale of the girlie magazine "Candid" to a 17-year-old minor. Tannenbaum, the retailer, was convicted in the trial court and the New York Court of Appeals upheld the conviction on the minor's statute which tested that material by its appeal to the minor rather than the average person.

The last two cases, Landau v. Fording, a California case, and New York v. Jacobs and Mekas, a New York case, involved two home-made 16 mm. so-called "underground" films, "Un Chant D'Amour" and "Flaming Creatures". Threatened with arrest if he showed the film "Un Chant D'Amour" on the Berkeley campus, Landau brought a declaratory judgment in the California Superior Court to have the 30-minute film declared to be protected material.

After full trial on the merits, Alameda Superior Court Judge Phillips held the film to be hard-core pornography. A 3-judge District Court of Appeal agreed, describing the film as follows in its opinion:

"Un Chant D'Amour' is a 16 mm. silent film of about 30 minutes' duration, made in the style of the short silent films of the 1920's and apparently and deliberately ambiguous * * *.

"The setting is an unnamed prison cell block in an unnamed place. The principal characters are a guard and four prisoners. At the outset, the guard is walking outside the prison walls. Each prisoner is alone in his cell, engaged in various acts of self love and masturbation. The prisoners are also shown communicating with each other by knocking on the walls and by the passage of a straw through a hole in the thick wall between the cells, and the blowing of smoke through a straw. Two of the prisoners are clearly involved in a homosexual relationship. The guard in the course of his duties looks into each of the individual cells through peep holes and observes the prisoners. Their acts of sexual perversion and particularly the conduct of one hairy-chested prisoner arouses the guard's voyeuristics and latent homosexual tendencies. The film reaches a climatic ending in a sadistic meeting of the hairy-chested prisoner by the algolacnic guard. In the last scene the guard is again walking outside the prison wall.

"In the last half of the film, the realistic scenes in the prison are interspersed with three series of brief recurring fantasy scenes that may or may not be the fantasy of some or only one of the characters. In the final series, two hands emerge from their individual barred cell windows and one hand attempts unsuccessfully to throw a garland of flowers to the other. Toward the end of the film, the garland is caught. In the second series of fantasy scenes (most likely those of one or both of the prisoners who are homosexually involved with each other), the prisoners are playing together in a romantic sunlit wood. During the third series (most likely those of the guard during the beating), two male heads are seen passionately kissing; two male torsos appear in various positions depicting fellatio, sodomy, and oral copulation. The fantasy scenes increase in intensity during the film. At several points, the fantasy and the reality appear to merge; for example, in one scene, a prisoner puts on his jacket; he is next seen wearing the jacket in the sentimental woods fantasy. The portrayals of

sexual perversion occupy in excess of half of the footage of the film * * * as Mr. Justice Stewart noted in Jacobellis * * * hard-core pornography * * * is hard to define but he 'knew it when I see it.' We think we have seen it in 'Un Chant D'Amour'. It is nothing more than hard-core pornography and should be banned."

The California Supreme Court refused a petition for a hearing in that court by a 4–3 decision, with Justices Tobriner, Peters and Mosk dissenting.

In the New York case, Jacobs and Mekas were convicted by a 3-judge trial court in New York County for exihibiting the film "Flaming Creatures" in violation of the state obscenity statute. The home-made film, produced by Jack Smith, has gained a notorious reputation for its homosexual content. The 40-minute film presents five unrelated, badly filmed sequences, which are studded with sexual symbolisms. Amapola and other recordings are heard as background music. Included in the first sequence of 17 minutes is a mass rape scene involving two females and many males, which lasts for 7 minutes, showing the female pubic area, the male penis, males massaging the female vagina and breasts, cunnilingus, masturbation of the male organ, and other sexual symbolisms. The second sequence which lasts approximately three minutes shows lesbian activity between two women. The third sequence, about 7 minutes in duration, shows homosexual acts between a man dressed as a female, who emerges from a casket, and other males, including masturbation of the visible male organ. The fourth and fifth scenes show homosexuals dancing together and other disconnected erotic activity, such as massaging the female breasts and group sexual activity. Jacobs and Mekas were found guilty by the trial court and sentenced to 60 days in the New York City workhouse, but execution of the sentence was suspended. The Appelate Court in New York refused to reverse the conviction.

VII. THE HIGH COURT'S RULINGS ON MAY 8, 1967, AND JUNE 12, 1967

Expectations were high on October 10, 1966, as attorneys for the people and CDL counsel, as amicus curiae, climbed the 42 marble steps of the United States Supreme Court building and headed for the bronze doors which offered admission to the towering edifice and oral arguments in the Redrup, Austin and Gent cases, Behind the people were 10 years of unremitted toil and outstanding success in the local communities and courtrooms—years in which the communities had, by their courtoom verdicts, indicated a high standard of public morals, and complete disapproval for the rising tide of obscenity which was flooding the Nation. Not only had the 26 obscenity verdicts which were awaiting decision cleared all legal hurdles in the state courts, but the 26 represented only a sampling of the total number of such community victories in recent years, most of which had never been appealed.

The subject matter which was before the Court was unquestionably smut—20 sex paperbacks, 8 girlie strip-tease film, hundreds of prurient photos of females in provocative poses, bondage materials, girlie and nudist magazines—all of it material which degraded the sex function. Out of the past, one could hear the voice of Justice John Marshall Harlan, speaking in his opinion in the *Roth* case:

"The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards * * *. Since the domain of sexual morality is preeminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality * * *."

In the more distant annals of history, could be heard the arguments in the House of Lords in Curl's case, which first established the obscenity crime:

"As to morality, destroying that is destroying the peace of government, for government is no more than public order, which is morality * * * the court is the custos mores of the King's subjects * * *."

These nine men in black robes were the custodians of our public morality. As the English high court had checked the flight toward hedonism in 1688, so in the year 1966, it appeared as though history were to repeat itself. Only last term the

Court had upheld Mishkin's jail sentence of three years and Ginzburg's term of five years and had refused to consider the obscenity ruling in the three cases which were being argued.

During arguments, Justices Black and Stewart attempted to expand the issues. Justice Stewart inquired whether the Kentucky case should not be reversed for failure of the trial court to instruct the jury properly on the issue of obscenity. In responding, Kentucky Attorney General John Browning advised the Court that, because of the Court's initial ruling against the defendants on that issue, the state had not taken time to brief and was not prepared to argue other issnes, whereupon Justice Clark reminded the justices that, by virtue of the Court's prior ruling, it must be assumed that the subject matter was obscene. No member of the Court bothered to reply to Justice Clark's statement, nor was the obscenity issue inquired into thereafter.

At the close of the oral arguments, the parties submitted their cases on the issue of scienter, i.e., knowledge that the material was obscene, and withdrew to await the Court's action which was expected within a few months. Of the 13 cases argued in the past 10 years, six had been handed down two months after oral arguments, five had taken three months, and two had taken four months. The two months of waiting stretched into four, then five, then six, and finally on May 8th, seven months after argument, the Court handed down its decision in the three cases—a decision which reversed its initial ruling on the obscenity issue and completely ignored the only issue as to which it had asked for briefing and argument.

The arbitrary nature of the Court's action cannot be overemphasized. One year earlier six members of the Court had entertained no difficulty in finding the subject matter *not* to be constitutionally protected. Then, after finding themselves unable to agree on the only issue argued—and seven months is an extraordinary long period of time for the Court to debate any issue—the majority changed its mind, as if controlled by the flip of a coin. Without asking for argument on the obscenity issue from the people, the Court said:

"The Court originally limited review in these cases to certain particularized questions, upon the hypothesis that the material involved in each case was of a character described as 'obscene in the constitutional sense' * * * but we have concluded that the hypothesis upon which the Court originally proceeded was invalid, and accordingly that the cases can and should be decided upon a common and controlling fundamental constitutional basis * * * ."

Justices Harlan and Clark took issue with the Court's attitude. In a strong dissent, those justices said:

"The Court disposes of the cases on the issue that was deliberately excluded from review, and refuses to pass on the questions that brought the cases here.

"In my opinion these dispositions do not reflect well on the processes of the Court, and I think the issues for which the cases were taken should be decided. Failing that, I prefer to cast my vote to dismiss the writs in Redrup and Austin as improvidently granted and, in the circumstances, to dismiss the appeal in Gent for lack of a substantial federal question."

In its short opinion of less than 600 words, the majority of seven disposed of the three cases. *Redrup* v. *Austin*, involving the paperback books, "Shame Agent" and "Lust Pool," which the New York judiciary had held to be hard-core pornography—*reversed*. *Austin* v. *Ky.*, involving the girlie magazines, "Spree" and "High Heels," which two Kentucky juries and the Kentucky judiciary had ruled obscene under the Kentucky statutes—*reversed*. *Gent* v. *Arkansas*, involving the girlie magazines, "Gent," "Swank," "Modern Man," "Bachelor," "Cavalcade," "Gentlemen," "Ace" and "Sir," which an Arkansas jury, the trial court, and the Arkansas Supreme Court had ruled unacceptable to Arkansas standards of public morality—*reversed*.

As the judgments were being sounded, the people's attorneys could not help looking in wonderment to the panel carved in marble on the west wall—"Justice" with winged figure of "Divine Inspiration," flanked by "Truth" and "Wisdom."

On the right were "Powers of Evil," "Corruption," "Slander," "Deceit" and "Despotic Powers" and on the left were groups symbolizing "Powers of Good," "Defense of Virtue," "Charity," "Peace," "Harmony" and "Security."

As the opinion was read aloud those familiar with the Court transcripts and the subject matter in the three cases were overwhelmed by an atmosphere of irony as they examined the surronndings—the echoing marble hall, the elegant mahogany furnishings harmonizing with the red velour hangings and the sienna tints of the Italian marble columns—the tourists sitting in reverent silence or walking on tiptoe, whispering to each other, as though they were in a cathedral—the mystique which clothed the nine justices with an air of Solomonic wisdom.

As the seven justices put their individual stamp of approval on the commercial depicitions of sex orgies and degradation in "Lust Pool" and "Shame Agent" and the voyeuristic portrayals in "High Heels" and "Spree," silencing the objecting voices of the jury verdicts and State court pronouncements, CDL attorneys could not help but question whether the Conrt itself was not operating under a double standard of conduct. Rnle 40 of the Revised Rules of the Supreme Court of the United States governing conduct before the United States Supreme Court, established by the justices themselves, stood out like a sore thumb.

"Briefs must be free from * * * scandalous matter. (Those) not complying may be disregarded and stricken by the Court."

Those who sought for hidden meaning in the three cases were made aware of the futility of that search by the Court's further pronouncement in the 23 other cases five weeks later. *Keney* v. *N.Y.*, involving the paperback books, "Lust School", "Lust Web" and "Sin Servant", which the New York judiciary had called hard-core pornography—*reversed*; Freedman, involving 9 bondage hooks, which the New York judiciary had held to be hard-core pornography—*reversed; Sheperd* v. *N.Y.*, *Lewis* v. *N.Y.*, *Bloomberg* v. *N.Y.*, involving three bondage books and nnde photos of females in provocative poses, which the New York judiciary had held to be hard-core pornography—*reversed; Avansino* v. *N.Y.*, *Sessa* v. *N.Y.*, *Strombelline* v. *N.Y.*, *Gaggi* v. *N.Y.*, and *Costanza* v. *N.Y.*, involving one bondage book and several hundred nude photos of females in provocative poses, which the New York judiciary had held to be hard-core pornography—*reversed; N.Y.* v. *Cobert*, involving three girlie strip-tease films, which the New York court had held to be hard-core pornography—*reversed; Ratner* v. *Calif.*, involving a girlie strip-tease film, entitled, "Honey Bee", which a California jury and the California appellate system had held to be hard-core pornography—*reversed; Shackman* v. *Calif.*, involving the girlie strip-tease films "D–15", "O–7" and "O–12", which a Los Angeles jury, a federal district judge, and the California appellate system had held to be hard-core pornography—*reversed; Quantity of Books* v. *Kansas*, involving 11 paperback books, which the Kansas Supreme Court had held to be hard-core pornography—*reversed; Corinth Publications v. Georgia*, involving the paperback book "Sin Whisper", which the Georgia Supreme Court had ruled to be obscene—*reversed; Books, Inc.* v. *U.S.*, involving the paperback book "Lust Job", which a federal jury and the Circuit Court of Appeals for the Second Circuit had held to be obscene—*reversed; Aday and Maxie* v. *U.S.*, involving the paperback book, "Sex Life of a Cop" which a Grand Rapids federal jury and the Circuit Court of Appeals for the Sixth Circuit had held to be hard-core pornography—*reversed; Rosenbloom* v. *Va.*, involving a German nudist magazine, "Solis", which the Virginia judiciary held to be obscene—*reversed; Mazes* v. *Ohio*, involving the paperback book "Orgy Club", which a Cincinnati jury and the Ohio judiciary had held to be obscene—*reversed.*

In *New York* v. *Jacobs*, the Court refused to render a judgment on the homemade 16 mm. film "Flaming Creatures", which depicted a 7-minute rape scene and other sexual deviate acts. In *Tannenbaum* v. *N.Y.*, the Court refused to pass upon a New York statute imposing absolute liability where girlie magazines were sold to minors. The Court termed both cases moot.

Only in *Landau* v. *Fording* did the Court uphold an obscenity determination, and that by a 5–4 decision—in that case a 16 mm. film, "Un Chant D'Amour",

no scenes of which approached the offensiveness of "Flaming Creatures". In *Wenzler* v. *Pitchess*, the only other obscenity determination left untouched, the Court by a 6–3 decision, refused to nullify the 30-day jail sentence of Wenzler for selling the 8 mm. girlie strip-tease film "First Fling" at the Oaks Theater in Pasadena, Calif. "First Fling" did not approach "O–7" or "O–12" in degree of offensiveness.

Thus, in June 1967, the curtain rang down on the performance of the United States Supreme Court during the 1966 Octoher term. By their action the community standards of 13 states were upset. Contrary to the provisions of the Federal Constitution, eight jury determinations relating to the determination of contemporary community standards were "re-examined" in the United States Supreme Court—and by that Court reversed.

There are certain facets concerning the Redrup-Austin-Gent opinion, the decision in these 26 cases, and the manner of arriving at them which deserve further comment:

First. The 600-word Redrup-Austin-Gent opinion was the only written opinion rendered by the Court. *Its rationale was the only reasoning offered to govern* the entire 26 decisions.

Second. Not only did the Court renege upon its original ruling which assumed that the materials involved in each case were ohscene, but the opinion announcing the same was unsigned.

Third. In the Redrup-Austin-Gent opinion, no more thau three justices could find agreement iu their reasoning—the Redrup-Austin-Geut decision is what is known as a no-clear majority decision—one which governs the result but sets no precedence. Black and Douglas restated their position that a state could uot suppress obscene writings; Stewart held to the view that only hard-core pornography could be proscribed; Brennan, Fortas and Warren adhered to their view that there were three independent tests which must "coalesce" and Justice White retained his view that the "social value" test was not an independent factor.

Fourth. The Court in its opinion did uot discuss the nature of the materials or the circumstances surrounding their dissemination. In the written opinion in Redrup-Austin-Gent, nothing was said as the coutent of "Lust Pool" or "Shame Agent", or "Spree" or "High Heels", or the eight girlies magazines in the Arkansas case. The Court referred to them only as "paperback" books and "magazines". Nor did the Court report the evidentiary facts presented in the record in each case, or point to any item of redeeming social importauce. The Court's ouly comment was:

"Whichever of these constitutional views is brought to bear upon the case before us, it is clear that the judgments cannot stand."

In the 23 other decisions rendered five weeks later, nothing whatsoever was said of the subject matter there involved, or the circumstances surrounding the dissemination of the materials. The Court merely cited the Redrup-Austin-Gent decision.

Fifth. Not only were the majority of seven not in agreement on the rationale of Redrup-Austiu-Gent, but they were also iu disagreement in the application of the divergent tests to specific materials, the voting in the individual cases ranged from 8–1 and 5–4 in one direction to 5–4 iu the other direction.

Sixth. Even those who were in agreement as to the test to be applied upon review, did not arrive at the same result in their personal application of that test. Presumably Warren, Fortas and Brennan were in agreement that the three "separate" test must "coalesce". Yet in the girlie strip-tease film cases, Fortas thought the films not obscene, whereas Brennan and Warren thought otherwise; in the girlie photo cases Brennan and Fortas thought then not obscene, whereas Warren thought otherwise; in the paperback book cases Warren voted to set them for argument, whereas Fortas and Brennan voted for reversal, except that in the paperback "publisher" case involving, "Sex Life of a Cop" Warren and Brennan voted to remand for reconsideration as to the test involved, whereas Fortas voted for reversal on the ground that it was not obscene.

Seventh. The individual judgments of the separate justices were not consistent. Brennan, who thought the girlie strip-tease movies to be obscene, was of the opinion that still photos of the same type of action, that is, photos focusing on the vagina or backside, suggesting invitations to intercourse or sodomy—were not obscene. Chief Justice Warren, who thought the materials in Roth, Ginzburg and Mishkin were obscene, in looking at the same type of materials in Austin, Keney, Redrup, Gent, and Freedman, could not see the similarity nor did he come by the same result. Warren, who castigated the Attorney General of Kansas in 1964 for employing the injunctive device and exorted him to prosecute criminally, voted to reverse criminal convictions in Redrup, Austen, Keney, and Freedman. In Jacobellis Chief Justice Warren said community standards meant "local" community standards and the communities throughout the United States were "diversified" and that the Supreme Court should respect the lower court's determination, yet he ignored jury verdicts in Austin, Keney, Gent and Aday. In the Mishkin case in 1966, six justices voted to affirm, yet in Freedman v. N.Y., dealing with almost identical subject matter (sadistic and masochistic magazines) five of those six justices voted to reverse.

Eighth. While the Court voted the underground film "Un Chant D'Amour" obscene 5-4, the same majority of five unable to get together on a lower grade film, "Flaming Creatures", which depicted a 7-minute rape scene, acts of oral intercourse, fondling of the female vagina and breasts, masturbation of the visible penis, and the like, some of which were suggested but never shown in the film, "Un Chant D'Amour". The Court held the issues in that case "moot", to avoid a decision.

VIII. CONCLUSION: MAKING USE OF THE "CHECKS AND BALANCES" IN OUR CONSTITUTION

Having placed before the view of this audience the underlying historical facts in this cross-section of obscenity cases, we ask the question, "Where do you think the difficulty lies in this Nation's growing obscenity problem?" At the outset we laid claim to an understanding of the source of the problem. The history of these 26 decisions is clear proof to us that the root of this Nation's problem is the United States Supreme Court.

While the documentation appearing in this film may startle the casual observer, it has less of the shock impact to those who have followed closely the High Court's actions in recent years, for a "silent" revolution is being waged in that arena, not only in the obscenity area, but in other areas of the law as well. Not all revolutions are fought with guns. Playing the role of revolutionaries are certain justices of the United States Supreme Court.

In a continuous line of decisions dating back more than 10 years, the modern court has steered a course which has been indelibly marked by an abandonment of fixed principles. In this brief span of years, laws dealing with the control of Communistic activities, laws involving the rights of criminals, such as search and seizure, the privilege against self-incrimination and a defendant's right to counsel, reapportionment, free speech and a multitude of other major issues have been re-examined by the Court. The result has been an uprooting of long and well-established principles with a replacement by doctrine which experience has taught us is dangerous, and which often does not comport with the tenor of our times. In all of these cases, the Court's direction has been away from self-government and toward a concentration of power in the federal judiciary.

In an unprecedented petition to the justices of the United States Supreme Court, the 10th Annual Conference of the State Chief Justices went on record 9 years ago as urging the Court to amend their ways and exercise judicial restraint. The revolutionary bent of the Court has been the subject of continuing criticism by the American Bar Association, the Governors Conference, the National Association of Attorneys General and others. Unfortunately the urging of these high state officers has gone unheeded.

What you have witnessed is not new—if the reality of the situation comes through more clearly, it is only because the layman needs no legal training to come by an intimate knowledge of the common reference—the contemporary community standards. Unlike the prayer decision, the cases involving the rights of criminals, the Communist control legislation case and the other issues which have been shrouded in semantics and surrounded by legal debate, the average citizen needs no legal interpretation to smell filth when he sees it; and to assign culpability to a judiciary whose rulings give it free reign. The High Court's judgment and capacity in such matter is riveted to, and must rise or fall with the subject matter and conduct involved in these cases.

As we mentioned at the outset, this present conflict between certain members of the judiciary and the community has an ancient origin in our Government, the most famous controversy occurring 50 years before this Nation's founding. In that instance, the American judiciary sought to reserve to themselves control of the determination of what in fact constituted a libel. In freeing Zenger in 1735, the jury established the supremacy of the jury system on the American scene as a check and balance against an overbearing judiciary. That concept was to become one of the foundations of our Federal Constitution, appearing as a check and balance in Article 3, Section 2, which authorized Congress, acting for the people, to set the limits of the appellate jurisdiction of the United States Supreme Court, and as a part of the Bill of Rights guaranteeing the right of trial by jury and the supremacy of the jury's determination over those of the judiciary on questions of fact.

There is a solution to this Nation's obscenity problems but it takes dedication like that shown by Alexander Hamilton in the Zenger case to demand its achievement. It requires legislative action by Congress to enact into law the constitutional principles espoused by one of the present Supreme Court justices in this area.

"Since the domain of sexual morality is preeminently a matter of state concern, the Court should be slow to interfere with state legislation calculated to protect that morality."

The voice is that of Associate Justice John Marshall Harlan, speaking in the Roth-Alberts case. That justice went on to say:

"The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of material, the essential character of which is to degrade sex, will have an eroding effect on moral standards."

Accordingly, it is Justice Harlan's view, as stated in the Jacobellis case, that "as to the state, I would make the federal test one of rationality. It would not prohibit them from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such materials." It was Justice Harlan who voted to affirm the state determinations in the Keney, Freedman, Ratner, Cobert, Shepherd, Lewis, Bloomberg, Avansino, Cessa, Strombellene, Gaggi, Costanza, Corinth, Rosenbloom, Quantity of Books, Shackman, and Landau cases.

As noted by Justice Harlan in Alberts, the interest which the obscenity statutes protect are primarily matters of state concern, for each state is the primary guardian of the moral standards of its citizens. It is that justice's view that the great strength of our federal system is that we have, in the 50 states, 50 experimental social laboratories. If a mistake is encountered in the New York or California jurisdictions in setting the limit too low, as at hard-core pornography, that is something which can be more readily controlled by government in action, with all of its competing forces, within that state. The social experiments in other states go on undisturbed. Were this error to be made at the federal level, as in these 26 cases, the corrosion infects each state within the Union with disastrous results. The recovery there is not so easy to come by.

The Kentucky jurisdiction, the Arkansas jurisdiction, the New York jurisdiction, the California jurisdiction, each should have the power to control the moral destiny of its own community. No state government should be forced to accept

girlie magazines like "Spree" and "High Heels", or books like "Lust Pool" and "Shame Agent", or strip-tease film like "D–15", "O–7", and "O–12", against the express wishes of its citizenry. To hold otherwise is to censor the voice of the community and impair its moral development, for by its jury verdict in an obscenity trial, the jury is actually "speaking out" in the constitutional sense.

Our forefathers in Article 3, Section 2, wisely provided the necessary check and balance against an arbitrary judiciary. That section reads:

"The Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions, and under such regulations as the Congress shall make.*" (Our emphasis.)

Congress can, through legislation in implementation of Justice Harlan's view, withdraw appellate jurisdiction from the United States Supreme Court and give it back to the state supreme courts where it belongs. Had such legislation existed in May of 1967, the result in these cases would have been different, and the Nation would be well on its way to a solution of the obscenity problem—a solution mandated by the people in their verdicts in these 26 cases.

In conclusion, we emphasize that vice and pornography are not new to our scene. Such is but a recurrence in the cycle of history and the nature of man. For those of this audience who will say we have treated the United States Supreme Court with irreverence in this documentary, we would point to the moral problems this Nation faces and adopt the wise words and strong argument of Alexander Pope, a contemporary of Sedley and Curl, speaking in his Essay on Man, in 1705, of the same battle being waged in that century:

"Vice is a monster of so frightful mien as to be hated, only needed to be seen, yet seen too oft, familiar with her face, we first endure, then pity, then embrace."

The evidence is all around us that this Nation in 1967 has embraced the monster vice. Those statistics are well known. Since 1957, the juvenile delinquency cases have almost doubled, to more than 1.1 million in 1965. Between 1960 and 1966, juvenile arrests for homicide went up 31.3%, rape 34%, robbery 55%, and aggravated assault 115%—many of the latter offenses involving brutal and wanton beatings of helpless persons. During this period of time, Americans aged 10 to 17 increased by less than 20%. The spiralling climb of illegitimate births is told in these figures: In 1950 about one out of 25 children born in the United States was illegitimate. By 1960 the figure was one out of 19, by 1965 it was one out of 15 American births. If trends continue at the recent rate, at some time in the 1970's one out of every 10 American babies will be born out of wedlock. Already in some major cities, far more than 10% of all new babies are illegitimate. It was in this setting that the United States Supreme Court wrote its decision in these cases.

It is not to be expected that the parents of the 12-year-old girl who was raped on the city streets by a 20-year-old boy with a girlie magazine in his hip pocket will show reverence for a Court which reversed the State ruling which sought to control the girlie magazine problem.

The parents of the 7 teen-agers, who sexually attacked a 12-year-old girl, will not be able to understand the logic of a Court whose actions have neutralized State efforts to control the runaway distribution of subject matter which instructs, in enticing terms, that perversion is acceptable—material which the youths themselves indicated was their book of instruction for the sexual crimes they committed.

The parents of a 19-year-old girl who was raped and murdered by a youth, who forcibly entered her car at an intersection in the afternoon, after spending a morning watching lewd motion picture films, will be unable to accept a Court's determination which holds such films to be constitutionally protected, against the contrary demands of the State governments.

It is not our purpose to draw in question in any way the good faith of the justices of the United States Supreme Court. It is just that, in the sick climate in which we are now suffering, it is no defense that the Court acted with good intentions. That a Court, in acting beyond the scope of its powers, may do so with good intentions is unimportant. On this matter, Daniel Webster had the following to say:

"Good intention will always be pleaded for every assumption of power * * *. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters."

Case No. (1966 term) and date filed	Title	Case exhibits
2 (39) (793), Dec. 29, 1964	Keney v. N.Y. (jury)	3 paperback books (Nightstand and Midnight Reader) "Lust School" and "Lust Web" (MR–484), copyright 1963, Midnight Reader; "Sin Servant" (NB–1651), copyright 1963, Nightstand Books. Reversed, 18 L. Ed. 2d 1302 (June 12, 1967).
3 (72) (1073)	Redrup v. N.Y. (court)	2 paperback books "Lust Pool" and "Shame Agent," Ember Book (EB–943), copyright 1964 by Ember Books. Reversed, 18 L. Ed. 2d 515 (May 8, 1967).
7 (137) (1161), May 13, 1965.	Friedman v. N.Y. (court)	9 bondage books and magazines "Bondage Boarding School," "English Spanking School," "Bound and Spanked," "Sweeter Gwen," "Traveling Saleslady Gets Spanked," "Bound to Please," "Bizarre Summer Rivalry," "Heat Wave," and "Escape Into Bondage," book No. 2. Reversed, 18 L. Ed. 2d 1303 (June 12, 1967).
10 (285), June 24, 1965	Ratner v Calif. (jury)	Girlie film "Honey Bee." Reversed 18 L Ed 2d 1305 (June 12, 1967).
16 (453), Aug 13, 1965	Austin v Ky. (jury)	2 girlie magazines "High Heels," vol. 2, No. 6 and "Spree," No. 38. Reversed, 18 L. Ed. 2d 515 (May 8, 1967).
2 (544), Sept. 7, 1965	Cobert v. N Y. (court)	3 girlie films "June Palmer," No. 2, "M. Jordan," and "June Tracy." Opinion below reported in 15 N.Y. 21020, 207 N.E. 2619. Reversed, 18 L. Ed. 2d 1305 (June 12, 1967).
26 (626), Sept. 28, 1965	Sheperd v. N.Y. (court)	Bondage book "Promenade Bondage," vol. 4.
	Lewis v. N Y. (court)	Nude photos and 2 bondage books "Bondage Annual," No. 1, and "Spanking Sisters."
	Bloomberg v. N.Y. (court)	2 bondage books "Bondage Annual," No. 1, and "Spanking Sisters." All reversed, 18 L. Ed. 2d 1306 (June 12, 1967).
50 (874), Jan. 4, 1966	Gent v Arkansas (Jury)	8 girlie magazines "Cavalcade," "Gentlemen," "Ace," "Sir," "Gent," "Swank," "Modern Man," and "Bachelor." Opinion below reported in 239 Ark. 474, 393 5W2 219. Reversed 18 L. Ed. 2d 535 (May 8, 1967).
72 (1008), Feb. 11, 1966	Avansino v. N.Y. (court)	Nude photographs of females in provocative poses. Reversed, 18 L. Ed. 2d 1308 (June 12, 1967).
	Sessa v. N.Y. (court)	Case 1, nude color photos (female); case 2, nude photos (females). Reversed, 18 L. Ed. 2d 1308 (June 12, 1967).
	Stombelline v. N.Y. (court)	Case 1, Bondage book "Promenade Bondage"; case 2, nude photos (female). Reversed, 18 L. Ed. 2d 1308 (June 12, 1967).
	Gaggi v. N.Y	Nude photos (female). Reversed, 18 L. Ed. 2d 1308 (June 12, 1967).
	Costanza v. N.Y. (court)	Do.
149 (1329), May 18, 1966	Aday v. U.S (jury)	Paperback book "Sex Life of a Cop," Saber Book (SA–11), copyright 1958, Fresno, Calif. Opinion below reported in — F2 —. Reversed, 18 L. Ed. 2d 1309 (June 12, 1967).
227 (1409), June 13, 1966	Corinth Publications, Inc. v Wesberry (court).	Paperback book "Evening Reader" (ER–768), "Sin Whisper," copyright 1964, Colnth Publications, San Diego, Calif. Opinion below reported in 221 Ga. 704 146 S.E. 2 764. Reversed, 18 L. Ed. 2d 1310 (June 12, 1967).
323, July 8, 1966	Books, Inc. v. U.S. (jury)	Paperback book "Lust Job." Opinion below reported in — F2 —. Reversed, 18 L. Ed. 2d 1311 (June 12, 1967).
332, July 9, 1966	The Bookcase, Inc. v. Leary (court).	Declaratory judgment re statute opinion below reported in— N.E. 2 —. Dismissed for lack of proper question, 17 L. Ed. 2d 111 (Oct. 10, 1966).
366, July 19, 1966	Rosenbloom v. Va. (court)	Nudist magazines "Solis" plus others. Reversed, 18 L. Ed. 2d 1312 (June 12, 1967).
616, Sept 30, 1966	Wenzler v. Pitchess (court)	Girlie film "First Fling." A habeas corpus action brought by the defendant after the U.S. Supreme Court refused to grant certiorari in Wenzler v. Calif., 12 L. Ed 2d 1047 (June 22, 1964); rehearing denied in 13 L. Ed. 2d 77 (Oct. 12, 1964). Petition for certiorari again denied in 18 L Ed. 2d 1351 (June 12, 1967).
66 0, Oct. 11, 1966	Jacobs v. N Y. (court)	Underground art film "Flaming Creatures." Held to be "moot," 18 L. Ed. 2d 1294 (June 12, 1967).
865, Dec. 14, 1966	A Quantity of Books v. Kansas (court).	11 Nightstand-type paperbacks (Idlehour, Ember Book, Evening Reader, Sundown Reader, Leisure Book) "Sin Hooked," "Bayou Sinners," "Lust Hungry," "Shame Shop," "Flesh Pot," "Sinner's Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," "Sin Warden," and "Flesh Avenger." Opinion below reported in 197 Kans. 306, 416 P2 703. Reversed, 18 L. Ed. 1314 (June 12, 1967).
896, Dec. 22, 1966	Mazes v. Ohio (jury)	Paperback book "Orgy House," Merit Books, published by Camerarts Publishing Co., 2715 North Pulaski Rd., Chicago, Ill. Opinion below reported in 3 Ohio app. 2, 90, 209 N.E. s2 496 and 7 Ohio St. 136 218 N.E. 2 725. Reversed, 18 L. Ed. 2d 1315 (June 12, 1967).

Case No. (1966 term) and date filed	Title	Case exhibits
971 [1]	Interstate Circuit, Inc. v. Dallas	Involving constitutionality of Dallas movie classification ordinance. No disposition during October term, 1966. Opinion below reported in — F2 —, certiorari granted and judgment reversed, 20 L. Ed. 2 — (May 6, 1968).
978 [2]	Dallas v. Interstate Circuit, Inc.	Involving constitutionality of Dallas movie classification ordinance. No disposition during October term, 1966. Opinion below reported in — F2 —, Certiorari granted and judgment reversed, 20 L. Ed. 2 — (May 6, 1968).
993	Tannenbaum v. N.Y. (court)	Sale of girlie magazine "Candid" to 17-year-old minor in violation of sec. 484–I (New York minor's statute) held to be "moot." Opinion below reported in 18 N.Y. 2, 268, 220 N.E. 2 783. Revised by 18 L. Ed. 2d 1300 (June 12, 1967).
995, Jan. 23, 1967	Shackman v. Calif. (jury)	3 girlie films D–15, 0–7, and 0–12. No opinion below, but see 258 F. Supp. 983. Reversed, 18 L. Ed. 2d 1316 (June 12, 1967).
1022, [3] Feb. 11, 1967	Ginsberg v. N.Y. (court)	Sale of girlie magazines "Mr. Annual," fall 1965, and "Sir, Decals" to 16-year-old minor in violation of sec. 484–H (New York minor's statute).
1088, Feb. 23, 1967	Holding v. Blankenship	Involving action taken by Oklahoma Censor Board. Opinion below reported in 259 F. Supp. 694. Reversed, 18 L. Ed. 2d 585 (May 15, 1967).
1089, Feb. 23, 1967	Blankenship v. Holding	Involving action taken by Oklahoma Censor Board. Opinion below reported in 259 F. Supp. 694. Oklahoma statute held unconstitutional, 18 L. Ed. 2d 686 (May 15, 1967).
56, 1109 [4]	Interstate Circuit, Inc. v. Dallas (court).	Application of Dallas movie classification ordinance to film "Viva Maria." Opinion below reported in 402 S.W. 2 779.
64, 1155, [4] Mar. 16, 1967	United Artists Corp. v. Dallas (court).	Do.
1164, Mar. 18, 1967	Landau v. Fording (court)	Declaratory judgment that underground art film, "Un Chant D'Amour" was obscene. Opinion below reported in 245 Calif. App. 2 —, 54 Cal. Rptr. 177. Judgment affirmed, 18 L. Ed. 2d 1317 (June 12, 1967).
1186, Mar. 24, 1967	Shackman v. Arneberg (court)	Federal court action attacking prosecution of 3 girlie films D–15, 0–7, and 0–12. Opinion below reported in 258 F. Supp. 983. Appeal dismissed for lack of jurisdiction, 18 L. Ed. 2d 865 (May 29, 1967).
1189, Mar. 24, 1967	Luros v. Superior Court of Calif. (court).	Attempt to halt criminal prosecution; petition for certiorari denied, 18 L. Ed. 2d 597 (May 8, 1967).
1187, [5] Apr. 17, 1967	Fort v. City of Miami (court)	Miami sculptors outdoor display of figures depicting sex acts (cunnilingus, fellatio, etc.). No disposition during October term, 1966.
1394, [5] May 15, 1967	Potomac News Co. v U.S. (court)	Nudist magazine "Hellenic Sun" No. 2. Opinion below reported in 373 F. 2 635. No disposition during October term, 1966.
306 miscellaneous	Conrad Chance v. Calif. (jury)	Criminal prosecution. 12 photos of female nudes. Certiorari granted. Judgment reversed, 19 L. Ed 2d 256 (Nov. 6, 1967). No opinion reported below.
259, June 19, 1967	Glen Conner v. City of Hammond (jury and court).	Sale of girlie magazines "Escapade," December 1964, "Dude," November 1964, "Rogue," December 1964, "Gent," November 1964, "Cavalier," October 1964, "Knight," vol. 41, issue 9. Certiorari granted. Judgment reversed, 19 L. Ed. 2d 47 (Oct. 23, 1967). Judgment below unreported.
260, June 19, 1967	I. M. Amusement Corp. v. Ohio (court).	Exhibition of 16-mm. girlie film "Artists Models." Judgment below, 266 N.E. 2d 567. Appeal granted. Judgment reversed 19 L. Ed. 2d 776 (Jan. 15, 1966).
323, July 3, 1967	Ramona Bennett and Moira C. Morse v. Calif. (jury).	Topless bar case. Prosecution under "Sir Charles Sedley's statute"—lewd exhibition. Certiorari denied, 19 L. Ed. 2d 478 (Dec. 4, 1967). Judgment below unreported.
368, July 14, 1967	Central Magazine Sales, Ltd. v U.S. (court).	Girlie magazine "Exclusive" and male nudist magazines "Revenue International," vol. 6, and "International Nudist Sun," vol. 16. Opinion below reported in 373 F. 2d 633. Certiorari granted. Judgment reversed, 19 L. Ed. 2d 49 (Oct. 23, 1967).
430, July 28, 1967	G. I. Distributors, Inc. v. N.Y. (court).	Criminal prosecution. "Grecian Guild Studio Quarterly." Opinion below reported in 228 N.E. 2d 787. Certiorari denied, 19 L. Ed. 2d 219 (Oct. 16, 1967).
594, Sept. 8, 1967	Arthur Levin v. Maryland (court)	Criminal prosecution. 3 sets of nude male photos. Opinion below reported in 228 A. 2d 487. Certiorari denied, 19 L. Ed. 2d 840 (Jan. 15, 1968).
611, Sept. 13, 1967	Rabeck v. Beck N.Y. (court)	Sale of girlie magazines "Snap," vol. 2, No. 8, and "Trojan," vol. 3, No. 4, to minor in violation of sec. 484–i (New York minor's statute). (See Tannenbaum v. N.Y. (supra) Cf. Ginsberg v. N.Y. (supra).) No opinion below. Appeal granted. Judgment reversed (May 27, 1968), 82 188.
679, Oct. 3, 1967	Robert-Arthur Management Corp. v. Tennessee ex rel Phil M. Canale, Dist. Atty General (court).	Injunction, 35-mm. motion picture film "Mondo Freudo." Opinion below reported in 414 S.W. 2d 638. Appeal granted. Judgment reversed, 19 L. Ed. 2d 777 (Jan. 15, 1968).

Case No. (1966 term) and date filed	Title	Case exhibits
[7] 29, Oct. 16, 1967	Samuel Ratner v Calif. (Jury)	Criminal prosecution. Count I Bondage book "Bondage Cabin." Count II, 8-mm. bondage film, "The Count." Count III advertising brochure. (Special advertising statute, Jan. 29, 1968). No opinion below. Certiorari denied, 19 L. Ed. 2d 983.
787, Nov. 6, 1967	Teitel Film Corp v. Cusack (court).	Motion picture censor board refused to grant license, 35-mm. motion picture films "Rent-A-Girl" and "Body of a Female." Appeal granted. Opinion below reported in 230 N.E. 2d 241. Judgment reversed on procedural grounds. No determination on obscenity issue, 19 L. Ed., 2d 966 (Jan. 29, 1968).
880, Dec. 4, 1967	Wm. C. Bray v. Calif. (jury)	Criminal prosecution. Sale of paperback book "Just for Kicks," Satan Press 111. No opinion below. Certiorari denied, 20 L. Ed. 2 — (Mar. 18, 1968).
921, Dec. 16, 1967	Samuels v. Calif. (jury)	Aggravated assault (sadism and masochism in films). Opinion below reported in 58 Calif. Rptr. 439. Certiorari denied, 20 L. Ed. 2 — (Apr. 22, 1968).
932, Dec. 18, 1967	Percy Henry v. Louisiana (court)	Criminal prosecution. Sale of girlie magazines "Gem," vol. 7, No. 3; "Carnival," vol. 12, No. 1; "Rogue," vol. 10, No. 1; "Sir," vol. 21, No. 6; "Ace," vol. 8, No. 4; "Caper," vol. 11, No. 2; "Jaguar," vol. 1, No. 2; "Gent," vol 8, No. 9; "Wildcat," vol. 5, No. 6; "Sir Year Book," fall 1964; and "Nugget," vol. 9, No. 4. Opinion below reported in 198 So. 2d 889. Appeal dismissed but certiorari granted and judgment reversed. 20 L. Ed. 2 — (June 19. 1968).
934, Dec 21, 1967	Felton v. City of Pensacola (court)	Criminal prosecution. Sale of nudist magazines. Opinion below reported in 200 So.2d 842. Certiorari granted. Judgment reversed, 20 L. Ed. 3 — (Mar. 11, 1968).
966, Dec 28, 1967	Pennsylvania v. Dell Publications, Inc (court).	Petition for certiorari by district attorney of Philadelphia County, Pa., to review Pennsylvania Supreme Court determination holding "Candy" not obscene. Denied 20 L. Ed. —, certiorari (Mar. 4, 1968).
997, Jan. 8, 1968	Lee Art Theater, Inc. v. Virginia (jury).	Criminal prosecution. 35-mm. motion picture films "Erotic Touch of Hot Skin" and "Rent-A-Girl." As to latter film, see Teitel Film Corp. v. Cusack, supra. No opinion below. Certiorari granted and judgment reversed on search and seizure grounds only, 20 L. ED. 2— (June 19, 1968).
1092, Feb. 7, 1968	Reed Enterprises v. Clark (court)	Constitutionality of Federal statute permitting prosecution in juris of distribution. Affirmed, 20 L. Ed. 2 — (Mar. 25, 1968).
1124, Feb. 15, 1968	California v. Noroff (court)	Petition for certiorari by Los Angeles City attorney to review California Supreme Court's decision holding male nudist magazine "International Nudist Sun," vol. 1, No. 5, protected. Conflicting opinions, 58 — Calif. Rptr. 172 and 63 Calif. Rptr. 575. Compare Central Mag. Sales v. U.S. supra. Certiorari denied, 20 L. Ed. 2 — (Apr. 8, 1968).
1235, Mar. 15, 1969	Sturman v. U S. (court)	Petition for certiorari to review Circuit Court of Appeals, 6th Circuit, decision against Sturman's appeal of grand jury subpenas. Certiorari denied, 20 L. Ed. 2 — (May 6, 1968).

[1] Redesignated as case No. 42 on October term, 1967 calendar.
[2] Redesignated as case No. 44 on October term, 1967 calendar.
[3] Jurisdiction noted in 18 L. Ed. 2d 1344 (June 12, 1967). Redesignated as case No. 47 on October 1967 calendar. Oral arguments heard Jan. 16, 1968. Affirmed, 20 L. 2d —.
[4] Jurisdiction noted in 18 L. Ed. 2d 620 (May 15, 1967). Redesignated as case Nos. 56 and 64 on October term, 1967 calendar. Oral arguments heard Jan. 16, 1968. Reversed, 20 L. Ed. 2 —.
[5] Redesignated as case No. 91 on October term, 1967 calendar. Certiorari denied, 19 L. Ed. 2d 498 (Dec. 4, 1967).
[6] Redesignated as case No. 164 on October term, 1967 calendar. Certiorari granted and judgment reversed, 19 L. Ed. 2d 46 (Oct. 23, 1967).

EXHIBIT 52

SUPREME COURT OF THE UNITED STATES

No. 645.—OCTOBER TERM, 1967.

Joseph Lee Jones et ux., Petitioners, *v.* Alfred H. Mayer Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 17, 1968.]

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are called upon to determine the scope and the constitutionality of an Act of Congress, 42 U. S. C. § 1982, which provides that:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

On September 2, 1965, the petitioners filed a complaint in the District Court for the Eastern District of Missouri, alleging that the respondents had refused to sell them a home in the Paddock Woods community of St. Louis County for the sole reason that petitioner Joseph Lee Jones is a Negro. Relying in part upon § 1982, the petitioners sought injunctive and other relief.[1] The District Court sustained the respondents' motion to

[1] To vindicate their rights under 42 U. S. C. § 1982, the petitioners invoked the jurisdiction of the District Court to award "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." 28 U. S. C. § 1343 (4). In such cases, federal jurisdiction does not require that the amount in controversy exceed $10,000. Cf. *Douglas* v. *City of Jeannette*, 319 U. S. 157, 161; *Hague* v. *C. I. O.*, 307 U. S. 496, 507–514, 527–532.

dismiss the complaint,[2] and the Court of Appeals for the Eighth Circuit affirmed, concluding that § 1982 applies only to state action and does not reach private refusals to sell.[3] We granted certiorari to consider the questions thus presented.[4] For the reasons that follow, we reverse the judgment of the Court of Appeals. We hold that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.[5]

I.

At the outset, it is important to make clear precisely what this case does *not* involve. Whatever else it may be, 42 U. S. C. § 1982 is not a comprehensive open housing law. In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73, the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin.[6] It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling.[7] It does not prohibit advertising or other representations that indicate discriminatory preferences.[8] It does not refer explicitly

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[2] 255 F. Supp. 115.

[3] 379 F. 2d 33.

[4] 389 U. S. 968.

[5] Because we have concluded that the discrimination alleged in the petitioners' complaint violated a federal statute that Congress had the power to enact under the Thirteenth Amendment, we find it unnecessary to decide whether that discrimination also violated the Equal Protection Clause of the Fourteenth Amendment.

[6] Contrast the Civil Rights Act of 1968, § 804 (a).

[7] Contrast § 804 (b).

[8] Contrast §§ 804 (c), (d), (e).

to discrimination in financing arrangements[9] or in the provision of brokerage services.[10] It does not empower a federal administrative agency to assist aggrieved parties.[11] It makes no provision for intervention by the Attorney General.[12] And, although it can be enforced by injunction,[13] it contains no provision expressly authorizing a federal court to order the payment of damages.[14]

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[9] Contrast § 805.

[10] Contrast § 806. In noting that 42 U. S. C. § 1982 differs from the Civil Rights Act of 1968 in not dealing explicitly and exhaustively with such matters (see also nn. 7 and 9, *supra*), we intimate no view upon the question whether ancillary services or facilities of this sort might in some situations constitute "property" as that term is employed in § 1982. Nor do we intimate any view upon the extent to which discrimination in the provision of such services might be barred by 42 U. S. C. § 1981, the text of which appears in n. 78, *infra*.

[11] Contrast the Civil Rights Act of 1968, §§ 808–811.

[12] Contrast § 813 (a).

[13] The petitioners in this case sought an order requiring the respondents to sell them a "Hyde Park" type of home on Lot No. 7147, or on "some other lot in [the] subdivision sufficient to accommodate the home selected . . . ." They requested that the respondents be enjoined from disposing of Lot No. 7147 while litigation was pending, and they asked for a permanent injunction against future discrimination by the respondents "in the sale of homes in the Paddock Woods subdivision." The fact that 42 U. S. C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy. See, *e. g.*, *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 568-570; *Deckert* v. *Independence Corp.*, 311 U. S. 282, 288; *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 491–492; *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432–435. Cf. *Ex parte Young*, 209 U. S. 123; *Griffin* v. *School Board*, 377 U. S. 218.

[14] Contrast the Civil Rights Act of 1968, § 812 (c). The complaint in this case alleged that the petitioners had "suffered actual damages in the amount of $50.00," but no facts were stated to support or explain that allegation. Upon receiving the injunctive relief to which they are entitled, see n. 13, *supra*, the petitioners

Thus, although § 1982 contains none of the exemptions that Congress included in the Civil Rights Act of 1968,[15] it would be a serious mistake to suppose that § 1982 in any way diminishes the significance of the law recently enacted by Congress. Indeed, the Senate Subcommittee on Housing and Urban Affairs was informed in hearings held after the Court of Appeals had rendered its decision in this case that § 1982 might well be "a presently valid federal statutory ban against discrimination by private persons in the sale or lease of real property."[16] The Subcommittee was told, however, that even if this Court should so construe § 1982, the existence of that statute would not "eliminate the need for congressional action" to spell out "responsibility on the part of the federal

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will presumably be able to purchase a home from the respondents at the price prevailing at the time of the wrongful refusal in 1965—substantially less, the petitioners concede, than the current market value of the property in question. Since it does not appear that the petitioners will then have suffered any uncompensated injury, we need not decide here whether, in some circumstances, a party aggrieved by a violation of § 1982 might properly assert an implied right to compensatory damages. Cf. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39–40; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 207; *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 202, 204. See generally *Bell* v. *Hood*, 327 U. S. 678, 684. See also 42 U. S. C. § 1988. In no event, on the facts alleged in the present complaint, would the petitioners be entitled to punitive damages. See *Philadelphia, Wilmington & Baltimore R. Co.* v. *Quigley*, 21 How. 202, 213–214. Cf. *Barry* v. *Edmunds*, 116 U. S. 550, 562–565; *Will* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360, 367–368. We intimate no view, however, as to what damages might be awarded in a case of this sort arising in the future under the Civil Rights Act of 1968.

[15] See §§ 803 (b), 807.

[16] Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 229. These hearings were a frequent point of reference in the debates preceding passage of the 1968 Civil Rights Act. See, *e. g.*, 114 Cong. Rec. S. 1387 (Feb. 16, 1968), S. 1453 (Feb. 20, 1968), S. 1641 (Feb. 26, 1968), S. 1788 (Feb. 27, 1968).

government to enforce the rights it protects." [17] The point was made that, in light of the many difficulties confronted by private litigants seeking to enforce such rights on their own, "legislation is needed to establish federal machinery for enforcement of the rights guaranteed under Section 1982 of Title 42 even if the plaintiffs in Jones v. Alfred H. Mayer Company should prevail in the United States Supreme Court." [18]

On April 10, 1968, Representative Kelly of New York focused the attention of the House upon the present case and its possible significance. She described the background of this litigation, recited the text of § 1982, and then added:

> "When the Attorney General was asked in court about the effect of the old law [§ 1982] as compared with the pending legislation which is being considered on the House floor today, he said that the scope was somewhat different, the remedies and procedures were different, and that the new law was still quite necessary." [19]

Later the same day, the House passed the Civil Rights Act of 1968. Its enactment had no effect upon § 1982 [20]

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[17] Hearings, *supra*, n. 16, at 229.

[18] *Id.*, at 230. See also *id.*, at 129, 162–163, 251. And see Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 416.

[19] 114 Cong. Rec. H. 2807 (April 10, 1968). See also *id.*, at H. 2808. The Attorney General of the United States stated during the oral argument in this case that the Civil Rights Act then pending in Congress "would provide open housing rights on a complicated statutory scheme, including administrative, judicial, and other sanctions for its effectuation . . . ." "Its potential for effectiveness," he added, "is prohably much greater than [§ 1982] because of the sanctions and the remedies that it provides."

[20] At oral argument, the Attorney General expressed the view that, if Congress should enact the pending bill, § 1982 would not be affected in any way but "would stand independently." That is, of course, correct. The Civil Rights Act of 1968 does not mention

and no effect upon this litigation,[21] but it underscored the vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority. Having noted these differences, we turn to a consideration of § 1982 itself.

II.

This Court last had occasion to consider the scope of 42 U. S. C. § 1982 in 1948, in *Hurd* v. *Hodge,* 334 U. S. 24. That case arose when property owners in the District of Columbia sought to enforce racially restrictive covenants against the Negro purchasers of several homes on their block. A federal district court enforced the restrictive agreements by declaring void the deeds of the Negro purchasers. It enjoined further attempts to sell or lease them the properties in question and directed them to "remove themselves and all of their personal belongings" from the premises within 60 days. The

42 U. S. C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute. See *United States* v. *Borden Co.,* 308 U. S. 188, 198–199. See also § 815 of the 1968 Act: "Nothing in this title shall be construed to invalidate or limit any law of . . . any . . . jurisdiction in which this title shall be effective, that grants, guarantees, or protects the . . . rights . . . granted by this title . . . ."

[21] On April 22, 1968, we requested the views of the parties as to what effect, if any, the enactment of the Civil Rights Act of 1968 had upon this litigation. The parties and the Attorney General, representing the United States as *amicus curiae,* have informed us that the respondents' housing development will not be covered by the 1968 Act until January 1, 1969; that, even then, the Act will have no application to cases where, as here, the alleged discrimination occurred prior to April 11, 1968, the date on which the Act

Court of Appeals for the District of Columbia affirmed,[22] and this Court granted certiorari [23] to decide whether § 1982, then § 1978 of the Revised Statutes of 1874, barred enforcement of the racially restrictive agreements in that case.

The agreements in *Hurd* covered only two-thirds of the lots of a single city block, and preventing Negroes from buying or renting homes in that specific area would not have rendered them ineligible to do so elsewhere in the city. Thus, if § 1982 had been thought to do no more than grant Negro citizens the legal capacity to buy and rent property free of prohibitions that wholly disabled them because of their race, judicial enforcement of the restrictive covenants at issue would not have violated § 1982. But this Court took a broader view of the statute. Although the covenants could have been enforced without denying the general right of Negroes to purchase or lease real estate, the enforcement of those covenants would nonetheless have denied the Negro purchasers "the same right 'as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.' " 334 U. S., at 34. That result, this Court concluded, was prohibited by

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became law; and that, if the Act were deemed applicable to such cases, the petitioners' claim under it would nonetheless be barred by the 180-day limitation period of §§ 810 (b) and 812 (a).

Nor did the passage of the 1968 Act after oral argument in this case furnish a basis for dismissing the writ of certiorari as improvidently granted. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, relied upon in dissent, *post*, at 29–30, was quite unlike this case, for the statute that belatedly came to the Court's attention in *Rice* reached precisely the same situations that would have been covered by a decision in this Court sustaining the petitioner's claim on the merits. The coverage of § 1982, however, is markedly different from that of the Civil Rights Act of 1968.

[22] 162 F. 2d 233.

[23] 332 U. S. 789.

§ 1982. To suggest otherwise, the Court said, "is to reject the plain meaning of language." *Ibid.*

Hurd v. *Hodge, supra,* squarely held, therefore, that a Negro citizen who is denied the opportunity to purchase the home he wants "[s]olely because of [his] race and color," 334 U. S., at 34, has suffered the kind of injury that § 1982 was designed to prevent. Accord, *Buchanan* v. *Warley,* 245 U. S. 60, 79; *Harmon* v. *Tyler,* 273 U. S. 668; *Richmond* v. *Deans,* 281 U. S. 704. The basic source of the injury in *Hurd* was, of course, the action of private individuals—white citizens who had agreed to exclude Negroes from a residential area. But an arm of the Government—in that case, a federal court—had assisted in the enforcement of that agreement.[24] Thus *Hurd* v. *Hodge, supra,* did not present the question whether *purely* private discrimination, unaided by any action on the part of government, would violate § 1982 if its effect were to deny a citizen the right to rent or buy property solely because of his race or color.

The only federal court (other than the Court of Appeals in this case) that has ever squarely confronted that question held that a wholly private conspiracy among white citizens to prevent a Negro from leasing a farm violated § 1982. *United States* v. *Morris,* 125 F. 322. It is true that a dictum in *Hurd* said that § 1982 was directed only toward "governmental action," 334 U. S., at 31, but neither *Hurd* nor any other case

[24] Compare *Harmon* v. *Tyler,* 273 U. S. 668, invalidating a New Orleans ordinance which gave legal force to private discrimination by forbidding any Negro to establish a home in a white community, or any white person to establish a home in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected." See *Shelley* v. *Kraemer,* 334 U. S. 1, 12.

before or since has presented that precise issue for adjudication in this Court.[25] Today we face that issue for the first time.

III.

We begin with the language of the statute itself. In plain and unambiguous terms, § 1982 grants to all citizens, without regard to race or color, "the same right" to purchase and lease property "as is enjoyed by white citizens." As the Court of Appeals in this case evidently recognized, that right can be impaired as effec-

[25] Two of this Court's early opinions contain dicta to the general effect that § 1982 is limited to state action. *Virginia* v. *Rives*, 100 U. S. 313, 317–318; *Civil Rights Cases*, 109 U. S. 3, 16–17. But all that *Virginia* v. *Rives*, *supra*, actually *held* was that § 641 of the Revised Statutes of 1874 (derived from § 3 of the Civil Rights Act of 1866 and currently embodied in 28 U. S. C. § 1443 (1)) did not authorize the removal of a state prosecution where the defendants, without pointing to any statute discriminating against Negroes, could only assert that a denial of their rights might take place and might go uncorrected at trial. 100 U. S., at 319–322. See *Georgia* v. *Rachel*, 384 U. S. 780, 797–804. And of course the *Civil Rights Cases*, *supra*, which invalidated §§ 1 and 2 of the Civil Rights Act of 1875, 18 Stat. 335, did not involve the present statute at all.

It is true that a dictum in *Hurd* v. *Hodge*, 334 U. S. 24, 31, characterized *Corrigan* v. *Buckley*, 271 U. S. 323, as having "held" that "[t]he action toward which the provisions of the statute . . . [are] directed is governmental action." 334 U. S., at 31. But no such statement appears in the *Corrigan* opinion, and a careful examination of *Corrigan* reveals that it cannot be read as authority for the proposition attributed to it in *Hurd*. In *Corrigan*, suits had been brought to enjoin a threatened violation of certain restrictive covenants in the District of Columbia. The courts of the District had granted relief, see 299 F. 899, and the case reached this Court on appeal. As the opinion in *Corrigan* specifically recognized, no claim that the covenants could not validly be *enforced* against the appellants had been raised in the lower courts, and no such claim was properly before this Court. 271 U. S., at 330–331. The only question presented for decision was whether the restrictive covenants *themselves* violated the Fifth, Thirteenth, and Fourteenth Amend-

tively by "those who place property on the market" [26] as by the State itself. For, even if the State and its agents lend no support to those who wish to exclude persons from their communities on racial grounds, the fact remains that, whenever property "is placed on the market for whites only, whites have a right denied to Negroes." [27] So long as a Negro citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy "the *same* right . . . as is enjoyed by white citizens . . . to . . . purchase [and] lease . . . real and personal property." 42 U. S. C. § 1982. (Emphasis added.)

On its face, therefore, § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities. Indeed, even the respondents seem to concede that, if § 1982 "means what it says"—to use the words of the respondents' brief—then it must encompass every racially motivated refusal

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ments, and §§ 1977, 1978, and 1979 of the Revised Statutes (now 42 U. S. C. §§ 1981, 1982, and 1983. *Ibid.* Addressing itself to that narrow question, the Court said that none of the provisions relied upon by the appellants prohibited private individuals from "enter[ing] into [contracts] in respect to the control and disposition of their own property." *Id.*, at 331. Nor, added the Court, had the appellants even *claimed* that the provisions in question "had, in and of themselves, . . . [the] effect" of prohibiting such contracts. *Ibid.*

Even if *Corrigan* should be regarded as an adjudication that 42 U. S. C. § 1982 (then § 1978 of the Revised Statutes) does not prohibit private individuals from *agreeing* not to sell their property to Negroes, *Corrigan* would *not* settle the question whether § 1982 prohibits an *actual refusal to sell* to a Negro. Moreover, since the appellants in *Corrigan* had not even argued in this Court that the statute prohibited private agreements of the sort there involved, it would be a mistake to treat the *Corrigan* decision as a considered judgment even on that narrow issue.

[26] 379 F. 2d 33, 43.

[27] *Ibid.*

to sell or rent and cannot be confined to officially sanctioned segregation in housing. Stressing what they consider to be the revolutionary implications of so literal a reading of § 1982, the respondents argue that Congress cannot possibly have intended any such result. Our examination of the relevant history, however, persuades us that Congress meant exactly what it said.

IV.

In its original form, 42 U. S. C. § 1982 was part of § 1 of the Civil Rights Act of 1866.[28] That section was cast in sweeping terms:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[29]

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[28] Act of April 9, 1866, c. 31, § 1, 14 Stat. 27, re-enacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144, and codified in §§ 1977 and 1978 of the Revised Statutes of 1874, now 42 U. S. C. §§ 1981 and 1982. For the text of § 1981, see n. 78, *infra*.

[29] It is, of course, immaterial that § 1 ended with the words "any law, statute, ordinance, regulation, or custom, to the contrary not-

The crucial language for our purposes was that which guaranteed all citizens "the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . . ." To the Congress that passed the Civil Rights Act of 1866, it was clear that the right to do these things might be infringed not only by "State or local law" but also by "custom, or prejudice." [30] Thus, when Congress provided in § 1 of the Civil Rights Act that the right to purchase and lease property was to be enjoyed equally throughout the United States by Negro and white citi-

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withstanding." The phrase was obviously inserted to qualify the reference to "like punishment, pains, and penalties, and to none other," thus emphasizing the supremacy of the 1866 statute over inconsistent state or local laws, if any. It was deleted, presumably as surplusage, in § 1978 of the Revised Statutes of 1874.

[30] Several weeks before the House began its debate on the Civil Rights Act of 1866, Congress had passed a bill (S. No. 60) to enlarge the powers of the Freedmen's Bureau (created by Act of March 3, 1865, c. 90, 13 Stat. 507) by extending military jurisdiction over certain areas in the South where, "in consequence of any State or local law, . . . *custom, or prejudice,* any of the civil rights . . . belonging to white persons (including the right . . . to inherit, purchase, lease, sell hold, and convey real and personal property . . .) are refused or denied to negroes . . . on account of race, color, or any previous condition of slavery or involuntary servitude . . . ." See Cong. Globe, 39th Cong., 1st Sess., 129, 209. (Emphasis added.) Both Houses had passed S. No. 60 (see *id.*, at 421, 688, 748, 775), and although the Senate had failed to override the President's veto (see *id.*, at 915–916, 943) the bill was nonetheless significant for its recognition that the "right to purchase" was a right that could be "refused or denied" by "custom or prejudice" as well as by "State or local law." See also the text accompanying nn. 49 and 59, *infra*. Of course an "ahrogation of civil rights made 'in consequence of . . . custom, or prejudice' might as easily he perpetrated by private individuals or by unofficial community activity as by state officers armed with statute or ordinance." J. tenBroek, Equal Under Law 179 (1965 ed.).

zens alike, it plainly meant to secure that right against interference from any source whatever, whether governmental or private.[31]

Indeed, if § 1 had been intended to grant nothing more than an immunity from *governmental* interference, then much of § 2 would have made no sense at all.[32] For that section, which provided fines and prison terms for certain

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[31] When Congressman Bingham of Ohio spoke of the Civil Rights Act, he charged that it would duplicate the substantive scope of the bill recently vetoed by the President, see n. 30, *supra*, and that it would extend the territorial reach of that bill throughout the United States. Cong. Globe, 39th Cong., 1st Sess., 1292. Although the Civil Rights Act, as the dissent notes, *post*, at 9, 13, made no explicit reference to "prejudice," cf. n. 30, *supra*, the fact remains that nobody who rose to answer the Congressman disputed his basic premise that the Civil Rights Act of 1866 would prohibit every form of racial discrimination encompassed by the earlier bill the President had vetoed. Even Senator Trumbull of Illinois, author of the vetoed measure as well as of the Civil Rights Act, had previously remarked that the latter was designed to "extend to all parts of the country," on a permanent basis, the "equal civil rights" which were to have been secured in rebel territory by the former, *id.*, at 322, to the end that "*all* the badges of servitude . . . be abolished." *Id.*, at 323. (Emphasis added.)

[32] Section 2 provided:

"That any person who, *under color of any law, statute, ordinance, regulation, or custom,* shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court." (Emphasis added.)

For the evolution of this provision into 18 U. S. C. § 242, see *Screws* v. *United States*, 325 U. S. 91, 98–99; *United States* v. *Price*, 383 U. S. 787, 804.

individuals who deprived others of rights "secured or protected" by § 1, was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed.[33] There would, of course, have been no private violations to exempt if the only "right" granted by § 1

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[33] When Congressman Loan of Missouri asked the Chairman of the House Judiciary Committee, Mr. Wilson of Iowa, "why the committee limit the provisions of the second section to those who act under the color of law," Cong. Globe, 39th Cong., 1st Sess., 1120, he was obviously inquiring why the second section did not also punish those who violated the first *without* acting "under the color of law." Specifically, he asked:

"Why not let them [the penalties of § 2] apply to the whole community where the acts are committed?" *Ibid.*

Mr. Wilson's reply was particularly revealing. If, as floor manager of the bill, he had viewed acts not under color of law as not violative of § 1 at all, that would of course have been the short answer to the Congressman's query. Instead, Mr. Wilson found it necessary to explain that the Judiciary Committee did not want to make "a general criminal code for the States." *Ibid.* Hence only those who discriminated "in reference to civil rights . . . under the color of . . . local laws" were made subject to the criminal sanctions of § 2. *Ibid.*

Congress might have thought it appropriate to confine criminal punishment to state officials, oath-bound to support the supreme federal law, while allowing only civil remedies—or perhaps only preventive relief—against private violators. Or Congress might have thought that States which did not authorize abridgment of the rights declared in § 1 would themselves punish all who interfered with those rights without official authority. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 1758, 1785. Cf. *Civil Rights Cases*, 109 U. S. 3, 19, 24–25.

Whatever the reason, it was repeatedly stressed that the only violations "reached *and punished*" by the bill, see *id.*, at 1294 (emphasis added), would be those "done under color of State authority." *Ibid.* It is observed in dissent, *post*, at 10, that Senator Trumbull told Senator Cowan that § 2 was directed not at "State officers especially, but [at] everybody who violates the law." That remark, however, was nothing more than a reply to Senator Cowan's charge that § 2 was "exceedingly objectionable" in singling out state judicial officers for punishment for the first time "in the history of civilized legislation." *Id.*, at 500.

had been a right to be free of discrimination by public officials. Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that § 1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated "under color of law" were to be criminally punishable under § 2.

In attempting to demonstrate the contrary, the respondents rely heavily upon the fact that the Congress which approved the 1866 statute wished to eradicate the recently enacted Black Codes—laws which had saddled Negroes with "onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value . . . ." *Slaughter-House Cases,* 16 Wall. 36, 70.[34] The respondents suggest that the only evil Congress sought to eliminate was that of racially discriminatory laws in the former Confederate States. But the Civil Rights Act was drafted to apply throughout the country,[35] and its language was far

[34] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., at 39, 474, 516–517, 602-603, 1123-1125, 1151-1153, 1160. For the substance of the codes and their operation, see H. Exec. Doc. No. 118, 39th Cong., 1st Sess.; S. Exec. Doc. No. 6, 39th Cong., 2d Sess.; 1 W. Fleming, Documentary History of Reconstruction 273–312 (1906); E. McPherson, The Political History of the United States During the Period of Reconstruction 29–44 (1871); 2 S. Morison and H. Commager, The Growth of the American Republic 17–18 (1950 ed.); K. Stampp, The Era of Reconstruction 79–81 (1965).

[35] See n. 31, *supra*. It is true, as the dissent emphasizes, *post*, at 11, that Senator Trumbull remarked at one point that the Act "could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union," whose laws did not themselves discriminate against Negroes. Cong. Globe, 39th Cong., 1st Sess., 1761. But the Senator was simply observing that the Act would "in no manner [interfere] with the . . . regulations of any State which protects all alike in their rights of person and property." *Ibid.* See also *id.*, at 476, 505, 600. That is, the Act would have

broader than would have been necessary to strike down discriminatory statutes.

That broad language, we are asked to believe, was a mere slip of the legislative pen. We disagree. For the same Congress that wanted to do away with the Black Codes *also* had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation. "Accounts in newspapers North and South, Freedmen's Bureau and other official documents, private reports and correspondence were all adduced" to show that "private outrage and atrocity" was "daily inflicted on freedmen . . . ." [36] The congressional debates are replete with references to private injustices against Negroes—references to white employers who refused to pay their Negro workers,[37] white planters who agreed among themselves not to hire freed slaves without the permission of their former masters,[38] white

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no effect upon nondiscriminatory legislation. Senator Trumbull obviously could *not* have meant that the law would apply to racial discrimination in some States but not in others, for the bill on its face applied upon its enactment "in every State and Territory in the United States," and no one disagreed when Congressman Bingham complained that, unlike Congress' recently vetoed attempt to expand the Freedmen's Bureau, see n. 30, *supra*, the Civil Rights Act would operate "in every State in the Union." *Id.*, at 1292. Nor, contrary to a suggestion made in dissent, *post*, at 12, was the Congressman speaking only of the Act's *potential* operation in any State that might enact a racially discriminatory law in the *future*. The Civil Rights Act, Congressman Bingham insisted, would "be enforced in every State . . . [at] the *present* . . . time." *Ibid.* (Emphasis added.)

[36] J. tenBroek, *supra*, n. 30, at 181. See also W. Brock, An American Crisis 124 (1963); J. McPherson, The Struggle For Equality 332 (1964); K. Stampp, *supra*, n. 34, at 75, 131–132.

[37] Cong. Globe, 39th Cong., 1st Sess., 95, 1833.

[38] *Id.*, at 1160.

citizens who assaulted Negroes [39] or who combined to drive them out of their communities.[40]

Indeed, one of the most comprehensive studies then before Congress stressed the prevalence of private hostility toward Negroes and the need to protect them from the resulting persecution and discrimination.[41] The report noted the existence of laws virtually prohibiting Negroes from owning or renting property in certain towns,[42] but described such laws as "mere isolated cases," representing "the local outcroppings of a spirit . . . found to prevail everywhere" [43]—a spirit expressed, for example,

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[39] *Id.*, at 339-340, 1160, 1835. It is true, as the dissent notes, *post*, at 13, that some of the references to private assaults occurred during debate on the Freedmen's Bureau bill, n. 30, *supra*, but the congressional discussion proceeded upon the understanding that all discriminatory conduct reached by the Freedmen's Bureau bill would be reached as well by the Civil Rights Act. See, *e. g.*, n. 31, *supra*.

[40] *Id.*, at 1835. It is clear that these instances of private mistreatment, see also text accompanying n. 41, *infra*, were understood as illustrative of the evils that the Civil Rights Act of 1866 would correct. Congressman Eldridge of Wisconsin, for example, said this: "Gentlemen refer us to individual cases of wrong perpetrated upon the freedmen of the South as an argument why we should extend the Federal authority into the different States to control the action of the citizens thereof. But, I ask, has not the South submitted to the altered state of things there, to the late amendment of the Constitution, to the loss of their slave property, with a cheerfulness and grace that we did not expect? . . . I deprecate all these measures because of the implication they carry upon their face that the people who have heretofore owned slaves intend to do them wrong. I do not believe it. . . . The cases of ill-treatment are exceptional cases." *Id.*, at 1156.

So it was that "opponents denied or minimized the facts asserted" but "did not contend that the [Civil Rights Act] would not reach such facts if they did exist." J. tenBroek, *supra*, n. 30, at 181.

[41] Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess., 2, 17–25. See W. Brock, *supra*, n. 36, at 40–42; K. Stampp, *supra*, n. 34, at 73–75.

[42] *Id.*, at 23–24.

[43] *Id.*, at 25.

by lawless acts of brutality directed against Negroes who traveled to areas where they were not wanted.[44] The report concluded that, even if anti-Negro legislation were "repealed in all the States lately in rebellion," equal treatment for the Negro would not yet be secured.[45]

In this setting, it would have been strange indeed if Congress had viewed its task as encompassing merely the nullification of racist laws in the former rebel States. That the Congress which assembled in the Nation's capital in December 1865 in fact had a broader vision of the task before it became clear early in the session, when three proposals to invalidate discriminatory state statutes were rejected as "too narrowly conceived."[46] From the outset it seemed clear, at least to Senator Trumbull of Illinois, Chairman of the Judiciary Committee, that stronger legislation might prove necessary. After Senator Wilson of Massachusetts had introduced his bill to strike down all racially discriminatory laws in the South,[47] Senator Trumbull said this:

> "I reported from the Judiciary Committee the second section of the [Thirteenth Amendment] for the very purpose of conferring upon Congress authority to see that the first section was carried out

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[44] *Id.*, at 18.

[45] *Id.*, at 35.

[46] J. tenBroek, *supra*, n. 30, at 177. One of the proposals, sponsored by Senator Wilson of Massachusetts, would have declared void all "laws, statutes, acts, ordinances, rules, and regulations" establishing or maintaining in former rebel States "any inequality of civil rights and immunities" on account of "color, race, or . . . a previous condition . . . of slavery." Cong. Globe, 39th Cong., 1st Sess., 39. The other two proposals, sponsored by Senator Sumner of Massachusetts, would have struck down in the former Confederate States "all laws . . . establishing any oligarchial privileges and any distinction of rights on account of color or race" and would have required that all persons there be "recognized as equal before the law." *Id.*, at 91.

[47] See n. 46, *supra*.

> in good faith . . . and I hold that under that second section Congress will have the authority, when the constitutional amendment is adopted, *not only to pass the bill of the Senator from Massachusetts, but a bill that will be much more efficient to protect the freedman in his rights.* . . . And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that the men whose liberties are secured by it are deprived of the privilege to go and come when they please, *to buy and sell when they please,* to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them. *It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights.* . . . [So] when the constitutional amendment is adopted I trust we may pass a bill, if the action of the people in the southern States should make it necessary, that will be *much more sweeping and efficient than the bill under consideration.*" [48]

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[48] Cong. Globe, 39th Cong., 1st Sess., 43. (Emphasis added.) The dissent seeks to neutralize the impact of this quotation by noting that, prior to making the above statement, the Senator had argued that the second clause of the Thirteenth Amendment was inserted "for the purpose, and none otber, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." See *post,* at 7, 14. In fact, Senator Trumbull was simply replying at that point to the contention of Senator Saulsbury of Delaware that the second clause of the Thirteenth Amendment was never intended to authorize federal legislation interfering with subjects other than slavery itself. See *id.,* at 42. Senator Trumbull responded that the clause was intended to authorize *precisely* such legislation. That, "and none other," he said for emphasis, was its avowed purpose. But Senator Trumbull did *not* imply that the force of § 2 of the Thirteenth Amendment would be

Five days later, on December 18, 1865, the Secretary of State officially certified the ratification of the Thirteenth Amendment. The next day Senator Trumbull again rose to speak. He had decided, he said, that the "more sweeping and efficient" bill of which he had spoken previously ought to be enacted

> ". . . at an early day for the purpose of quieting apprehensions in the minds of many friends of freedom lest by local legislation *or a prevailing public sentiment* in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom . . . ." [49]

On January 5, 1866, Senator Trumbull introduced the bill he had in mind—the bill which later became the Civil Rights Act of 1866.[50] He described its objectives in terms that belie any attempt to read it narrowly:

> "Mr. President, I regard the bill to which the attention of the Senate is now called as the most important measure that has been under its consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be

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spent once Congress had nullified discriminatory state laws. On the contrary, he emphasized the fact that it was "for Congress to determine, and nobody else," what sort of legislation might be "appropri-" ate" to make the Thirteenth Amendment effective. *Id.*, at 43. Cf. Part V of this opinion, *infra*.

[49] *Id.*, at 77. (Emphasis added.)

[50] *Id.*, at 129.

> affected by them have some means of availing themselves of their benefits." [51]

Of course, Senator Trumbull's bill would, as he pointed out, "destroy all [the] discriminations" embodied in the Black Codes,[52] but it would do more: It would affirmatively secure for all men, whatever their race or color, what the Senator called the "great fundamental rights":

> ". . . the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property." [53]

As to those basic civil rights, the Senator said, the bill would "break down *all* discrimination between black men and white men." [54]

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[51] *Id.*, at 474.

[52] *Ibid.* See the dissenting opinion, *post*, at 9.

[53] *Id.*, at 475.

[54] *Id.*, at 599. (Emphasis added.) Senator Trumbull later observed that his bill would add nothing to federal authority if the States would fully "perform their constitutional obligations." *Id.*, at 600. See also Senator Trumbull's remarks, *id.*, at 1758; the remarks of Senator Lane of Indiana, *id.*, at 602–603; and the remarks of Congressman Wilson of Iowa, *id.*, at 1117–1118. But it would be a serious mistake to infer from such statements any notion (see the dissenting opinion, *post*, at 11–12) that, so long as the States refrained from actively discriminating against Negroes, their "obligations" in this area, as Senator Trumbull and others understood them, would have been fulfilled. For the Senator's concern, it will be recalled (see text accompanying n. 49, *supra*), was that Negroes might be "oppressed and in fact deprived of their freedom" not only by hostile laws but also by "prevailing public sentiment," and he viewed his bill as necessary "unless by local legislation they [the States] provide for the real freedom of their former slaves." *Id.*, at 77. See also *id.*, at 43. And see the remarks of Congressman Lawrence of Ohio:

"Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by

That the bill would indeed have so sweeping an effect was seen as its great virtue by its friends [55] and as its great danger by its enemies [56] but was disputed by none. Opponents of the bill charged that it would not only regulate state laws but would directly "determine the persons who [would] enjoy . . . property within the States," [57] threatening the ability of white citizens "to determine who [would] be members of [their] communit[ies] . . . ." [58] The bill's advocates did not deny the accuracy of those characterizations. Instead, they defended the propriety of employing federal authority to deal with "the white man . . . [who] would invoke the power of local prejudice" against the Negro.[59] Thus, when the Senate passed the Civil Rights Act on February 2, 1866,[60] it did so fully aware of the breadth of the measure it had approved.

In the House, as in the Senate, much was said about eliminating the infamous Black Codes.[61] But, like the Senate, the House was moved by a larger objective—that of giving real content to the freedom guaranteed by the Thirteenth Amendment. Representative Thayer of Pennsylvania put it this way:

> "[W]hen I voted for the amendment to abolish slavery . . . I did not suppose that I was offer-

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prohibitory laws, or by a failure to protect any one of them." *Id.*, at 1833.

[55] See, *e. g.*, the remarks of Senator Howard of Michigan. *Id.*, at 504.

[56] See, *e. g.*, the remarks of Senator Cowan of Pennsylvania, *id.*, at 500, and the remarks of Senator Hendricks of Indiana. *Id.*, at 601.

[57] Senator Saulsbury of Delaware. *Id.*, at 478.

[58] Senator Van Winkle of West Virginia. *Id.*, at 498.

[59] Senator Lane of Indiana. *Id.*, at 603.

[60] *Id.*, at 606–607.

[61] See, *e. g.*, *id.*, *at* 1118–1119, 1123–1125, 1151–1153, 1160. See generally the discussion in the dissenting opinion, *post*, at 16–18.

> ing . . . a mere paper guarantee. And when I voted for the second section of the amendment, I felt . . . certain that I had . . . given to Congress ability to protect . . . the rights which the first section gave . . . .
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> "The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of that great measure. It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country. . . . The events of the last four years . . . have changed [a] large class of people . . . from a condition of slavery to that of freedom. *The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty* given to them by the American people." [62]

Representative Cook of Illinois thought that, without appropriate federal legislation, any "combination of men in [a] neighborhood [could] prevent [a Negro] from having any chance" to enjoy those benefits.[63] To Congressman Cook and others like him, it seemed evident that, with respect to basic civil rights—including the "right to . . . purchase, lease, sell, hold, and convey . . . property," Congress must provide that "there . . . be *no* discrimination" on grounds of race or color.[64]

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[62] *Id.*, at 1151. (Emphasis added.)

[63] *Id.*, at 1124.

[64] *Ibid.* (Emphasis added.) The clear import of these remarks is in no way diminished by the heated debate, see *id.*, at 1290–1294, portions of which are quoted in the dissenting opinion, *post*, at 18–19, between Representative Bingham, opposing the bill, and Representative Shellabarger, supporting it, over the question of what *kinds* of state laws might be invalidated by § 1, a question not involved in this case.

It thus appears that, when the House passed the Civil Rights Act on March 13, 1866,[65] it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding *all* racial discrimination affecting the basic civil rights enumerated in the Act.

President Andrew Johnson vetoed the Act on March 27,[66] and in the brief congressional debate that followed, his supporters characterized its reach in all-embracing terms. One stressed the fact that § 1 would confer "the right . . . to purchase . . . real estate . . . without any qualification and without any restriction whatever . . . ." [67] Another predicted, as a corollary, that the Act would preclude preferential treatment for white persons in the rental of hotel rooms and in the sale of church pews.[68] Those observations elicited no reply. On April 6 the Senate, and on April 9 the House, overrode the President's veto by the requisite majorities,[69] and the Civil Rights Act of 1866 became law.[70]

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[65] *Id.*, at 1367. On March 15, the Senate concurred in the several technical amendments that had been made by the House. *Id.*, at 1413–1416.

[66] *Id.*, at 1679–1681.

[67] Senator Cowan of Pennsylvania. *Id.*, at 1781.

[68] Senator Davis of Kentucky. *Id.*, Appendix, at 183. Such expansive views of the Act's reach found frequent and unchallenged expression in the Nation's press. See, *e. g.*, Daily National Intelligencer (Washington, D. C.), March 24, 1866, p. 2, col. 1; New York Herald, March 29, 1866, p. 4, col. 3; Cincinnati Commercial, March 30, 1866, p. 4, col. 2; Evening Post (New York), April 7, 1866, p. 2, col. 1; Indianapolis Daily Herald, April 17, 1866, p. 2, col. 1.

[69] Cong. Globe, 39th Cong., 1st Sess., 1809, 1861.

[70] "Never before had Congress over-ridden a President on a major political issue, and there was special gratification in feeling that this had not been done to carry some matter of material interest, such as a tariff, but in the cause of disinterested justice." W. Brock, *supra*, n. 36, at 115.

In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property.

Nor was the scope of the 1866 Act altered when it was re-enacted in 1870, some two years after the ratification of the Fourteenth Amendment.[71] It is quite true that some members of Congress supported the Fourteenth Amendment "in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States." *Hurd* v. *Hodge*, 334 U. S. 24, 32–33. But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were meant somehow to *limit* its application to state action. The legislative history furnishes not the slightest factual basis for any such speculation, and the conditions prevailing in 1870 make it highly implausible. For by that time most, if not all, of the former Confederate States, then under the control of "reconstructed" legislatures, had formally repudiated racial discrimination, and the focus of congressional concern had clearly shifted from hostile statutes to the activities of groups like the Ku Klux Klan, operating wholly outside the law.[72]

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[71] Section 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 18, 16 Stat. 140, 144:

"*And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hnndred and sixty-six, is hereby re-enacted . . . ."

[72] See *United States* v. *Mosley*, 238 U. S. 383, 387–388; *United States* v. *Price*, 383 U. S. 787, 804–805; 2 W. Fleming, Documentary History of Reconstruction 285–288 (1907); K. Stampp, *supra*, n. 34, at 145, 171, 185, 198–204; G. Stephenson, Race Distinctions in American Law 116 (1910).

Against this background, it would obviously make no sense to assume, without any historical support whatever, that Congress made a silent decision in 1870 to exempt private discrimination from the operation of the Civil Rights Act of 1866.[73] "The cardinal rule is that repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U. S. 497, 503. All Congress said in 1870 was that the 1866 law "is hereby re-enacted." That is all Congress meant.

As we said in a somewhat different setting two Terms ago, "We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language." *United States* v. *Price*, 383 U. S. 787, 801. "We are not at liberty to seek ingenious analytical instruments," *ibid.*, to carve from § 1982 an exception for private conduct—even though its application to such conduct in the present context is without established precedent. And, as the Attorney General of the United States said at the oral argument of this case, "The fact that the statute lay partially dormant for many years cannot be held to diminish its force today."

V.

The remaining question is whether Congress has power under the Constitution to do what § 1982 purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property. Our starting point is the Thirteenth Amendment, for it was pursuant

[73] The Court of Appeals in this case seems to have derived such an assumption from language in *Virginia* v. *Rives*, 100 U. S. 313, 317–318, and *Hurd* v. *Hodge*, 334 U. S. 24, 31. See 379 F. 2d 33, 39–40, 43. Both of those opinions simply asserted that, at least after its re-enactment in 1870, the Civil Rights Act of 1866 was directed only at governmental action. Neither opinion explained why that was thought to be so, and in each case the statement was merely dictum. See n. 25, *supra*.

to that constitutional provision that Congress originally enacted what is now § 1982. The Amendment consists of two parts. Section 1 states:

> "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Section 2 provides:

> "Congress shall have power to enforce this article by appropriate legislation."

As its text reveals, the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases,* 109 U. S. 3, 20. It has never been doubted, therefore, "that the power vested in Congress to enforce the article by appropriate legislation," *ibid.,* includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." *Id.,* at 23.[74]

Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of

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[74] So it was, for example, that this Court unanimously upheld the power of Congress under the Thirteenth Amendment to make it a crime for one individual to compel another to work in order to discharge a debt. *Clyatt* v. *United States,* 197 U. S. 207.

Congress simply because it reaches beyond state action to regulate the conduct of private individuals. The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." *Civil Rights Cases,* 109 U. S. 3, 20. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*" *Ibid.* (Emphasis added.)

Those who opposed passage of the Civil Rights Act of 1866 argued in effect that the Thirteenth Amendment merely authorized Congress to dissolve the legal bond by which the Negro slave was held to his master.[75] Yet many had earlier opposed the Thirteenth Amendment on the very ground that it would give Congress virtually unlimited power to enact laws for the protection of Negroes in every State.[76] And the majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act. Their chief spokesman, Senator Trumbull of Illinois, the Chairman of the Judiciary Committee, had brought the Thirteenth

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[75] See, *e. g., Cong. Globe,* 39th Cong., 1st Sess., 113, 318, 476, 499, 507, 576, 600–601.

[76] See, *e. g.,* Cong. Globe, 38th Cong., 1st Sess., 1366, 2616, 2940–2941, 2962, 2986; Cong. Globe, 38th Cong., 2d Sess., 178–180, 182, 192, 195, 239, 241–242, 480–481, 529.

Amendment to the floor of the Senate in 1864. In defending the constitutionality of the 1866 Act, he argued that, if the narrower construction of the Enabling Clause were correct, then

> "the trumpet of freedom that we have been blowing throughout the land has given an 'uncertain sound,' and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself. . . . I have no doubt that under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end." [77]

Surely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to

[77] Cong. Globe, 39th Cong., 1st Sess., 322. See also the remarks of Senator Howard of Michigan. *Id.*, at 503.

inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Civil Rights Cases*, 109 U. S. 3, 22.[78] Just as the Black Codes, enacted after the Civil

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[78] The Court did conclude in the *Civil Rights Cases* that "the act of . . . the owner of the inn, the public conveyance or place of amusement, refusing . . . accommodation" cannot be "justly regarded as imposing any badge of slavery or servitude upon the applicant." 109 U. S., at 24. "It would be running the slavery argument into the ground," the Court thought, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business." *Id.*, at 24–25. Mr. Justice Harlan dissented, expressing the view that "such discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment." *Id.*, at 43.

Whatever the present validity of the position taken by the majority on that issue—a question rendered largely academic by Title II of the Civil Rights Act of 1964, 78 Stat. 241, 243 (see *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241; *Katzenbach* v. *McClung*, 379 U. S. 294)—we note that the entire Court agreed upon at least one proposition: The Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." 109 U. S., at 22. Cf. *id.*, at 35.

In *Hodges* v. *United States*, 203 U. S. 1, a group of white men had terrorized several Negroes to prevent them from working in a sawmill. The terrorizers were convicted under 18 U. S. C. § 241 (then Revised Statutes § 5508) of conspiring to prevent the Negroes from exercising the right to contract for employment, a right secured by 42 U. S. C. § 1981 (then Revised Statutes § 1977, derived from § 1 of the Civil Rights Act of 1866, see n. 28, *supra*). Section 1981 provides, in terms that closely parallel those of § 1982 (then Revised Statutes § 1978), that all persons in the United States "shall have *the same right . . . to make and enforce contracts*, to sue, be parties,

War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Negro citizens North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to

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give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." (Emphasis added.)

This Court reversed the conviction. The majority recognized that "one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts." 203 U. S., at 17. And there was no doubt that the defendants had deprived their Negro victims, on racial grounds, of the opportunity to dispose of their labor by contract. Yet the majority said that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery," *id.*, at 18, and asserted that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment. Contra, *United States* v. *Cruikshank*, 25 Fed. Cas. 707, 712 (dictum of Mr. Justice Bradley, on circuit), aff'd, 92 U. S. 542; *United States* v. *Morris*, 125 F. 322, 324, 330–331. Mr. Justice Harlan, joined by Mr. Justice Day, dissented. In their view, the interpretation the majority placed upon the Thirteenth Amendment was "entirely too narrow and . . . hostile to the freedom established by the supreme law of the land." 203 U. S., at 37. That interpretation went far, they thought, "towards neutralizing many declarations made as to the object of the recent Amendments to the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom." *Ibid.*

The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled.

"go and come at pleasure" [79] and to "buy and sell when they please" [80]—would be left with "a mere paper guarantee" [81] if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

Representative Wilson of Iowa was the floor manager in the House for the Civil Rights Act of 1866. In urging that Congress had ample authority to pass the pending bill, he recalled the celebrated words of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." [82]

"The end is legitimate," the Congressman said, "because it is defined by the Constitution itself. The end is the maintenance of freedom . . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. . . . This settles the appropriateness of this measure, and that settles its constitutionality." [83]

We agree. The judgment is

Reversed.

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[79] See text accompanying n. 48, *supra*.

[80] *Ibid.*

[81] See text accompanying n. 62, *supra*.

[82] Cong. Globe, 39th Cong., 1st Sess., 1118.

[83] *Ibid.*

SUPREME COURT OF THE UNITED STATES

No. 645.—October Term, 1967.

Joseph Lee Jones et ux., Petitioners, *v.* Alfred H. Mayer Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 17, 1968.]

Mr. Justice Douglas, concurring.

The Act of April 9, 1866, 14 Stat. 27, 42 U. S .C. § 1982, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Act was passed to enforce the Thirteenth Amendment which in § 1 abolished "slavery" and "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted" and in § 2 gave Congress power "to enforce this article by appropriate legislation."

Enabling a Negro to buy and sell real and personal property is a removal of one of many badges of slavery.

> "Slaves were not considered men. . . . They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out; they could not legally marry nor constitute families; they could not control their children; they could not appeal from their master; they could be punished at will." Dubois, Black Reconstruction in America 10 (1935).[1]

[1] The cases are collected in five volumes in Catterall, Judicial Cases Concerning American Slavery and the Negro (1937). And see Cobb, Law of Negro Slavery, c. XIV (1858); Ostrander, The Rights of Man in America 1606–1861, p. 252 (1960); Stroud, Slavery 45–50 (1827); Wheeler, Law of Slavery 190–191 (1837).

The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock—to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.

Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, *e. g., Lane* v. *Wilson,* 307 U. S. 268. Negroes have been excluded over and again from juries solely on account of their race, *e. g., Strauder* v. *West Virginia,* 100 U. S. 303, or have been forced to sit in segregated seats in court rooms, *Johnson* v. *Virginia,* 373 U. S. 61. They have been made to attend segregated and inferior schools, *e. g., Brown* v. *Board of Education,* 347 U. S. 483, or been denied entrance to colleges or graduate schools because of their color, *e. g., Pennsylvania* v. *Board of Trusts,* 353 U. S. 230; *Sweatt* v. *Painter,* 339 U. S. 629. Negroes have been prosecuted for marrying whites, *e. g., Loving* v. *Virginia,* 388 U. S. 1. They have been forced to live in segregated residential districts, *Buchanan* v. *Warley,* 245 U. S. 60, and residents of white neighborhoods have denied them entrance, *e. g., Shelley* v. *Kraemer,* 334 U. S. 1. Negroes have been forced to use segregated facilities in going about their daily lives, being excluded from railway coaches, *Plessy* v. *Ferguson,* 163 U. S. 537; public parks, *New Orleans* v. *Detiege,* 358 U. S. 54; restaurants, *Lombard* v. *Louisiana,* 373 U. S. 267; public beaches, *Mayor of Baltimore* v. *Dawson,*

350 U. S. 877; municipal golf courses, *Holmes* v. *City of Atlanta,* 350 U. S. 879; amusement parks, *Griffin* v. *Maryland,* 378 U. S. 130; busses, *Gayle* v. *Browder,* 352 U. S. 903; public libraries, *Brown* v. *Louisiana,* 383 U. S. 131. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton." *Hamilton* v. *Alabama,* 376 U. S. 650.

That brief sampling of discriminatory practices, many of which continue today, stands almost as an annotation to what Frederick Douglass (1817–1895) wrote a century earlier:

> "Of all the races and varieties of men which have suffered from this feeling, the colored people of this country have endured most. They can resort to no disguises which will enable them to escape its deadly aim. They carry in front the evidence which marks them for persecution. They stand at the extreme point of difference from the Caucasian race, and their African origin can be instantly recognized, though they may be several removes from the typical African race. They may remonstrate like Shylock—'Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same summer and winter, as a Christian is?'—but such eloquence is unavailing. They are Negroes—and that is enough, in the eye of this unreasoning prejudice, to justify indignity and violence. In nearly every department of American life they are confronted by this insidious influence. It fills the air. It meets them at the workshop and factory, when they apply for work. It meets them at the church, at the hotel, at the

> ballot-box, and worst of all, it meets them in the jury-box. Without crime or offense against law or gospel, the colored man is the Jean Valjean of American society. He has escaped from the galleys, and hence all presumptions are against him. The workshop denies him work, and the inn denies him shelter; the ballot-box a fair vote, and the jury-box a fair trial. He has ceased to be the slave of an individual, but has in some sense become the slave of society. He may not now be bought and sold like a beast in the market, but he is the trammeled victim of a prejudice, well calculated to repress his manly ambition, paralyze his energies, and make him a dejected and spiritless man, if not a sullen enemy to society, fit to prey upon life and property and to make trouble generally." [2]

Today the black is protected by a host of civil rights laws. But the forces of discrimination are still strong.

A member of his race, duly elected by the people to a state legislature, is barred from that assembly because of his views on the Vietnam war. *Bond* v. *Floyd*, 385 U. S. 116.

Real estate agents use artifice to avoid selling "white property" to the blacks.[3] The blacks who travel the country, though entitled by law to the facilities for sleeping and dining that are offered all tourists, *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, may well learn that the "vacancy" sign does not mean what it says, especially if the motel has a swimming pool.

On entering a half-empty restaurant they may find "reserved" signs on all unoccupied tables.

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[2] Excerpt from Frederick Douglass, The Color Line, The North American Review, June 1881, IV The Life and Writings of Frederick Douglass 343–344 (1955).

[3] See *Kanter* v. *Secretary of State* (N. Y. Ct. App. May —, 1968), in N. Y. Times, May 19, 1968, at 31, col. 1.

The black is often barred from a labor union because of his race.[4]

He learns that the order directing admission of his children into white schools has not been obeyed "with all deliberate speed," *Brown* v. *Board of Education*, 349 U. S. 294, 301, but has been delayed by numerous strategies and devices.[5] State laws, at times, have even encour-

[4] See, *e. g.*, O'Hanlon, The Case Against the Unions, Fortune, Jan. 1968, at 170.

[5] The contrivances which some States have concocted to thwart the command of our decision in *Brown* v. *Board of Education* are by now legendary. See, *e. g.*, *Monroe* v. *Board of Commissioners*, — U. S. — (Tennessee "free transfer" plan); *Green* v. *County School Board*, — U. S. — (Virginia school board "freedom-of-choice" plan); *Raney* v. *Board of Education*, — U. S. — (Arkansas "freedom-of-choice" plan); *Bradley* v. *School Board*, 382 U. S. 103 (allocation of faculty allegedly on a racial basis); *Griffin* v. *County School Board*, 377 U. S. 218 (closing of public schools in Prince Edward County, Virginia, with tuition grants and tax concessions used to assist white children attending private segregated schools); *Goss* v. *Board of Education*, 373 U. S. 683 (Tennessee rezoning of school districts, with a transfer plan permitting transfer by students on the basis of race); *United States* v. *Jefferson County Board of Education et al.*, 372 F. 2d 836, aff'd *en banc*, 380 F. 2d 385 (C. A. 5th Cir. 1967) ("freedom-of-choice" plans in States within the jurisdiction of the United States Court of Appeals for the Fifth Circuit); *Northcross* v. *Board of Education*, 302 F. 2d 818 (C. A. 6th Cir. 1962) (Tennessee pupil assignment law); *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (C. A. 5th Cir. 1957) (Louisiana pupil assignment law); *Hall* v. *School Board*, 197 F. Supp. 649 (D. C. E. D. La. 1961), aff'd, 368 U. S. 515 (Louisiana law permitting closing of public schools, with extensive state aid going to private segregated schools); *Holmes* v. *Danner*, 191 F. Supp. 394 (D. C. M. D. Ga. 1961) (Georgia statute cutting off state funds if Negroes admitted to state university); *Aaron* v. *McKinley*, 173 F. Supp. 944 (D. C. E. D. Ark. 1959), aff'd, 361 U. S. 197 (Arkansas statute cutting off state funds to integrated school districts); *James* v. *Almond*, 170 F. Supp. 331 (D. C. E. D. Va. 1959) (closing of all integrated public schools). See also *Rogers* v. *Paul*, 382 U. S. 198; *Calhoun* v. *Latimer*, 377 U. S. 263; *Cooper* v. *Aaron*, 358 U. S. 1.

aged discrimination in housing. *Reitman* v. *Mulkey*, 387 U. S. 369.

This recital is enough to show how prejudices, once part and parcel of slavery, still persist. The men who sat in Congress in 1866 were trying to remove some of the badges or "customs" [6] of slavery when they enacted § 1982. And, as my Brother STEWART shows, the Congress that passed the so-called Open Housing Act in 1968 did not undercut any of the grounds on which § 1982 rests.

[6] My Brother HARLAN's listing of some of the "customs" prevailing in the North at the time § 1982 was first enacted (*post*, at ——) shows the extent of organized white discrimination against newly-freed blacks. As he states, "[r]esidential segregation was the prevailing pattern almost everywhere in the North." *Post*, at ——. Certainly, then, it was "customary." To suggest, however, that there might be room for argument in this case (*post*, at ——, n. 65) that the discrimination against petitioners was not in some measure a part and product of this longstanding and widespread customary pattern is to pervert the problem by allowing the legal mind to draw lines and make distinctions that have no place in the jurisprudence of a nation striving to rejoin the human race.

SUPREME COURT OF THE UNITED STATES

No. 645.—October Term, 1967.

Joseph Lee Jones et ux., Petitioners, *v.* Alfred H. Mayer Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 17, 1968.]

Mr. Justice Harlan, whom Mr. Justice White joins, dissenting.

The decision in this case appears to me to be most ill-considered and ill-advised.

The petitioners argue that the respondent's racially motivated refusal to sell them a house entitles them to to judicial relief on two separate grounds. First, they claim that the respondent acted in violation of 42 U. S. C. § 1982; second, they assert that the respondent's conduct amounted in the circumstances to "state action" [1] and was therefore forbidden by the Fourteenth Amendment even in the absence of any statute. The Court, without reaching the second alleged ground, holds that the petitioners are entitled to relief under 42 U. S. C. § 1982, and that § 1982 is constitutional as legislation appropriate to enforce the Thirteenth Amendment.

For reasons which follow, I believe that the Court's construction of § 1982 as applying to purely private action is almost surely wrong, and at the least is open to serious doubt. The issue of the constitutionality of § 1982, as construed by the Court, and of liability under the Fourteenth Amendment alone, also present formidable difficulties. Moreover, the political processes of our

[1] This "state action" argument emphasizes the respondent's role as a housing developer who exercised continuing authority over a suburban housing complex with about 1,000 inhabitants.

own era have, since the date of oral argument in this case, given birth to a civil rights statute [2] embodying "fair housing" provisions [3] which would at the end of this year make available to others, though apparently not to the petitioners themselves,[4] the type of relief which the petitioners now seek. It seems to me that this latter factor so diminishes the public importance of this case that by far the wisest course would be for this Court to refrain from decision and to dismiss the writ as improvidently granted.

I.

I shall deal first with the Court's construction of § 1982, which lies at the heart of its opinion. That construction is that the statute applies to purely private as well as to state-authorized discrimination.

A.

The Court's opinion focuses upon the statute's legislative history, but it is worthy of note that the precedents in this Court are distinctly opposed to the Court's view of the statute.

In the *Civil Rights Cases*, 109 U. S. 3, decided less than two decades after the enactment of the Civil Rights Act of 1866, from which § 1982 is derived, the Court said in dictum of the 1866 Act:

> "This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified. . . . The Civil Rights Bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that

[2] The Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73.

[3] *Id.*, §§ 801–819.

[4] See *ante*, at 5, n. 21.

> the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable in an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence." *Id.*, at 16–17.[5]

In *Corrigan* v. *Buckley*, 271 U. S. 323, the question was whether the courts of the District of Columbia might enjoin prospective breaches of racially restrictive covenants. The Court held that it was without jurisdiction to consider the petitioners' argument that the covenant was void because it contravened the Fifth, Thirteenth, and Fourteenth Amendments and their implementing statutes. The Court reasoned, *inter alia*, that the statutes, including the immediate predecessor to § 1982,[6] were inapplicable because

> "they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property." 271 U. S., at 331.[7]

In *Hurd* v. *Hodge*, 334 U. S. 24, the issue was again whether the courts of the District might enforce racially restrictive covenants. At the outset of the process of reasoning by which it held that judicial enforcement of such a covenant would violate the predecessor to § 1982, the Court said:

> "We may start with the proposition that the statute does not invalidate private restrictive agree-

[5] See also *Virginia* v. *Rives*, 100 U. S. 313, 317–318.

[6] Section 1978 of the Revised Statutes.

[7] See also *Buchanan* v. *Warley*, 245 U. S. 60, 78–79.

ments so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is [*sic*] directed is governmental action. Such was the holding of *Corrigan* v. *Buckley* . . . ." 334 U. S., at 31.[8]

B.

Like the Court, I begin analysis of § 1982 by examining its language. In its present form, the section provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

The Court finds it "plain and unambiguous," *ante,* at 9, that this language forbids purely private as well as state-authorized discrimination. With all respect, I do not find it so. For me, there is an inherent ambiguity in the term "right," as used in § 1982. The "right" referred to may either be a right to equal status under the law, in which case the statute operates only against state-sanctioned discrimination, or it may be an "absolute" right enforceable against private individuals. To me, the words of the statute, taken alone, suggest the former interpretation, not the latter.[9]

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[8] It seems to me that this passage is not dictum, as the Court terms it, *ante,* at 8 and n. 25, but a holding. For if the Court had held the covenants in question invalid as between the parties, then it would not have had to rely upon a finding of "state action."

[9] Despite the Court's view that this reading flies in the face of the "plain and unambiguous terms" of the statute, see *ante,* at 9, it is not without precedent. In the *Civil Rights Cases,* 109 U. S. 3, the Court said of identical language in the predecessor statute to § 1982:

"[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of indi-

Further, since intervening revisions have not been meant to alter substance, the intended meaning of § 1982 must be drawn from the words in which it was originally enacted. Section 1982 originally was a part of § 1 of the Civil Rights Act of 1866, 14 Stat. 27. Sections 1 and 2 of that Act provided in relevant part:

> "That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . , shall have the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.
>
> "Sec. 2 . . . . That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . shall be deemed guilty of a misdemeanor. . . ."

It seems to me that this original wording indicates even more strongly than the present language that § 1 of the Act (as well as § 2, which is explicitly so limited) was

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viduals, unsupported by State authority . . . . The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true . . . . ; but if not sanctioned rights remain in full force, and may presumably be vindicated by in some way by the State, or not done under State authority, his resort to the laws of the State for redress. An individual cannot deprive a man of his right . . . to hold property, to buy and sell . . .; he may, by force or fraud, interfere with the enjoyment of the right in a particular case . . .; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right . . . ." 109 U. S., at 17.

intended to apply only to action taken pursuant to state or community authority, in the form of a "law, statute, ordinance, regulation, or custom." [10] And with deference I suggest that the language of § 2, taken alone, no more implies that § 2 "was carefully drafted to exempt private violations of § 1 from the criminal sanctions it imposed," see *ante*, at 14, than it does that § 2 was carefully drafted to enforce all of the rights secured by § 1.

C.

The Court rests its opinion chiefly upon the legislative history of the Civil Rights Act of 1866. I shall endeavor to show that those debates do not, as the Court would have it, overwhelmingly support the result reached by the Court, and in fact that a contrary conclusion may equally well be drawn. I shall consider the legislative history largely in chronological sequence, dealing separately with the Senate and House debates.

The First Session of the Thirty-ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the States the Thirteenth Amendment, and a few days before word was received of that Amendment's ratification. On December 13, Senator Wilson introduced a bill which would have invalidated all laws in the former rebel States which discriminated among persons as to civil rights on the basis of color, and which would have made it a misdemeanor to enact or enforce such a statute.[11] On the same day, Senator Trumbull said with regard to Senator Wilson's proposal:

> "The bill does not go far enough, if what we have been told to-day in regard to the treatment of freed-

[10] The Court does not claim that the deletion from § 1 of the statute, in 1874, of the words "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding" was intended to have any substantive effect. See *ante*, at 11, n. 29.

[11] See Cong. Globe, 39th Cong., 1st Sess., 39–42.

> men in the southern States is true. . . . [U]ntil the [Thirteenth Amendment] is adopted, there may be some question . . . as to the authority of Congress to pass such a bill as this, but after the adoption of the constitutional amendment there can be none.
>
> "The second clause of that amendment was inserted for some purpose, and I would like to know . . . for what purpose? Sir, for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free." [12]

Senator Trumbull then indicated that he would introduce separate bills to enlarge the powers of the recently founded Freedmen's Bureau and to secure the freedmen in their civil rights, both bills in his view being authorized by the second clause of the Thirteenth Amendment.[13] Since he had just stated that the purpose of that clause was to enable Congress to nullify acts of the state legislatures, it seems inferable that this also was also to be the aim of the promised bills.

On January 5, Senator Trumbull introduced both the Freedmen's bill and the civil rights bill.[14] The Freedmen's bill would have strengthened greatly the existing system by which agents of the Freedmen's Bureau exercised protective supervision over freedmen wherever they were present in large numbers. *Inter alia,* the Freedmen's bill would have permitted the President, acting through the Bureau, to extend "military protection and jurisdiction" over all cases in which persons in the former rebel States were

> "in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice,

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[12] *Id.,* at 43.

[13] See *ibid.*

[14] See Cong. Globe, 39th Cong., 1st Sess., 129.

> [denied or refused] any of the civil rights or immunities belonging to white persons, including the right . . . to inherit, purchase, lease, sell, hold and convey real and personal property, . . . on account of race . . . ." [15]

The next section of the Freedmen's bill provided that the agents of the Freedmen's Bureau might try and convict of a misdemeanor any person who deprived another of such rights on account of race and "under color of any State or local law, ordinance, police, or other regulation, or custom . . . ." Thus, the Freedmen's bill, which was generally limited in its application to the Southern States and which was correspondingly more sweeping in its protection of the freedmen than the civil rights bill,[16] defined both the rights secured and the denials of those rights which were criminally punishable in terms of acts done under the aegis of a State or locality. The only significant distinction was that denials which occurred "in consequence of a State or local . . . prejudice" would have entitled the victim to military protection but would not have been criminal. In the corresponding section of the companion and generally parallel civil rights bill, which was to be effective throughout the Nation, the

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[15] Freedmen's bill, § 7. The text of the bill may be found in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 72 (1871). The Freedmen's bill was passed by both the Senate and the House, but the Senate failed to override the President's veto. See Cong. Globe, 39th Cong., 1st Sess., 421, 688, 742, 748, 775, 915–916, 943.

[16] Section 7 of the Freedmen's bill would have permitted the President to extend "military protection and jurisdiction" over all cases in which the specified rights were denied, while § 3 of the Civil Rights Act merely gave the federal courts concurrent jurisdiction over such actions. Section 8 of the Freedmen's bill would have allowed agents of the Freedmen's Bureau to try and convict those who violated the bill's criminal provisions, while § 3 of the Civil Rights Act only gave the federal courts exclusive jurisdiction over such actions.

reference to "prejudice" was omitted from the rights-defining section. This would seem to imply that the more widely applicable civil rights bill was meant to provide protection only against those discriminations which were legitimated by a state or community sanction sufficiently powerful to deserve the name "custom."

The form of the Freedmen's bill also undercuts the Court's argument, *ante*, at 13, that if § 1 of the Civil Rights Act were construed as extending only to "state action," then "much of § 2 [which clearly was so limited] would make no sense at all." For the similar structure of the companion Freedmen's bill, drafted by the same hand and largely parallel in structure, would seem to confirm that the limitation to "state action" was deliberate.

The civil rights bill was debated intermittently in the Senate from January 12, 1866, until its eventual passage over the President's veto on April 6. In the course of the debates, Senator Trumbull, who was by far the leading spokesman for the bill, made a number of statements which can be taken only to mean that the bill was aimed at "state action" alone. For example, on January 29, 1866, Senator Trumbull began by citing a number of recently enacted Southern laws depriving men of rights named in the bill. He stated that "[t]he purpose of the bill under consideration is to destroy *all these discriminations*, and carry into effect the constitutional amendment." [17] Later the same day, Senator Trumbull quoted § 2 of the bill in full, and said:

> "This is the valuable section of the bill so far as protecting the rights of freedmen is concerned. . . . When it comes to be understood in all parts of the United States that *any person* who shall deprive another of *any right* . . . in consequence of his color

[17] Cong. Globe, 39th Cong., 1st Sess., 474. (Emphasis added.)

> or race will expose himself to fine and imprisonment, I think such acts will soon cease." [18]

These words contain no hint that the "rights" protected by § 2 were intended to be any less broad than those secured by § 1. Of course, § 2 plainly extended only to "state action." That Senator Trumbull viewed §§ 1 and 2 as coextensive appears even more clearly from his answer the following day when asked by Senator Cowan whether there was "not a provision [in the bill] by which State officers are to be punished?" Senator Trumbull replied: "Not State officers especially, but *everybody who violates the law. It is the intention to punish everybody who violates the law.*" [19]

On January 29, Senator Trumbull also uttered the first of several remarkably similar and wholly unambiguous statements which indicated that the bill was aimed only at "state action." He said:

> "[This bill] may be assailed as drawing to the Federal Government powers that properly belong to 'States'; but I apprehend, rightly considered, it is not obnoxious to that objection. *It will have no operation in any State where the laws are equal, where all persons have the same civil rights without*

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[18] *Id.*, at 475. (Emphasis added.)

[19] *Id.*, at 500. (Emphasis added.) The *Civil Rights Cases*, 109 U. S. 3, suggest how Senator Trumbull might have expected § 2 to affect persons other than "officers" in spite of its "under color" language, for it was there said in dictum that:

"The Civil Rights Bill . . . is analogous . . . to [a law] under the original Constitution, declaring that the validity of contracts should not be impaired, and that if *any person* bound by a contract should refuse to comply with it, *under color or pretence that it had been rendered void or invalid by a State law,* he should be liable to an action upon it in the courts of the United States, *with the addition of a penalty for setting up such an unjust and unconstitutional defence.*" 109 U. S., at 17. (Emphasis added.)

> *regard to color or race. It will have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished.*[20]

Senator Trumbull several times reiterated this view. On February 2, replying to Senator Davis of Kentucky, he said:

> "Why, sir, *if the State of Kentucky makes no discrimination in civil rghts between its citizens, this bill has no operation whatever in the State of Kentucky.* Are all the rights of the people of Kentucky gone because they cannot discriminate and punish one man for doing a thing that they do not punish another for doing? The bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations." [21]

On April 4, after the President's veto of the bill Senator Trumbull stated that "If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts . . . ." [22] Later the same day, he said:

> "This bill in no manner interferes with the municipal regulations of any State which protects all men alike in their rights of person and property. *It could have no operation in Massachusetts, New York, Illinois, or most of the States of the Union.*[23]

The remarks just quoted constitute the plainest possible statement that the civil rights bill was intended to

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[20] Cong. Globe, 39th Cong., 1st Sess., 476. (Emphasis added.)

[21] *Id.*, at 600. (Emphasis added.)

[22] *Id.*, at 1758.

[23] *Id.*, at 1761. (Emphasis added.)

apply only to state-sanctioned conduct and not to purely private action. The Court has attempted to negate the force of these statements by citing other declarations by Senator Trumbull and others that the bill would operate everywhere in the country. See *ante*, at 15, n. 35. However, the obvious and natural way to reconcile these two sets of statements is to read the ones about the bill's nationwide application as declarations that the enactment of a racially discriminatory law in any State would bring the bill into effect there.[24] It seems to me that very great weight must be given these statements of Senator Trumbull, for they were clearly made to reassure Northern and Border State Senators about the extent of the bill's operation in their States.

On April 4, Senator Trumbull gave two additional indications that the bill was intended to reach only state-sanctioned action. The first occurred during Senator Trumbull's defense of the part of § 3 of the bill which gave federal courts jurisdiction "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts . . . of the State or locality where they may be any of the right secured to them by the first section of this act . . . ." Senator Trumbull said:

> "If it be necessary in order to protect the freedman in his rights that he should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the [Thirteenth Amendment]." [25]

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[24] Moreover, a few Northern States apparently did have laws which denied to Negroes rights enumerated in the Act. See G. Stephenson, Race Distinctions in American Law 36–39 (1910); L. Litwack, North of Slavery: The Negro in the Free States, 1790–1860, at 93–94 (1961).

[25] Cong. Globe, 39th Cong., 1st Sess., 1759.

If the bill had been intended to reach purely private discrimination it seems very strange that Senator Trumbull did not think it necessary to defend the surely more dubious federal jurisdiction over cases involving no state action whatsoever. A few minutes later, Senator Trumbull reiterated that his reason for introducing the civil rights bill was to bring about "the passage of a law by Congress, securing equality in civil rights *when denied by State authorities* to freedmen and all other inhabitants of the United States . . . ." [26]

Thus, the Senate debates contain many explicit statements by the bill's own author, to whom the Senate naturally looked for an explanation of its terms, indicating that the bill would prohibit only state-sanctioned discrimination.

The Court puts forward in support of its construction an impressive number of quotations from and citations to the Senate debates. However, upon more circumspect analysis than the Court has chosen to give, virtually all of these appear to be either irrelevant or equally consistent with a "state action" interpretation. The Court's mention, *ante,* at 16, of a reference in the Senate debates to "white employers who refused to pay their Negro workers" surely does not militate against a "state action" construction, since "state action" would include conduct pursuant to "custom," and there was a very strong "custom" of refusing to pay slaves for work done. The Court's citation, *ante,* at 16–17, of Senate references to "white citizens who assaulted Negroes" is not in point, for the debate cited by the Court concerned the Freedmen's bill, not the civil rights bill.[27] The former by its terms forbade discrimination pursuant to "prejudice," as well as "custom," and in any event neither bill pro-

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[26] *Id.,* at 1760.

[27] See Cong. Globe, 39th Cong., 1st Sess., 339–340.

vided a remedy for the victim of a racially motivated assault.[28]

The Court's quotation, *ante*, at 18–19, of Senator Trumbull's December 13 reference to the then-embryonic civil rights bill is also compatible with a "state action" interpretation, at least when it is recalled that the unedited quotation, see *supra*, at ——, includes a statement that the second clause of the Thirteenth Amendment, the authority for the proposed bill, was intended solely as a check on state legislatures. Senator Trumbull's declaration the following day that the forthcoming bill would be aimed at discrimination pursuant to "a prevailing public sentiment" as well as to legislation, see *ante*, at 20, is also consistent with a "state action" reading of the bill, for the bill explicitly prohibited actions done under color of "custom" as well as of formal laws.

The three additional statements of Senator Trumbull and the remarks of senatorial opponents of the bill, quoted by the Court, *ante*, at 20–22, to show the bill's sweeping scope, are entirely ambiguous as to whether the speakers thought the bill prohibited only state-sanctioned conduct or reached wholly private action as well. Indeed, if the bill's opponents thought that it would have the latter effect, it seems a little surprising that they did not object more strenuously and explicitly.[29] The remark of Senator Lane which is quoted by the Court, *ante*, at 22, to prove that he viewed the bill as reaching " 'the white man . . . [who] would invoke the

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[28] The Court also gives prominence, see *ante*, at 17–18, to a report by General Carl Schurz which described private as well as official discrimination against freedmen in the South. However, it is apparent that the Senate regarded the report merely as background, and it figured relatively little in the debates. Moreover, to the extent that the described discrimination was the product of "custom," it would have been prohibited by the bill.

[29] See *infra*, at ——.

power of local prejudice' against the Negro," seems to have been quoted out of context. The quotation is taken from a part of Senator Lane's speech in which he defended the section of the bill permitting the President to invoke military authority when necessary to enforce the bill. After noting that there might be occasions "[w]here organized resistance to the legal authority assumes that shape that the officers cannot execute a writ," [30] Senator Lane concluded that "if [the white man] would invoke the power of local prejudice to override the laws of the country, this is no Government unless the military may be called in to enforce the order of the civil courts and obedience to the laws of the country." [31] It seems to me manifest that, taken in context, this remark is beside the point in this case.

The post-veto remarks of opponents of the bill, cited by the Court, *ante,* at 24, also are inconclusive. Once it is recognized that the word "right" as used in the bill is ambiguous, then Senator Cowan's statement, *ante,* at 24, that the bill would confer "the right . . . to purchase . . . real estate . . . without any qualification" [32] must inevitably share that ambiguity. The remarks of Senator Davis, *ante,* at 24, with respect to rental of hotel rooms and sale of church pews are, when viewed in context, even less helpful to the Court's thesis. For these comments were made immediately following Senator Davis' plaintive acknowledgment that "this measure proscribes all discriminations . . . that may be made . . . by any 'ordinance, regulation, or custom,' as well as by 'law or statute.' " [33] Senator Davis then observed that ordinances, regulations, and customs presently conferred upon white persons the most comfortable accommodations in ships

[30] Cong. Globe, 39th Cong., 1st Sess., 603.

[31] *Ibid.*

[32] See Cong. Globe, 39th Cong., 1st Sess., 1781.

[33] Cong. Globe, 39th Cong., 1st Sess., Appendix, 183.

and steamboats, hotels, churches, and railroad cars, and stated that "[t]his bill . . . declares all persons who enforce these distinctions to be criminals against the United States . . . ." [34] Thus, Senator Davis not only tied these obnoxious effects of the bill to its "customs" provision but alleged that they were brought about by § 2 as well as § 1. There is little wonder that his remarks "elicited no reply," see *ante,* at 24, from the bill's supporters.

The House debates are even fuller of statements indicating that the civil right bill was intended to reach only state-endorsed discrimination. Representative Wilson was the bill's sponsor in the House. On the very first day of House debate, March 1, Representative Wilson said in explaining the bill:

> "[I]f the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though citizens were of one race or color, our troubles as a nation would be well-nigh over. . . . It will be observed that *the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States* on 'account of race color, or previous condition of slavery.' " [35]

A few minutes later, Representative Wilson said:

> "Before our Constitution was formed, the great fundamental rights [which are embodied in this bill] belonged to every person who became a member of our great national family . . . . The entire machinery of government . . . was designed, among other things, to secure a more perfect enjoyment of these rights . . . . I assert that we possess the power to do those things which Governments are organized to do; *that we may protect a citizen of*

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[34] *Ibid.*

[35] Cong. Globe, 39th Cong., 1st Sess., 1118.

> *the United States against a violation of his rights by the law of a single State;* . . . that this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to citizens of the United States . . . ." [36]

These statements surely imply that Representative Wilson believed the bill to be aimed at state-sanctioned discrimination and not at purely private discrimination, which of course existed unhindered "[b]efore our Constitution was formed."

Other congressmen expressed similar views. On March 2, Representative Thayer, one of the bill's supporters, said:

> "The events of the last four years . . . have changed [the freedmen] from a condition of slavery to that of freedom. The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty given to them by the American people.
>
> "Sir, *if it is competent for the new-formed Legislatures of the rebel States to enact laws* . . . which declare, for example, that they shall not have the privilege of purchasing a home for themselves and their families; . . . then I demand to know, of what practical value is the amendment abolishing slavery . . . ?" [37]

A few minutes later, he said:

> "Do you give freedom to a man when you allow him to be deprived of [those] great natural rights to which every man is entitled by nature? . . . [W]hat kind of freedom is that by which the man placed in

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[36] *Id.*, at 1119.

[37] *Id.*, at 1151. (Emphasis added.)

> a state of freedom is subject to the tyranny of *laws* which deprive him of [those] rights . . . ?" [38]

A little later, Representative Thayer added:

> "[The freedmen] are entitled to the benefit of that guarantee of the Constitution which secures to every citizen the enjoyment of life, liberty, and property, and no just reason exists why they should not enjoy the protection of that guarantee . . . .
>
> "What is the necessity which gives occasion for that protection? Sir, in at least six of the lately rebellious States *the reconstructed Legislatures of those States have enacted laws* which, if permitted to be enforced, would strike a fatal blow at the liberty of the freedmen . . . ." [39]

An opponent of the bill, Representative Bingham, said on March 9:

> "[W]hat, then, is proposed by the provision of the first section? *Simply to strike down by congressional enactment every State constitution which makes a discrimination on account of race or color* in any of the civil rights of the citizen." [40]

Representative Shellabarger, a supporter of the bill, discussed it on the same day. He began by stating that he had no doubt of the constitutionality of § 2 of the bill, provided Congress might enact § 1. With respect to § 1, he said:

> "Its whole effect is not to confer or regulate rights, but to require that whatever of these enumerated rights and obligations are imposed by state laws shall be for and upon all citizens alike . . . . Self-evidently, this is the whole effect of this first section. It secures . . . equality of protection in those

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[38] *Id.*, at 1152. (Emphasis added.)
[39] *Id.*, at 1153. (Emphasis added.)
[40] *Id.*, at 1291. (Emphasis added.)

> enumerated civil rights which the States may deem proper to confer upon any races . . . . It must . . . be noted that the violations of citizens' rights, which are reached and punished by this bill, are those which are inflicted under 'color of law,' &c. The bill does not reach mere private wrongs, but only those done under color of state authority . . . . [I]ts whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act. This is the whole of it." [41]

Thus, Representative Shellabarger said in so many words that the bill had no impact on "mere private wrongs."

After the President's veto of the bill, Representative Lawrence, a supporter, stated his views. He said:

> "The bill does not declare who shall or shall not have the right to sue, give evidence, inherit, purchase, and sell property. These questions are left to the States to determine, subject only to the limitation that there are some inherent and inalienable rights pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws . . . .
>
> "Now, there are two ways in which a State may undertake to deprive citizens of these . . . rights: either by prohibiting laws, or by a failure to protect any one of them.
>
> "If the people of a State should become hostile to a large class of naturalized citizens *and should enact*

[41] *Id.*, at 1293–1294. It is quite clear that Representative Shellabarger was speaking of the bill's first section, for he did not mention the second section until later in his speech, and then only briefly and in terms which indicated that he thought it co-extensive with the first ("I cannot remark on the second section further than to say that it is the ordinary case of providing punishment for violating a law of Congress."). See *id.*, at 1294.

> *laws* to prohibit them and no other citizens . . . from inheriting, buying, holding, or selling property, . . . that would be prohibitory legislation. If the State *should simply enact laws* for native-born citizens *and provide no law* under which naturalized citizens could enjoy any of these rights, and should deny them protection by civil process or penal enactments, that would be a denial of justice." [42]

From this passage it would appear that Representative Lawrence conceived of the word "right" in § 1 of the bill as referring to a right to equal legal status, and that he believed that the sole effect of the bill was to prohibit state-imposed discrimination.

The Court quotes and cites a number of passages from the House debates in aid of its construction of the bill. As in the case of the Senate debates, most of these appear upon close examination to provide little support. The first significant citation, *ante,* at 14, n. 33, is a dialogue between Representative Wilson and Representative Loan, another of the bill's supporters.

The full exchange went as follows:

> "Mr. LOAN. Mr. Speaker, I . . . ask the chairman . . . why the committee limit the provisions of the second section to persons who act under the color of law. Why not let them apply to the whole community where the acts are committed?
>
> "Mr. WILSON, of Iowa. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.
>
> "Mr. LOAN. What penalty is imposed upon others than officers who inflict these wrongs on the citizen?

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[42] Cong. Globe, 39th Cong., 1st Sess., 1832–1833. (Emphasis added.)

"Mr. WILSON, of Iowa. We are not making a general criminal code for the States.

"Mr. LOAN. Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?

"Mr. WILSON, of Iowa. A law without a sanction is of very little force.

"Mr. LOAN. Then why not put it in the bill directly?

"Mr. WILSON, of Iowa. That is what we are trying to do." [43]

The interpretation which the Court places on Representative Wilson's remarks, see *ante*, at 14, n. 33, is a conceivable one.[44] However, it is equally likely that, since both participants in the dialogue professed concern solely with § 2 of the bill, their remarks carried no implication about the scope of § 1. Moreover, it is possible to read the entire exchange as concerned with discrimination in communities having discriminatory laws, with Representative Loan urging that the laws should be abrogated directly or that all persons, not merely officers, who discriminated pursuant to them should be criminally punishable.

The next significant reliance upon the House debates is the Court's mention of references in the debates "to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities."

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[43] *Id.*, at 1120.

[44] It is worthy of note, however, that if Representative Wilson believed that § 2 of the bill would apply only to state officers, and not to other members of the community, he apparently differed from the bill's author. See the remarks of Senator Trumbull quoted, *supra*, at —.

Ante, at 16–17. (Footnotes omitted.)[45] As was pointed out in the discussion of the Senate debates, *supra,* at —, the references to white men's refusals to pay freedmen and their agreements not to hire freedmen without their "masters' " consent are by no means contrary to a "state action" view of the civil rights bill, since the bill expressly forbade action pursuant to "custom" and both of these practices reflected "customs" from the time of slavery. The Court cites two different House references to assaults on Negroes by whites. The first was by Congressman Windom,[46] and close examination reveals that his only mention of assaults was with regard to a Texas "pass system," under which freedmen were whipped if found abroad without passes, and a South Carolina law permitting freedmen to be whipped for insolence.[47] Since these assaults were sanctioned by law, or at least by "custom," they would be reached by the bill even under a "state action" interpretation. The other allusion to assaults, as well as the mention of combinations of whites to drive freedmen from communities, occurred in a speech by Representative Lawrence.[48] These references were shortly preceded by the remarks of Congressman Lawrence quoted, *supra,* at —, and were immediately followed by his comment that *"If States should undertake to authorize such offenses, or deny to a class of citizens all protection against them,* we may then inquire whether

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[45] The Court's reliance, see *ante,* at 14, n. 33, on the statement of Representative Shellabarger that "the violations of citizens' rights which are reached and punished by this bill are those which are inflicted under 'color of law' . . . ," Cong. Globe, 39th Cong., 1st Sess., 1294, seems very misplaced when the statement is taken in context. A fuller version of Representative Shellabarger's remarks will be found, *supra,* at —.

[46] See Cong. Globe, 39th Cong., 1st Sess., 1160.

[47] See *ibid.*

[48] See Cong. Globe, 39th Cong., 1st Sess., 1835.

the nation itself may be destroyed . . . ." [49] These fore and aft remarks imply that Congressman Lawrence's concern was that the activities referred to would receive state sanction.

The Court, *ante*, at 17, n. 40, quotes a statement of Representative Eldridge, an opponent of the bill, in which he mentioned references by the bill's supporters to "individual cases of wrong perpetrated upon the freedmen of the South . . . ." [50] However, up to that time there had been no mention whatever in the House debates of any purely private discrimination,[51] so one can only conclude that by "individual cases" Representative Eldridge meant "isolated cases," not "cases of purely private discrimination."

The last significant reference [52] by the Court to the House debates is its statement, *ante*, at 23, that "Representative Cook of Illinois thought that, without appropriate federal legislation, any 'combination of men in [a] neighborhood [could] prevent [a Negro] from having a chance' to enjoy" the benefits of the Thirteenth Amendment. This quotation seems to be taken out of context. What Representative Cook said was:

> "[W]hen those rights which are enumerated in this bill are denied to any class of men on account of race or color, *when they are subjected to a system of vagrant laws* which sells them into slavery or involuntary servitude, which operates upon them as upon no other part of the community, they are not secured in the rights of freedom. If a man can be sold, the man is a slave. If he is nominally freed

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[49] *Ibid.* (Emphasis added.)

[50] Cong. Globe, 39th Cong., 1st Sess., 1156.

[51] See *id.*, at 1115–1124, 1151–1155.

[52] The emphasis given by the Court to the statement of Representative Thayer which is quoted *ante*, at 22–23, surely evaporates when the statement is viewed in conjunction with Representative Thayer's immediately following remarks, quoted, *supra*, at ——.

> by the amendment to the Constitution, . . . he has simply the labor of his hands on which he can depend. Any combination of men in his neighborhood can prevent him from having any chance to support himself by his labor. *They can pass a law* that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold." [53]

These remarks clearly were addressed to discriminations effectuated by law, or sanctioned by "custom." As such, they would have been reached by the bill even under a "state action" interpretation.

D.

The foregoing analysis of the language, structure, and legislative history of the 1866 Civil Rights Act shows, I believe, that the Court's thesis that the Act was meant to extend to purely private action is open to the most serious doubt, if indeed it does not render that thesis wholly untenable. Another, albeit less tangible, consideration points in the same direction. Many of the legislators who took part in the congressional debates inevitably must have shared the individualistic ethic of their time, which emphasized personal freedom [54] and embodied a distaste for governmental interference which was soon to culminate in the era of laissez-faire.[55] It

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[53] *Id.*, at 1124. (Emphasis added.) Earlier in the same speech, Representative Cook had described actual vagrancy laws which had recently been passed by reconstructed Southern legislatures. See *id.*, at 1123–1124.

[54] An eminent American historian has said that the events of the last third of the 19th century took place "in a framework of pioneer individualistic mores . . . ." S. E. Morison, The Oxford History of the American People 788 (1965). See also 3 V. Parrington, Main Currents in American Thought 7–22 (1930).

[55] It has been suggested that the effort of the congressional radicals to enact a program of land reform in favor of the freedmen during Reconstruction failed in part because it smacked too much

seems to me that most of these men would have regarded it as a great intrusion on individual liberty for the Government to take from a man the power to refuse for personal reasons to enter into a purely private transaction involving the disposition of property, albeit those personal reasons might reflect racial bias. It should be remembered that racial prejudice was not uncommon in 1866, even outside the South.[56] Although Massachusetts had recently enacted the Nation's first law prohibiting racial discrimination in public accommodations,[57] Negroes could not ride within Philadelphia streetcars [58] or attend public schools with white children in New York City.[59] Only five States accorded equal voting rights to Negroes,[60] and it appears that Negroes were allowed to serve on juries only in Massachusetts.[61] Residential

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of "paternalism" and interference with property rights. See K. Stampp, The Era of Reconstruction 126–131 (1965).

[56] See generally M. Konvitz & T. Leskes, A Century of Civil Rights (1961); L. Litwack, North of Slavery: The Negro in the Free States, 1790–1860 (1961); K. Stampp, *supra*, at 12–17; G. Stephenson, Race Distinctions in American Law (1910); Maslow & Robison, Civil Rights Legislation and the Fight for Equality, 1862–1952, 20 U. Chi. L. Rev. 363 (1953).

[57] See M. Konvitz & T. Leskes, *supra*, at 155–156; [1864–1865] Mass. Laws 650.

[58] Negroes were permitted to ride only on the front platforms of the cars. See L. Liwack, *supra*, at 112.

[59] Negro students in New York City were compelled to attend separate schools, called African schools, under authority of an 1864 New York State statute which empowered school officials to establish separate, equal schools for Negro children. See L. Litwack, *supra*, at 121, 133–134, 136, 151; G. Stephenson, *supra*, at 185; [1864] N. Y. Laws 1281. In 1883, the New York Court of Appeals held that students in Brooklyn might constitutionally be segregated pursuant to the statute. See *People ex rel. King* v. *Gallagher*, 93 N. Y. 438. In 1900, the statute was finally repealed and segregation legally forbidden. See [1900] N. Y. Laws, Vol. II, at 1173.

[60] See L. Litwack, *supra*, at 91–92. The States were Massachusetts, Rhode Island, Maine, New Hampshire, and Vermont. See *id.*, at 91.

[61] See L. Litwack, *supra*, at 94.

segregation was the prevailing pattern almost everywhere in the North.[62] There were no state "fair housing" laws in 1866, and it appears that none had ever been proposed.[63] In this historical context, I cannot conceive that a bill thought to prohibit purely private discrimination not only in the sale or rental of housing but in *all* property transactions would not have received a great deal of criticism explicitly directed to this feature. The fact that the 1866 Act received *no* criticism of this kind [64] is for me strong additional evidence that it was not regarded as extending so far.

In sum, the most which can be said with assurance about the intended impact of the 1866 Civil Rights Act upon purely private discrimination is that the Act probably was envisioned by most members of Congress as prohibiting official, community-sanctioned discrimination in the South, engaged in pursuant to local "customs" which in the recent time of slavery probably were embodied in laws or regulations.[65] Acts done under the

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[62] See *id.*, at 168–170.

[63] It has been noted that:

"Residential housing, despite its importance . . . , appears to be the last of the major areas of discrimination that the states have been willing to attack." M. Konvitz & T. Leskes, *supra*, at 236.

And as recently as 1953, it could be said:

"Bills have been introduced in state legislatures to forbid racial or religious discrimination in 'multiple dwellings' (those housing three or more families), . . . but these proposals have not been considered seriously by any legislative body." Maslow & Robinson, *supra*, at 408. (Footnotes omitted.)

[64] In contrast, the bill was repeatedly and vehemently attacked, in the face of emphatic denials by its sponsors, on the ground that it allegedly would invalidate two types of *state laws:* those denying Negroes equal voting rights and those prohibiting intermarriage. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 598, 600, 604, 606, 1121, 1157, 1263.

[65] The petitioners do not argue, and the Court does not suggest, that the discrimination complained of in this case was the product of such a "custom."

color of such "customs" were, of course, said by the Court in the *Civil Rights Cases*, 109 U. S. 3, to constitute "state action" prohibited by the Fourteenth Amendment. See *id.*, at 16, 17, 21. Adoption of a "state action" construction of the Civil Rights Act would therefore have the additional merit of bringing its interpretation into line with that of the Fourteenth Amendment, which this Court has consistently held to reach only "state action." This seems especially desirable in light of the wide agreement that a major purpose of the Fourteenth Amendment, at least in the minds of its congressional proponents, was to assure that the rights conferred by the then recently enacted Civil Rights Act could not be taken away by a subsequent Congress.[66]

II.

The foregoing, I think, amply demonstrates that the Court has chosen to resolve this case by according to a loosely worded statute a meaning which is open to the strongest challenge in light of the statute's legislative history. In holding that the Thirteenth Amendment is sufficient constitutional authority for § 1982 as interpreted, the Court also decides a question of great importance. Even contemporary supporters of the aims of the 1866 Civil Rights Act doubted that those goals could constitutionally be achieved under the Thirteenth Amendment,[67] and this Court has twice expressed similar doubts. See *Hodges* v. *United States*, 203 U. S. 1, 16–18; *Corrigan* v. *Buckley*, 271 U. S. 323, 330. But cf. *Civil*

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[66] See, *e. g.*, H. Flack, The Adoption of the Fourteenth Amendment 94 (1908); J. James, The Framing of the Fourteenth Amendment 126–128, 179 (1956); 2 S. E. Morison & H. Commager, The Growth of the American Republic 39 (4th ed. 1950); K. Stampp, *supra*, at 136; J. tenBroek, Equal Under Law 224 (1965); L. Warsoff, Equality and the Law 126 (1938).

[67] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 504–505 (Senator Johnson); *id.*, at 1291–1293 (Representative Bingham).

Rights Cases, 109 U. S. 3, 22. Thus, it is plain that the course of decision followed by the Court today entails the resolution of important and difficult issues.

The only apparent way of deciding this case without reaching those issues would be to hold that the petitioners are entitled to relief on the alternative ground advanced by them: that the respondent's conduct amounted to "state action" forbidden by the Fourteenth Amendment. However, that route is not without formidable obstacles of its own, for the opinion of the Court of Appeals makes it clear that this case differs substantially from any "state action" case previously decided by this Court. See 379 F. 2d, at 40–45.

The fact that a case is "hard" does not, of course, relieve a judge of his duty to decide it. Since, the Court did vote to hear this case, I normally would consider myself obligated to decide whether the petitioners are entitled to relief on either of the grounds on which they rely. After mature reflection, however, I have concluded that this is one of those rare instances in which an event which occurs after the hearing of argument so diminishes a case's public significance, when viewed in light of the difficulty of the questions presented, as to justify this Court in dismissing the writ as improvidently granted.

The occurrence to which I refer is the recent enactment of the Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73. Title VIII of that Act contains comprehensive "fair housing" provisions, which by the terms of § 803 will become applicable on January 1, 1969, to persons who, like the petitioners, attempt to buy houses from developers. Under those provisions, such persons will be entitled to injunctive relief and damages from developers who refuse to sell to them on account of race or color, unless the parties are able to resolve their dispute by other means. Thus, the type of relief which the peti-

tioners seek will be available within seven months time under the terms of a presumptively constitutional Act of Congress.[68] In these circumstances, it seems obvious that the case has lost most of its public importance, and I believe that it would be much the wiser course for this Court to refrain from deciding it. I think it particularly unfortunate for the Court to persist in deciding this case on the basis of a highly questionable interpretation of a sweeping, century-old statute which, as the Court acknowledges, see *ante,* at 4, contains none of the exemptions which the Congress of our own time found it necessary to include in a statute regulating relationships so personal in nature. In effect, this Court, by its construction of § 1982, has extended the coverage of federal "fair housing" laws far beyond that which Congress in its wisdom chose to provide in the Civil Rights Act of 1968. The political process now having taken hold again in this very field, I am at a loss to understand why the Court should have deemed it appropriate or, in the circumstances of this case, necessary to proceed with such precipitous and insecure strides.

I am not dissuaded from my view by the circumstance that the 1968 Act was enacted after oral argument in this case, at a time when the parties and *amici curiae* had invested time and money in anticipation of a decision on the merits, or by the fact that the 1968 Act apparently will not entitle these petitioners to the relief which they seek.[69] For the certiorari jurisdiction was not conferred upon this Court "merely to give the defeated party in the . . . Court of Appeals another hearing," *Magnum Co.* v. *Coty,* 262 U. S. 159, 163, or "for the benefit of the particular litigants," *Rice* v. *Sioux City*

[68] Of course, the question of the constitutionality of the "fair housing" provisions of the 1968 Civil Rights Act is not before us, and I intend no implication about how I would decide that issue.

[69] See *ante,* at 5, n. 21.

Cemetery, 349 U. S. 70, 74, but to decide issues, "the settlement of which is important to the public as distinguished from . . . the parties," *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393. I deem it far more important that this Court should avoid, if possible, the decision of constitutional and unusually difficult statutory questions than that we fulfill the expectations of every litigant who appears before us.

One prior decision of this Court especially suggests dismissal of the writ as the proper course in these unusual circumstances. In *Rice* v. *Sioux City Cemetery*, *supra*, the issue was whether a privately owned cemetery might defend a suit for breach of a contract to bury on the ground that the decedent was a Winnebago Indian and the contract restricted burial privileges to Caucasians. In considering a petition for rehearing following an initial affirmance by an equally divided Court, there came to the Court's attention for first time an Iowa statute which prohibited cemeteries from discriminating on account of race, but which would not have benefited the *Rice* petitioner because of an exception for "pending litigation." Mr. Justice Frankfurter, speaking for a majority of the Court, held that the writ should be dismissed. He pointed out that the case presented "evident difficulties," 349 U. S., at 77, and noted that "[h]ad the statute been properly brought to our attention . . . , the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance." *Id.*, at 76–77. This case certainly presents difficulties as substantial as those in *Rice*. Compare what has been said in this opinion with 349 U. S., at 72–73; see also *Bell* v. *Maryland*, 378 U. S. 226. And if the petition for a writ of certiorari in this case had been filed a few months after, rather than a few months before, the passage of the 1968 Civil Rights Act, I venture to say that the case would have been deemed

to possess such "isolated significance," in comparison with its difficulties, that the petition would not have been granted.

For these reasons, I would dismiss the writ of certiorari as improvidently granted.

EXHIBIT 53

[From the Statesville Landmark, Statesville, N.C.]

ADVISE AND CONSENT

Television gliberals and their counterparts in the press are doing their best to give Senator Sam J. Ervin, Jr., the Goldwater treatment for having the audacity to question the qualifications of Abe Fortas to sit as Chief Justice of the United States.

And Justice Fortas, like Thurgood Marshall before him, has taken refuge behind the theory of the separation of powers in refusing to answer questions touching upon his understanding of the role of the court in interpreting and applying the constitution.

But, from some of the admissions he made before the Senate Judiciary committee, he has not always been too careful to observe this separation of powers in practice.

He admitted having consulted with President Johnson on a number of high policy matters, such as sending troops into Detroit, Vietnam war decisions and the best approach to riot control in the big cities of the nation.

Thus, Justice Fortas wants to use the separation of powers argument as a one-way street. It is a convenient dodge when senators, who are charged under the advise and consent clause of the constitution with approving his appointment as chief justice, seek to discover his legal philosophy. But it is quite another thing when he helps to determine executive policy, such as riot control, which might later have to be settled before the court on which he sits.

If we were a member of the United States senate, we would automatically vote against the confirmation of any nominee to the Supreme court who declined to discuss, freely and openly, his philosophy of the role of the court in the republic.

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These are crucial points. Justice Marshall refused to say what he thinks certain constitutional provisions mean; and Justice Fortas said only recently that "the exact meaning of the words of the constitution has not yet been fixed."

If we are to continue to pack the court with unknown quantities, with men whose future course cannot reasonably be anticipated from statements they are willing to make pnblicly, then this compact between the people and their government, the constitution and its amendments, can be made to say anything five men on the court want it to say at any given time.

So we hope Senator Ervin and his associates on the Judiciary committee continue to hammer away at all nominees to the Supreme court. Indeed, we hope they become a little more selective in the individuals they are willing to confirm.

As distinguished a commentator as the Chief Justice of the Pennsylvania Supreme court said no later than July 8:

"Let's face it—a dozen recent, revolutionary decisions by a majority of the Supreme Court of the United States in favor of murderers, robbers, rapists and other dangerous criminals, whicb astonish and dismay countless law-abiding citizens who look to our courts for protection and help, and the mollycoddling of lawbreakers and dangerous criminals by many judges—each and all of these are worrying and frightening millions of law-abiding citizens and are literally jeopardizing the future welfare of our country * * *.

"Let's stop kidding the American people. It is too often forgotten that crime is increasing six times more rapidly than our population. This delnge of violence, this flouting and defiance of law and this crime wave cannot be stopped and crime cannot be eliminated by pious platitudes and by governmental promises of millions and billions of dollars.

"The recent decisions of a majority of the Supreme Court of the United States, which shackle police and make it terrifically difficult to protect society from crime and criminals, are, I repeat, among the principal reasons for the turmoil

and near-revolutionary conditions which prevail in our country, and especially in Washington."

It's time somebody started asking questions about how the court got that way; for pretty soon somebody is going to have to come up with some answers.

EXHIBIT 54

[From the New York Times, May 24, 1968]

(By Fred P. Graham)

FORTAS CONDEMNS COLUMBIA PROTEST

SOME STUDENT ACTIVITIES ARE 'INEXCUSABLE,' HE SAYS

WASHINGTON, May 23.—Justice Abe Fortas today condemned some of the activities of protesting students at Columbia University as "totally inexcusable from the point of view of even primitive morality."

He denounced their barring other students from classes, occupying buildings and rifling the desks and files of university officials.

"The advocacy of civil rights does not require or justify the abandonment of all decency," Justice Fortas said in a rare interview.

(In New York, the troubled Columbia University campus returned to a semblance of normality after its latest eruption of violence.)

He warned that on many campuses faculty members and students who oppose lawlessness were demoralized and fearful of being denounced as "white Uncle Toms" if they spoke out against illegal means of dissent.

His frequent lecturing visits to colleges persuaded him, Justice Fortas said, that law-abiding students and faculty members were handicapped by the absence of a statement of liberal principles to distinguish legitimate forms of protest from methods that should be considered too extreme.

This prompted him to write a booklet entitled "Concerning Dissent and Civil Disobedience," which is being published by the New American Library. Justice Fortas granted the interview today to elaborate on his views and his reasons for writing the booklet.

Excerpts from the booklet were published in The New York Times Magazine on May 12.

In the interview, he said:

"The idea of the booklet came to me because I had a feeling, as I went around to the various colleges and talked to faculty and students, that there's only one side that was being presented, the side of lawlessness. On the other side was a kind of ideological demoralization.

"I got the feeling at some of the places that I visited that the faculty is demoralized. They don't know how to talk with their students on this issue. They don't want to take a position that will lead the students to think of them as a sort of, as one of them phrased it to me, 'White Uncle Toms'."

TAKEN TO TASK FOR VIEWS

However, Justice Fortas said he had occasionally been taken to task by university professors with impressive credentials for speaking against law violations as a means of protest.

"It is deeply disturbing to me that there has been a measure of acceptance by some young faculty members of the teaching of this kind of lawlessness," he said.

Justice Fortas's strong condemnation of some of the current student tactics has been noteworthy, not only because Justices rarely speak out on events that could eventually reach the High Court, but also because he has impeccable liberal credentials as one of the courts' most consistent libertarians.

20,000-WORD VOLUME

His booklet is a slim, 20,000-word volume between slick paper covers that sells for 50 cents. It is one of a new "broadside" series by the New American Library in which topical issues will be discussed by leading public figures.

In his book, Justice Fortas argues that peaceful and legal forms of protest have usually been adequate to challenge unjust laws. He contends there is a moral

right to protest by violating the law, but only when the law that is being violated is thought to be unjust and unconstitutional.

"But," he said, "I'd like to make this clear—that involves very heavy responsibilities because obedience to law is not only compelled in a democratic society, obedience to law is the profound moral duty of every citizen.

"It is only where the particular law relates to a subject of basic importance that this kind of civil disobedience for purposes of testing that law is permissible. You don't engage in civil disobedience because you don't like the food served in the cafeteria."

Asked if the announced plans for civil disobedience by the Poor People's campaign fell within his definition of permissible protest, he said:

"It depends. If the civil disobedience takes the form of disrupting traffic, preventing people from going to their offices, their buildings, perhaps even their homes—that is a violation of law that should not be called civil disobedience.

"It is simply law breaking on a large scale. The fact that it is a protest does not rescue it."

OMNIBUS CRIME BILL

He would not comment directly on the action this week by the Senate, which approved provisions of the omnibus crime bill designed to reverse recent Supreme Court decisions that limited the admissibility of confessions and police line-up identifications.

But he said there is "the most startling proof to my mind that our decisions have not increased the crime rate."

He noted that until the spring of 1967, when the Supreme Court decided a case called in re Gault, none of the court's controversial criminal law procedures had applied to juvenile courts.

"But if yon compare the increase in adult crime and the increase in juvenile crime prior to our decision in Gault," he said "you will find that juvenile crime has increased at a greater rate than adnlt crime—even if you discouut the relatively greater increases in the juvenile component of our society."

EXHIBIT 55

[From the American Bar Association Journal, January 1949]

NOW IS THE TIME: FORTIFYING THE SUPREME COURT'S INDEPENDENCE

(By Owen J. Roberts, former Associate Justice of the Supreme Court of the United States)*

I feel entirely free to talk on this subject now because I have no longer any connection with any of the courts of the United States. I elected to resign the commission that I held and I am, like you, a common citizen and able, thank God, to express my view on public questions without feeling that I may, in some way, breach the properties. I cannot, of course, divorce myself from my experiences as a justice of the Supreme Court and I cannot divorce myself from the opinions that I formed then with respect to policies.

It is because I have been with that body and it is because I have a deep affection for the Court and a deep desire that it be protected and that it carry its place in our tri-une form of government, the proper place, that I felt I ought to say what I could to stop the movement that has now gone so far and become a matter of such wide discussion amongst our profession and good citizens of the United States. It has now reached the point that the American Bar Association after inconclusive action at two meetings has recommitted the matter to the appropriate committees with the expectation that they will report to the House of Delegates at its next meeting.

The proposals are for certain amendments to the Constitution of the United States or, alternatively as to some of them, for legislation by Congress.

The first proposal is that the Constitution should be amended to provide that the Supreme Conrt shall be composed of the Chief Justice of the United States

*Speaking at a luncheon of the Association of the Bar of the City of New York on December 11, former Justice Roberts discussed and advocated the various constitutional amendments relating to the Supreme Court of the United States that have been proposed to and considered by the House of Delegates. Readers should refer to 34 A.B.A.J. 1072–1073, November, 1948, where the substance and text of the proposed amendments that Justice Roberts discusses are given.

and eight associate justices. It was a matter of remark by James Bryce that the personnel of the Supreme Court had changed so often in the history of the country. He did not quite understand it, that the number had run all the way from six to nine, up and back again. Of course, we understand there is nothing in the world to prevent the Court from being twenty if Congress should so legislate.

You will remember the great letter that Chief Justice Hughes wrote to the Congress in 1937, when the plan to increase the personnel of the Court was under consideration. He said justly then, as I think, that a court of nine is as large a court as is manageable. The Court could do its work, except for writing of the opinions, a good deal better if it were five rather than nine. Every man who is added to the Court adds another voice in council, and the most difficult work of the Court, as you may well have imagined, is that that is done around the council table; and if you make the Conrt a convention instead of a small body of experts, you will simply confuse council. It will confnse council within the Court, and will cloud the work of the Court and deteriorate and degenerate it. I have not any doubt about that.

LIGHTEN COURT'S LOAD BY INCREASING DISCRETIONARY JURISDICTION

The remedy for the weight of work that is placed on the Court is to increase the discretionary jurisdication and not to increase the personnel of the Court. I can well understand how the founding fathers left the number at large because there were many problems that they could not envisage when they drafted the Constitution, and one of its great virtues is that it is drawn with a wide sweep and with a broad brush, and that details are left to he filled in afterwards. And that is one objection that will he made to these amendments of which I will speak in a minute.

The second proposal is an amendment to the Constitution that the Chief Justice of the United States and each associate justice of the Supreme Court shall retire when he shall attain the age of seventy-five years. I think little need be said about it. I believe it is a wise provision. First of all, it will forestall the basis of the last attack on the Court, the extreme age of the justices, and the fact that superannuated old gentlemen hung on there long after their usefulness had ceased. More than that, it tends to provide for each administration an opportunity to add new personnel to the Court, which, I think, is a good thing. I think it is a bad thing for an administration to run as long as President Roosevelt's did without a single opportunity to name a justice to the Court.

PROPOSAL TO FORESTALL POLITICAL AMBITIONS

The third proposal has to do with the appellate jurisdiction of the Court, and I want to pass that for a moment, because that is the crux of what I have to say here today, and that is the log-jam we were up against at the Annual Meeting in Seattle. So I pass the third proposal for the moment and come to the fourth. The substance of it is that no person who hereafter shall become Chief Justice or an associate justice of the Supreme Court shall be eligible to the office of President or Vice President.

Just by so much as the Supreme Court is set apart, just because of the great powers the Supreme Court exercises in our constitutional system, there ought not to he any ambition in any man who sits in that Court to go beyond where he is. I would go farther than that. As a matter of personal belief, I do not think an associate justice ought to be eligible to be Chief Justice, and I do not think that any member of the Court ought to be eligible to hold any political office, but perhaps the present proposal goes far euough. It says that no justice shall be eligible to be President or Vice President.

It is a fact, as I think you know, that every justice who has ever sat on that Court who was bitten by political ambition aud has actively promoted his own candidacy for office has hurt his own career as a judge and has hurt the Court. Instances run pretty far back in the history of the Court.

When a man goes on the Court he ought not to have to depend upon the strength and robustness of his own character to resist the temptation to shade a sentence in an opinion or to shade a view in order to put an umbrella up in case it should rain. He ought to be free to say his say, knowing, as the fouuding fathers meant he should know, that nothing could reach him and that his conscience was as free as could he.

The other limitations that the Constitution put, the good behavior clause, and the fact that a judge's compensation cannot be reduced during his term of office, were intended to guarantee him utter independence. He ought not to have to make a vow to himself that ambition shall not color his opinions. It should be impossible for that to happen.

PROPOSAL THAT JUSTICES HOLD NO OTHER OFFICE

Another proposal is that the Chief Justice or any associate justice or any judge of any other court of the United States shall not, during his term of office, hold any other governmental or public office or position.

A bill providing something of that sort was introduced in the last Congress. I feel very strongly that that would be a great protection to the Court. Perhaps it is enough protection to embody it in an act of Congress. It may be a little out of part for me to speak on this subject, for, as you know, I accepted, at the hands of two Presidents, commissions to do work not strictly of a judicial nature. I have every reason to regret that I ever did so. I do not think it was good for my position as a justice, nor do I think it was a good thing for the Court.

I had an unfortunate experience in the German-American Mixed Claims Commission, in which the German Commissioner accused me of bias and unfairness and walked out of the arbitration. I had another unpleasant experience as a result of the Pearl Harbor Commission report, when a Congressional investigating committee sought to comb over what was done, and there might have been rather an unfortunate reflection on the justice who was a member of that commission.

In the last administration, the Roosevelt administration, it got to be a very common thing to call on federal judges, not only of the Snpreme Court but from other federal courts, to take part in administrative work. I think that is a bad thing for the courts, and I think it is not a good thing for the standing of the judges.

EXTENT OF AMENDMENT OF THE CONSTITUTION

Of course, there is the question of how far you are going in amending the Constitution of the United States. I am all for the view that it onght to be a document stating great principles and not attempting the meticnlousness of a regulatory statute. Every time you suggest an amendment, you violate, to some extent, that great principle.

I want to say that in my opinion this prohibition should extend not only to the Supreme Court but to all of the federal courts. If any of the federal judges have time to run around on all sorts of administrative work, then we have too many federal judges.

When I went to Pearl Harbor for three weeks I was out of the arguments and consultations in my Court. Chief Justice Stone agreed to my going with the greatest reluctance because he said: "There are some important cases coming up here, and I do not want a court of eight to hear them. A full court ought to hear them." But, as I say, he regretfully gave his consent as the President wanted me to go.

I agreed to take the Chairmanship of the German-American Mixed Claims Commission with the understanding that it would be but a few hours' work. It was years of work. It took time off from my judicial duties.

The last time that Chief Justice Hughes took a position of this kind, which was that of an international arbitrator between two South American countries, he said to me: "I will never do that sort of thing again. It is not fair to the Court for one of us to take time from the Court's work."

Some people think that if those proposals were adopted, the independence and integrity of the Court would be well protected. Others, and I am one of them, think that this does not go nearly far enough. Now why?

PROPOSAL TO PROTECT COURT'S APPELLATE JURISDICTION

Well, the third proposal to which I said I would return, suggests an amendment of the judiciary article of the Constitution which would give the Supreme Court appellate jurisdiction in all cases arising under the Constitution, and give it appellate jurisdiction both as to matters of law and matters of fact.

That is a major amendment of the authority of the Supreme Court. It is a major enlargement of it. It is interesting that the founding fathers fixed a very narrow obligatory jurisdiction, and a jurisdiction that could not be touched or

taken away, that affecting ambassadors, other public ministers and suits in which states would be a party.

Why did they then leave it to Congress to regulate the appellate jurisdiction of the Court? I think they did not envisage any such large federal judiciary as we have today. The federal judiciary was rather in the background—that is, the lower judiciary. The theory was that constitutional questions would arise in state courts and then an appeal would come to the Supreme Court from a decision of a state court on a constitutional question.

There came into play state pride, the states' rights feeling, and another feeling that since Anglo-Saxons prize the jury system, giving the Supreme Court appellate jurisdiction as to matters of law and fact would give it the opportunity to overturn jury verdicts, jury decisions, judgments based on jury decisions in New York, in Pennsylvania and elsewhere. The best compromise that could be made in the situation was to leave the Congress the right to define the appellate jurisdiction of the Supreme Court.

APPELLATE JURISDICTION DEPENDS ON CONGRESSIONAL LEGISLATION

You know what the result of that has been. The appellate jurisdiction of the Supreme Court depends upon the judiciary acts—the original Judiciary Act passed in the first session of Congress and the amendments that have been adopted to it since—and Congress has set forth in what cases the Supreme Court can entertain an appeal.

Very early the Court was faced with the question whether it had a general appellate jurisdiction, modified by what Congress had said on the subject. Chief Justice Marshall, in two decisions, said that was not the way to read the Constitution. He said that the Congress and the judiciary acts, having set forth in which cases the Supreme Court might have jurisdiction on appeal, impliedly provided that it should not take jurisdiction in any other class of cases.

That is the settled law and I think it is right. It remains, therefore, so far as we can see, that Congress could affect the Court's powers, just as President Roosevelt could have in his way, unless there were a popular uprising that would frighten them out of doing what they threatened to do.

You have, of course, in mind *Ex parte McCardle*. There was a case that had come up under the jurisdiction then existing under the judiciary acts. The case had been briefed, argued and submitted and was ready for a decision, when the Congress removed the appellate jurisdiction of the Supreme Court in that specific class of case. The Chief Justice wrote a short opinion in which he said that the jurisdiction was subject to regulation by Congress and that the Court had lost the power to deal with that case. The case was dismissed for want of jurisdiction.

That has never been done again. Nothing like it has ever been attempted, but it was done for political reasons and in a political exigency to meet a supposed emergency. The Court might well have said that, jurisdiction having existed when the case was submitted and the case now being in the bosom of the Court, it was too late for Congress to take away its jurisdiction; but you know how deferential the Court has been to the doctrine of the division of powers and evidently it was felt that that would be a straining of the Court's authority and that it should not do it. So it submitted to having its jurisdiction taken away after the case was ready for decision.

It is difficult to say that Congress could not reach the same result by a rather indirect route. Following the precedent that existed when the Emergency Court of Appeals was created to deal with OPA questions, Congress, it seems to me under the present phraseology of the Constitution, could create a federal court to hear certain classes of questions and provide that its decisions should be final.

Such a court might have to decide very serious constitutional questions, as the Emergency Court of Appeals had to do, and yet, if the Congress provided that its decision should be final and binding on the parties, and without appeal, what is there in the Constitution to prevent it? What is there to prevent Congress taking away, bit by bit, all the appellate jurisdiction of the Supreme Court of the United States, not doing it by direct attack but by that sort of indirect attack?

I see nothing. I do not see any reason why Congress cannot, if it elects to do so, take away entirely the appellate jurisdiction of the Supreme Court of the United States over state supreme court decisions. The jurisdiction is exercised now under the terms of the Judiciary Act. Suppose Congress should decide to let the decisions of state courts of appeal be final on constitutional questions. How could the Supreme Court assert a power to take those questions, notwithstanding the act of Congress, in view of the language of the Third Article of the Constitution?

That is the real loophole. What is the use of talking about limiting and fixing the number of the justices so that the Court cannot be packed; what is the utility of saying that the justices must retire at a certain period so as not to have an old, tired, superannuated Court; what is the good of providing that we shall make the Court less conscious of the political movements in the country by depriving the justices of the right to have any ambition for future office; if you leave the Court's appellate powers open to be dealt with and be set aside by action of Congress in any given class of cases or in all the cases which, traditionally, it has dealt with as the final appellate body under the Constitution?

PROTECTING COURT'S JURISDICTION IS MOST IMPORTANT PROPOSAL

For some reason or other this proposal has met with more opposition than the others. In my opinion, without it you have made a bucket and left a hole through which the bucket can empty itself. In other words, this carefully envisaged plan to protect the judiciary would be left with a defect which renders the protective measures futile.

I want to speak a moment about the objections that have been presented. The opposition says that the whole project of amending the judiciary article of the Constitution is to be frowned upon; that we ought not to tinker with our fundamental law; that we have lived under this Judiciary Act for these 160 years; that we have gotten along pretty well; and that it is reasonable to suppose we would get along in the future.

They take the position, on the other hand, that it is a pretty good thing the Constitution left this hole in it so that the Congress can act as a safety valve if the Court gets too heady.

The arguments are rather inconsistent. The one says "Don't touch the Constitution". The other says "It has a great big hole in it. Nobody has run through the hole yet, and let's take a chance that nobody ever will."

They argue that it would be futile to adopt these amendments. They say that if the people rise and attempt to destroy the court, it will not matter what the Constitution says about the powers of the Court. But what we are trying to provide against is not an overthrow of the Constitution but a tinkering with the Court by legislative or administrative action without violating the letter of the Constitution.

If we have a revolution and the constitutional system under which we live is destroyed by main force, it will not matter what the Constitution provides. But those who are supporting these amendments are supporting them in the belief that the general framework of our constitutional government is to be perpetuated and they want that framework of government to go on along the lines that traditionally we have been led to understand were the divisional lines between the executive, the judicial and the legislative.

Then, finally, there has been a suggestion that the Court ought not to be strengthened because the Court, as presently constituted, does not have the entire respect of the Bar. This I think a desperately bad argument. The Court is a great institution. Just because you and I may not like its decisions today, why should we encourage an opportunity to a politician some time to reach in and change its personnel, or change its jurisdiction? I do not think it is a worthy argument.

The Court could, in effect, be destroyed by a President's appointing consistently desperately bad men to it. But are we to indulge a fear of that? I think not.

CONSTITUTIONAL AMENDMENTS SHOULD BE ADOPTED

That is a summary of the opposition, as I understand it, and I do not think the arguments are valid. I do not see why we should not write into the judiciary article what right-thinking citizens and the Bar have felt is the tradition of the Court and is the core of the Court's fulfilling its independent functions in our system of government. I do not see any reason why we should fear to stand up for our views in this respect because it is a bad thing to get into discussions about constitutional amendments and about our system, and that it is only putting bad ideas into people's heads. We would never have any progress if we were afraid to stand up for what we think right.

We have seen what the dangers are that have popped up now and again, in *Ex parte McCardle* and in the last administration in two or three aspects. It is just good housekeeping and just good insurance and just good common sense to put into the Constitution explicitly what you and I all think has been there by tradition for a long time and which ought not to be subject to change.

So, while I am generally against tinkering with the Constitution, I am for making the judiciary branch as safe from attack as the founding fathers evidently

expected and desired it should be, and I think the proposed amendments taken together will do that effectively, and that nothing short of them will do it.

EXHIBIT 56

THE APPOINTMENT OF JUSTICES TO THE U.S. SUPREME COURT

(By Hon. Sam J. Ervin)

Mr. Chairman, during the last few weeks the Senate has been called upon to perform one of its most important constitutional functions—the consideration of the President's nominations to the Supreme Court. Our deliberations on the qualifications of these nominees have, once again, focused attention on what I feel is a primary weakness in the Court. That is, the method for selecting a new Justice.

Because of the present Court's easy willingness to depart from precedents and the plain meaning of the Constitution, I feel that today our Federal system stands in great jeopardy, and I believe we must begin now to devise some means which would ensure that only the best qnalified people serve on the Court. Rather than continuing the present method which often results in appointments for political purposes and not for judicial excellence, we should try to find some way to complete the job begun by the Constitution of having a truly qualified and independent judiciary.

Changing the methods of selecting the members of our three branches of government is not a novel idea. Both the exeentive and legislative branches have undergone perfecting changes through the years. For example, a person cannot be elected President more than twice, and the Vice Presidency is no longer filled by the person having the second largest nnmber of votes in a presidential election. Women are no longer denied the right to vote and no longer is the ballot denied to those on account of race. In the legislative branch, Senators used to be elected by the legislatures of the States. This is no longer true.

But the method of selecting the Supreme Court Justices continues unchallenged just as it was in 1791, and I feel, Mr. President, that it is even more important to ensure careful selection of the judiciary than the other two branches. As Alexis de Tocqueville, one of the most perceptive observers of American institutions and life, said:

"The President, who exercises a limited power, may err without causing grave mischief in the State. Congress may decide amiss without destroying the union, because the electoral body in which Congress originates may cause it to retract its decisions by changing its members. But if the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or civil war."

This quote takes on particular significance at this time in our nation's history when the judgment of just five men has been allowed, with increasing frequency, to seriously change the economic, social, and political direction of our nation and to do so by overriding our written Constitution and the prerogatives of the States and our Federal legislature.

Mr. Chairman, the drafters of the Constitution undertook to free Supreme Court Justices from all personal, political, and economic ambitions, fears and pressures which harass the occupant of other public offices by stipulating that they should hold office for life, and receive for their service a compensation which no authority on earth could reduce. They undertook to impose upon each Supreme Court Justice a personal ohligation to interpret the Constitution according to its true intent by requiring him to make an affirmation to support the Constitution. It causes me great pain to observe that the actions of the present Supreme Court lead to the inescapable conclusion that the founding fathers did not devise a method of selecting justices comparable to the trust they placed in them.

Mr. Chairman, I intend to offer a constitutional amendment designed to ensure, as far as humanly possible, the appointment of the best qualified people to the Supreme Court. In order to afford greater protection to the judicial branch, my amendment proposes a three step method of approving a Supreme Court Justice.

The procedure is as follows:

(1) Whenever a vacancy occurs in the office of Chief Justice of the United States or Associate Justice of the Supreme Court, the President shall convene a conference which shall be attended by the presiding judge of the highest appellate court of each State and the chief judge of each judicial circuit of the

United States. The senior chief judge of a judicial circuit of the United States shall preside at the conference. By majority vote the conference shall designate, and the presiding officer of the conference shall transmit to the President in writing, the names of five or more persons deemed by the conference to be qualified to fill the vacancy.

(2) The President shall nominate one of the persons so designated to fill the vacancy.

(3) If the Senate advises and consents to the appointment of such person, such person shall be appointed to fill the vacancy. If the Senate does not advise and consent to the appointment of any person so nominated, the President shall nominate another person so designated to fill the vacancy.

I believe that my proposed amendment will make it as certain as possible that members of the Supreme Court will not be chosen on the basis of personal friendship with the President, political service rendered to the political party in power, or past association with politically potent groups. Undoubtedly, these are worthwhile objectives.

Mr. Chairman, I hope all members of the Senate will study the problem and will support my proposed solution. At the very least, however, I hope my proposed amendment will serve as a catalyst to inspire dialogue on this vital and unfinished constitutional business.

EXHIBIT 57

[S.J. Res. —, 90th Cong., second sess.]

JOINT RESOLUTION Proposing an amendment to the Constitution relating to the appointment of members of the Supreme Court of the United States

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitntion of the United States, which shall be valid to all intents and purposes as part of the Constitntion when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"SECTION 1. Whenever a vacancy occurs in the office of Chief Justice of the United States or Associate Justice of the Supreme Conrt, the President shall convene a conference which shall be attended by the presiding judge of the highest appellate court of each State and the chief judge of each judicial circuit of the United States. The senior chief judge of a judicial circuit of the United States shall preside at the conference. By majority vote the conference shall designate, and the presiding officer of the conference shall transmit to the President in writing, the names of five or more persons deemed by the conference to he qualified to fill the vacancy.

"SEC. 2. The President shall nominate one of the persons so designated to fill the vacancy. If the Senate advises and consents to the appointment of such person, such person shall be appointed to fill the vacancy. If the Senate does not advise and consent to the appointment of any person so nominated, the President shall nominate another person so designated to fill the vacancy.

"SEC. 3. The Congress shall have power to carry this Article into effect by appropriate legislation.

"SEC. 4. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress."

EXHIBIT 58

[From Nation's Business, May 1968]

WANTED: A NONPOLITICAL SUPREME COURT

(By Philip B. Kurland)*

Appointments to the U.S. Supreme Court are among the most important tasks assigned to the Presidency. And yet the appointments are generally made with the same bows to political expediency as the appointing of local postmasters.

*Philip B. Kurland, author of this article, is professor of constitutional law at the University of Chicago and the author of several books on the Supreme Court. He was gradu-

The fault lies not alone with the President, for the Senators who treat lower federal court appointments as personal prerogatives have been willing to leave appointments to the Supreme Court as the personal prerogative of the Chief Executive. Not since Judge John Parker was rejected more than three decades ago has the Senate blocked a Presidential Supreme Court nomination. So seldom do nonpolitical factors play a part in judicial appointments that the surprise of the matter is that we have a Court which is not worse than it is.

The President ought to put aside politics and patronage and seek out only the best talents to staff the Court. Obviously, there is something wrong with a method that allows a Learned Hand to remain a judge on the Court of Appeals, while appointments are offered to a Frank Murphy, to allow a William H. Hastie to remain on a Court of Appeals but give a Thurgood Marshall a High Court seat. The shame of the matter has been that a long list could be made up of the names of those best qualified to do the task of a Supreme Court Justice who were never appointed because political considerations took precedence.

There have been times when a President acknowledged the appropriate standards, as when President Hoover appointed Benjamin Cardozo to the Court. But these have been rare.

It is somewhat strange that those who so vociferously denounce the advanced age of Congressional committee chairmen are so unconcerned about the septuagenarian and octogenarian attainments of Justices of the Supreme Court. Perhaps these critics do not realize that Justice Hugo Black is 82; that the Chief Justice is 77: William O. Douglas, 69; John Marshall Harlan, 68.

When the "Nine Old Men" reacched similar distinction, President Franklin Delano Roosevelt proposed to Congress that a new Justice be added to the Court for each of those over the age of 70, on the ground that aged judges are incapable of performing their jobs.

Roosevelt did not need to suceed with his court-packing bill because time was on his side. During his long tenure he appointed eight Justices to the Court, in addition to elevating Harlan F. Stone to the Chief Justice's chair. So, too, is it likely that the next President, whoever he is, will be called upon to make several appointments to the high tribunal. It seems appropriate, therefore, to look at the appointive process now.

CHOOSING THE "RIGHT" MAN

History demonstrates that Presidents have not infrequently named persons to the Supreme Court because the appointees were expected to express judicial views sympathetic to those of the Presidlent. This basis for choice has resulted in disappointments.

Joseph Story was appointed by President James Madison to counteract John Marshall's rampant federalism. Somehow Story's Jeffersonian Republicanism disappeared as soon as he donned bis judicial robes, and he quickly became Marshall's strongest and most effective ally.

President Theodore Roosevelt carefully checked with Henry Cabot Lodge about what he thought to be Oliver Wendell Holmes' political predilections before putting him on the Court. After one decision, Roosevelt was purported to have remarked that he could have put a banana on the Court with more backbone that Holmes had shown.

President Wilson's fighting, liberal Attorney General, James C. McReynolds, turned into an archreactionary on the Supreme Court.

If one looks at recent history, he will see that of the eight appointments by FDR, four have generally been lined up on the left: Black, Douglas, Murphy and Rutledge. But the other four have been thought to be on the right: Reed, Frankfurther, Byrnes and Jackson.

Of Eisenhower's appointees, Warren and Brennan would be classified as liberal, but Harlan, Whittaker and Stewart are usually regarded as couservatives.

President Kennedy appointed the left-leaning Goldberg, but he also appointed the more conservative White. Only President Truman's designees were all usually to be found to be on tbe same side. But Vinson, Miuton, Clark and Burton were not on the side which Truman was believed to have espoused.

Life tenure for the federal judiciary frequently dissolves political allegiances.

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ated from the Harvard Law School in 1944, where he edited the Harvard Law Review. He has served as law clerk to Justice Felix Frankfurter of the United States Supreme Court. Professor Kurland has been a Department of Justice attorney and consultant to the Economic Stabilization Agency. He is now consultant to the Senate Judiciary Subcommittee on separation of powers.

In 1960, Professor Kurland established The Supreme Court Review, an annual volume devoted to a critical analysis of the Supreme Court, and has been editor since its founding.

President Johnson may expect that the ideals of the Great Society—whatever they may be—will be furthered by Justice Fortas and Marshall. But time has not yet borne out that judgment.

THE IRRELEVANCE OF RELEVANCE

The error of the way of Supreme Court appointments lies not only in the choice of individuals because of their political proximity to the Chief Executive. Geography, race, religion and the personal friendship of the President are among other factors that have played, but should not play, a part in the making of a Justice.

Nor will the currently proffered Congressional remedy, a requirement of prior judicial experience, afford a rational criterion. For the fact is that the Supreme Court is like no other judicial body. Some of our best Justices never served in a judicial post before appointment to the Court. Many of our worst Justices did have prior service on a lower court.

What is the Court's function? To whom is it responsible and for what? The disparate answers to these questions have made the Warren Court the most divided—and perhaps the most divisive—Supreme Court in American history.

Clearly if you regard the Court as simply another political branch of the national government, expected to make and effectuate policies that it deems desirable, you will seek the same qualities in Justices as you seek in legislators and executives.

The Court, however, is politically irresponsible. Unlike the President and Congress, it has no constituency on whom it relies for return to office. Judicial life tenure was granted, not because the Court was to be a partisan in the political strife that is endemic in our nation, but rather in order to permit it to be above such political contests. And if that basis is in fact nonexistent, then perhaps the time has come to recognize the political nature of the Court and subject its members to the same controls imposed on other political branches of the government. The conflicting ideologies about the function and responsibility of the Supreme Court have been conveniently labeled "judicial activism," on the one hand, and "judicial restraint," on the other.

Two points should certainly be made about this dichotomy. First, the difference between the two is a difference in degree, not in kind. Second, the contest has been one that has been waged throughout our history.

John Marshall faced President Jefferson over the same issues—and won. Taney's Court confronted President Lincoln over the same issues—and lost, although it took a Civil War and three constitutional amendments to establish the defeat of the Court.

The Roosevelt-Court fight derived from the New Deal's objection that the judiciary was engaged in writing their personal predilections into the Constitution. This, the liberals of that era made quite clear, was not the function of the Supreme Court of the United States. Holmes was their hero because he applied a doctrine of judicial restraint.

Things have changed. The liberals who once shouted about judicial tyranny and the usurpation of power by the Court are now proclaiming both the desirability of acknowledging the prime political role of the Court and its immunity from the exertion of political pressures from other branches of the government.

A simple assertion of the right to eat cake and have it, too.

BEHAVIOR OF AN ACTIVIST COURT

If there is one hallmark of the activist wing of the present Court, it is its conception that in Holmes' language constitutionality does turn on the question whether the law under review "may seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree." There are now on the books a large number of opinions that adopt this position.

And, in the area of statutory construction, this group tends to regard Congressional legislation as a license to spell out its own notions of what the statute should contain. A statute that is unpalatable to the Court and can not be reconstructed to its liking is in danger of falling afoul the limits of the new Constitution.

The hard core of the activist bloc is made up of Warren, Douglas and Brennan, although the Chief Justice and Brennan—unlike Douglas—are a little queasy about all that pornography. Justice Black was once considered a solid member of this group, but its speedy reconstruction of the U.S. Constitution has tended to leave him far behind.

The success of this bloc in the future will depend largely upon recruitment of Fortas and Marshall, on both of whom the liberals are pinning great hopes.

What then are the general purposes to which the activists are committed? One can discern several major themes in the Court's recent efforts. Foremost is the Court's egalitarian bent. In recent years the Court's emphasis has shifted from the vagaries of the "due process" clause, utilized in the past to support business and individual rights, to the equally amorphous commands of tbe "equal protection" clause, used largely in support of newly created rights of socially and economically disadvantaged groups.

I do not mean to suggest by this that the Warren Court invented the "equal protection" clause as a device for the creation of new privileges that it espouses. Chief Jnstice Taft found in it a means of preveuting state legislatures from restricting the use of labor injunctions.

There are, however, differences between the use of the "equal protection" clause by the Taft Court and its use by the Warren Court.

The primary difference is in the clientele on whose behalf the clause is invoked.

The second major theme of the Court's work is the destruction of federalism in the American system by continued depletion of the power of the states. There is no novelty in this, except in terms of the rate at which it is traveling. After all, there is a major difference between a car traveling at 30 miles per hour and a car traveling at 100 miles per hour.

It should be couceded, however, that if one looks at the role of the Court in American history, he will discover that the primary function of the Court has been to serve as a centripetal force in American government.

The more interesting aspect of the Court's centralizing tendencies has been its hubsanding of greater and greater authority to itself, providing compulsory solutions for complex problems that heretofore had been considered beyond the domain of judicial competence.

On a less abstract level, the activist wing has shown its predilections, not in terms of principles, but rather in terms of parties. Between criminal defendants and prosecutors, its partisanship favors the defendants, except where they are such unpopular persons as James Hoffa.

As between labor and government, it favors government; but as between labor and management, it favors labor. Its choice is for the regulatory agency over the regulated industry, and for the tax collector over the taxpayer.

The Antitrust Division of the Justice Department must also win.

Property rights must fall before claims of civil rights.

The major defect of the Court, to my mind, however, lies not in the conclusions it reaches so much as in the way that it reaches them.

As two Yale professors noted in the early days of the Warren Court: "The Court's product has shown an increasing incidence of the sweeping dogmatic statement, the formulation of results accompanied by little or no effort to support them in reason. in sum, of oninions that do not opine and *per curiam* orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree."

This, to me, is the most serious charge leveled against the Court. To put it boldly, it is that the Court has not been honest in the means it has used to support its judgments.

The Court's political irresponsibility may be defended on the ground of the need to maintain its independence. However, since it is freed from any obligation to account directly to the electorate, the Court sbould be obliged to provide adequate explanatiou for its actions lest fiat be substituted for reason.

THE COURT AND ANTITRUST LAW

In no single area is the misguided direction of the Court more evident than in its development of antitrust law. Professor Milton Handler, one of our foremost experts on antitrnst law, both as a scholar and practitioner, has repeatedly pointed out the Court's failings.

The fact would seem to be that this Court is either incapable or unwilling to express such policies as it purports to rest in deciding cases.

A prime example of the Court's behavior is afforded by its creation of the "doctrine" of "potential competition" as an argument for inhibiting corporate mergers under the Clayton Act. If the "doctrine" were a real one, the Court would be required to have and use a good deal more information about the economics of the problems it purports to resolve than it has yet displayed.

Writing in *The Supreme Court Review*, George and Rosemary Hale have appropriately characterized the Court's decisions:

"The Supreme Court's dislike for corporate mergers reached new heights in . . . United States. v. Continental Can Co. . . . and United States v. El Paso Natural Gas Co. [in which] the Court made it pellucidly clear that the proscriptions of Section 7 of the Clayton Act extend to situations in which the parties to the proposed merger might become competitors as well as those in which the parties actually are in competition."

They appropriately concluded: "If, as may be the case, the Court is determined to block all mergers at whatever cost in efficiency—a position that is not wholly without merit on political grounds—then it would be preferable for the Court candidly to say so. Manipulation of the concept of potential competition so that plaintiffs invariably prevail can only lead to confusion."

The same criticism, that the Court places political objectives above legal ones, may be made of almost all its opinions in the area of economic regulation.

Two generations ago, the American legal scene was flooded by observations of the legal realists demonstrating that the rules applied by the judiciary were neither inspired nor revealed but simply created. The cult of the robe came under devastating attack, especially by law professors, for two reasons.

First, because the notion of judges as a priesthood propagating the dogma of a faith was just too absurd to he supported hy anyone who made a pretense of commitment to the truth.

And second, perhaps, because the courts of that period had tended to align themselves with the propertied elements of the commnuity: "property" rather than "equality" was the shibboleth of the day.

The Supreme Court is no longer aligned with the propertied classes but is rather in the vanguard of the political forces that would elevate the heretofore disadvantaged. This does not, to me at least, mean that the judicial robe has once again become a magic cloak.

The faithful may, with a fervor not unusual among the newly converted, see the clothes on the naked emperor. I find the exercise of power by the current Supreme Court no less naked than the exercise of power by its predecessor, despite the change in clientele.

If that power is uot to be deuied it, the Court must justify its use, honestly. If there are reasons for the couclusions that the Court is reaching, they should be good enough reasons to stand public scrutiny.

If they are not good enough to staud public scrutiny, they are not good euough.

Wherein lies the fault for the indiscretion that the Court has committed?

First, of course, the responsibility lies on the Justices who have made the decisious.

Second, on the appointive power that has failed to remove the Court from the political arena.

Third, on the national legislature that, in fact, delegates its role of making law to the executive and judicial brauches of the government.

Fourth, on the states which have voluntarily become fiefs of the central government.

Ultimately, however, the responsibility lies with the people of the nation. For, as Adlai Stevenson was wont to observe, we tend to get the kind of government we deserve.

This nation, as we would know it, can survive only so long as its people respect the law. They will respect the law only so long as the processes of lawmaking, whether by judiciary or legislature or executive, are worthy of that respect.

As Justice Frankfurter once said: "Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the fulfillment of both these august functious is to entrust them only to those who are equal to their demands."

EXHIBIT 59

1. BUSINESS LOCATION	2. P O ZONE	3. APPLICATION NUMBER	FOR	DATE LICENSE DUE AND PAYABLE		
5839 MISN GRGE RD	20	19235	4	07 MONTH	01 DAY	66 YEAR

THIS IS YOUR APPLICATION FOR MUNICIPAL LICENSE BY THE CITY OF SAN DIEGO, PURSUANT TO EXISTING LICENSE ORDINANCES AS AMENDED.

INSTRUCTIONS:

1. COMPLETELY FILL-IN THE INFORMATION REQUIRED ON THE REVERSE OF THIS FORM.
2. YOU WILL FIND THE LICENSE TAX RATE APPLICABLE TO YOUR BUSINESS BY REFERRING TO THE TABLE ENCLOSED WITH THIS FORM.
3. YOUR LICENSE BECOMES DELINQUENT AND SUBJECT TO PENALTY IF NOT PAID BEFORE THE EXPIRATION OF 30 DAYS AFTER IT BECOMES DUE AND PAYABLE.
4. USE ENCLOSED RETURN ENVELOPE TO MAIL YOUR COMPLETED APPLICATION AND REMITTANCE TO CITY TREASURER.
5. AFTER APPROVAL OF THIS APPLICATION, YOUR LICENSE WILL BE MAILED TO YOU.

NAME OF APPLICANT 5	REED ENTERPRISES
KIND OF BUSINESS 6	DISTR PERIODICAL
MAILING ADDRESS 7	5839 MISN GRGE RD
CITY & STATE 8	

19235 ZONE 20

ATTENTION PLEASE!

THIS CARD IS TO BE MACHINE PROCESSED TO SPEED RECORDING YOUR PAYMENT - PLEASE DO NOT PIN, STAPLE, SPINDLE, BEND, FOLD, GLUE, OR MUTILATE THIS CARD.

NOTICE-SEE OTHER SIDE-COMPLETE & E[illegible] WITH REQUIRED REMITTANCE IN THE RETURN ENVELOPE PROVIDED. MAIL PROMPTLY TO THE CITY [illegible]ASURER - P.O. BOX 2289 SAN DIEGO, CALIFORNIA [illegible]2112.

REV 471586

1264

1. NUMBER OF EMPLOYEES JULY 1st CURRENT YEAR	[redacted]
2. NUMBER OF EMPLOYEES PREVIOUS JANUARY 1st	[redacted]
3. TOTAL OF LINE 1 & 2	[redacted]
4. ENTER 1/2 OF LINE 3	[redacted]
5. TOTAL OF LINE 4 X $2.00	$ [redacted]
6. BASIC LICENSE FEE $25.00	$ [redacted]
7. TOTAL LINE 5 PLUS 6	$ [redacted]
8. IF DELINQUENT 10% OF LINE 7	$ —
9. TOTAL DUE & PAYABLE (LINE 7 PLUS 8)	$ [redacted]

LICENSE APPLICATION FOR PROFESSIONALS, WHOLESALERS, RETAILERS & MANUFACTURERS

PLEASE DO NOT BEND, FOLD, STAPLE OR MUTILATE THIS CARD

10. IF OWNERSHIP, LOCATION, MAILING ADDRESS OR TYPE OF BUSINESS IS DIFFERENT THAN LISTED ON REVERSE SIDE OF THIS CARD YOUR LICENSE MAY BE INVALID. PLEASE NOTIFY THE CITY TREASURER'S OFFICE AT ONCE.

11. I DECLARE UNDER PENALTY OF MAKING A FALSE STATEMENT THAT, TO THE BEST OF MY KNOWLEDGE AND BELIEF, THE STATEMENTS & DE HEREIN ARE CORRECT AND TRUE.

SIGNED: [redacted] Vice President

TIT [redacted] A. PARTNER, MGR. ETC.

SEE OTHER SIDE FOR INSTRUCTIONS

1265

1. BUSINESS LOCATION	2. P.O. ZONE	3. APPLICATION NUMBER	CAT. 4	DATE LICENSE DUE AND PAYABLE
5839 MISN GRGE RD	20	19236	4	07 (MONTH) 01 (YEAR) 66

THIS IS YOUR APPLICATION FOR MUNICIPAL LICENSE BY THE CITY OF SAN DIEGO, PURSUANT TO EXISTING LICENSE ORDINANCES AS AMENDED.

INSTRUCTIONS:

1. COMPLETELY FILL IN THE INFORMATION REQUIRED ON THE REVERSE OF THIS FORM.
2. YOU WILL FIND THE LICENSE TAX RATE APPLICABLE TO YOUR BUSINESS BY REFERRING TO THE TABLE ENCLOSED WITH THIS FORM.
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3. TOTAL OF LINE 1 & 2		
4. ENTER 1/2 OF LINE 3		
5. TOTAL OF LINE 4 X $2.00	$	
6. BASIC LICENSE FEE $25.00	$	
7. TOTAL LINE 5 PLUS 6	$	
8. IF DELINQUENT 10% OF LINE 7	$	
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SIGNED: X William L. Hawley

TIT. Vice President

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EXHIBIT 60

80TH CONGRESS } SENATE { EXECUTIVE REPT.
1st Session } { No. 7

NOMINATIONS OF HON. MARVIN JONES AND HON. JOHN CASKIE COLLET

JULY 2 (legislative day, APRIL 21), 1947.—Ordered to be printed

Mr. WILEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany the nominations of Hon. Marvin Jones and Hon. John Caskie Collet]

REPORT ON THE USE OF JUDGES IN NONJUDICIAL OFFICES IN THE FEDERAL GOVERNMENT

(Introductory Statement Reporting the Collet and Jones Nominations)

On this occasion your committee has been requested to go beyond the simple report on these nominations and to offer some commentary on the propriety of employing court justices in executive agencies of the Federal Government.

The growing practice of drafting judges to fill executive posts is a matter of serious concern. Justices of the Supreme Court have been used in this manner as in the case of Justice Roberts in the Pearl Harbor inquiry and Justice Jackson in the Nurnberg trials. In like manner Federal circuit judges, district judges, and justices of the Court of Claims have been called upon to perform executive and other nonjudicial functions.

Sometimes the assignment results in the permanent withdrawal of the judge from the Nation's judiciary. At other times the judge is merely "borrowed" for temporary executive duty and then is returned to the bench. On still other occasions the judge leaves one judicial post to engage in executive activities and is subsequently appointed to another judgeship often higher in rank than the one previously held.

Seriously disturbed by the growing frequency of this practice, and deeply concerned about its effect on the Nation's judiciary, the committee requested this report on the subject.

LEGAL STATUS OF THE QUESTION

Existing law does not provide adequate rules of conduct for all the situations involved in this practice. On the contrary, the propriety of taking men from the bench to fill executive posts is governed almost wholly by judicial ethics and public policy. The problem is presented in its most acute form when a Federal judge is asked to act in some other official capacity in the Government without resignation from his office as judge.

The only statutory restriction upon such a practice is found in the act of July 31, 1894 (sec. 2, 28 Stat. 205, 5 U. S. C. sec. 62, as amended), which provides in part that—

> No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law * * *.

Even this law has been weakened by rulings which narrowly confine its operations. The word "office", for example, has been construed to apply only to "constitutional" offices, thus creating a large number of instances in which judges may accept nonjudicial posts wholly outside the statutory restriction.[1] Where the nonjudicial office carries with it no compensation, the statutory restriction does not apply at all.[2] Yet it is precisely this class of cases which raise the most serious questions of public policy.

When historical precedent is examined, it appears that the practice of using Federal judges in nonjudicial capacities has been defended in some quarters and strongly disapproved in others.[3] A dearth of capable men in the early public life of the Nation gave rise to the frequent use of judges in nonjudicial activities, but objections to the practice were voiced by many, including Jefferson, Madison, and Pinckney. It was said that the choice of Federal judges for nonjudicial duties made the bench an "annex" of a political party and an "auxiliary" to the Executive. The situation was criticized as "unwise and degrading."[4]

Where the practice is infrequent, it may well be reasoned that the situation will take care of itself; but where there is an increasing tendency to draft members of the judiciary for executive and nonjudicial duties, as is the case in modern times, the propriety of the practice should be examined anew if the integrity of the judiciary in American life is to be preserved.

INDEPENDENCE OF THE JUDICIARY

When the architects of the Constitution embodied in it the principle of the separation of powers—legislative, executive, judicial—they wisely gave to each the power to resist encroachment on the part of the others.[5] Strongest of these powers in the case of the judiciary is independence of the judges maintained by security in tenure of office, by fixed salaries, and by clear delineation of jurisdiction. "The judiciary," wrote Hamilton, "is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches."[6]

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[1] 22 Op. Atty. Gen. 184 (1898).
[2] 40 Op. Atty. Gen. 93 (1945).
[3] Opinions of the Atty. Genl., ibid. See also Frank, If Men Were Angels (1942) pp. 218-219; Comment (1938) 7 J. B. A. Kan. 172.
[4] See account in 1 Warren, The Supreme Court in United States History (rev. ed. 1935) pp. 167-168.
[5] Federalist, No. 51.
[6] Ibid, No. 78.

What may happen to judges in the exercise of their judicial functions if the tendency increases to appoint them to executive offices? Will it not be difficult for them to maintain the integrity and independence of the judicial office if the practice becomes common of selecting them for executive positions carrying exceptional privileges and prestige? Would not the suspicion be ever present that the President might gain desired ends by favoring judges in Executive appointments? Ill motives need not be charged at all; they will be present as a matter of course where the situation, by its very nature, carries the seeds of suspicion.

How would the people regard a judiciary whose members were judges today, high public officials in the executive branch tomorrow, and perhaps judges again when the executive mission is ended?

The whole independence and integrity of judicial office must at least be embarrassed, if not compromised, by the easy flow from bench to political office. Yet this is where the practice of appointing judges to executive offices tends to lead.

FREEDOM OF CHOICE

It is well settled that judges of constitutional courts cannot be compelled to perform nonjudicial functions or duties.[7] Whether they may do so voluntarily at the behest of the Chief Executive is another matter. Elements other than statutory are present. Public opinion is a compelling factor. It is difficult for a judge to refuse the Executive when the request is placed on the plane of patriotism in time of war. Even without the compelling argument of war a judge is embarrassed in refusing an appointment when urged to serve on the grounds of indispensability, even though the doctrine of the indispensable man has no real place in American public life.

Personal motives may easily join with the urgent call to duty in exerting strong pressure on the judge to accept nonjudicial appointments. Ambition is a wholesome human trait and judges are human. If it becomes common to expect Executive appointments, judges may slip into that frame of mind which seeks promotional opportunity at the hand of the Executive and the quality of the judicial character may be impaired. This could take on an ugly political tinge if judges came to see in the Executive appointment a chance to advance themselves politically or a chance to aid the Chief Executive politically.

Thus, while judges may not be compelled to accept executive posts, their freedom of voluntary choice is readily susceptible to strong public and personal forces. The judge is placed in a worse position than that of mere embarrassment; except in rare cases he has little freedom to choose. It is not conducive to an independent judiciary or in keeping with public respect for the impartial dispensation of justice to place judges in a position where they may feel the pressure or influence of the executive branch.

ETHICS

In the realm of judicial ethics, one of the great figures in Anglo-American law, Sir Matthew Hale, when he became in 1660 the Chief

[7] Hayburns Case (1702), 2 Dall. 409; Muskrat v. U. S. (1911) 219 U. S. 346; Harris, The Judicial Power o the United States (1940), pp. 45–51.

Baron of the Exchequer, laid down the precept "to be continually had in remembrance" that—

I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable, and interruptions.[8]

It was on this ground that Justice Harlan F. Stone declined to consider the chairmanship of the Atomic Energy Commission in September 1945. In a letter to Senator Arthur H. Vandenberg, Justice Stone observed that—

the duties of a Justice of the Supreme Court of the United States are difficult and exacting. Their adequate performance is in a very real sense a "full-time job." I have accepted the office, and acceptance carries with it the obligation on my part to give whatever time and energy are needful for the performance of its functions.[9]

Bar associations have long been aware of the need to safeguard the independence of the judiciary and to preserve its high quality. The Canons of Judicial Ethics of the American Bar Association admonish a judge not to accept "inconsistent duties" (canon 24); that "his conduct should be above reproach" (canon 34); and that he may not practice law, although he may "act as arbitrator or lecturer upon or instruct in law, or write upon the subject, and accept compensation therefor" but only so long as "such course does not interfere with the due performance of his judicial duties" (canon 31).

Upon another occasion the American Bar Association's committee on professional ethics and grievances was asked to rule whether a judge might also properly hold an office in another branch of the Government—such as the executive. The committee held that this was clearly improper, since it "might easily involve conflicting obligations." [10]

It was on this ground that Justice Stone declined a second opportunity to serve in the executive branch of the Government. It was proposed to make him the decisive arbiter of a five-man United States Ballot Commission set up to handle the problem of soldier voting during the late war. In response to a request for his views, the Justice wrote:

* * * I regard the performance of such a function as incompatible with obligations which I assumed with the office of Chief Justice, and as likely to impair my usefulness in that office.

It is enough to say, without more, which might be said, that action taken by the Chief Justice in connection with the administration of the proposed legislation might become subject to review in the Court over which he presides and that it might have political implications and political consequences which should be wholly disassociated from the duties of the judicial office.[11]

In light of the above canons, the committee on professional ethics and grievances of the American Bar Association was asked to rule whether it was proper for a judge to conduct, for a newspaper, a column of comment on current news items and matters of general interest. The committee held that, while such conduct involved no wrongdoing, it was not in accordance with canon 24 that a judge should not accept "inconsistent duties," and that such activity might lead, or be thought by the public to lead, "to impairment of judicial efficiency."

[8] Warvelle, Legal Ethics (1902), pp. 207-208, Hale, History of the Common Law (1792, 4th ed.), pp. xv-xvi.
[9] Congressional Record, 79th Cong., 1st sess., (September 25, 1945), vol. 91, pt. 7, pp. 8950-8951.
[10] Opinion No. 22, January 24, 1930.
[11] Letter from Chief Justice Harlan F. Stone to Senator Arthur H. Vandenberg, November 22, 1944, Congressional Record, 78th Cong., 1st sess., vol. 80, pt. 7, p. 9701.

It was also pointed out that since canon 34 requires judicial conduct to be "above reproach," any activity which may be viewed with disfavor by many people as not consistent with judicial obligations comes within the scope of the canon.[12] In the same vein, a former judge has written that a judge—

> should not allow other affairs * * * to interfere with the prompt and proper performance of his judicial duties * * *.[13]

THE CHARACTER OF THE JUDGES MUST BE IMPECCABLE—THE OFFICE INVIOLATE

It should be remembered that a judge is the human embodiment of an office dedicated to impartial justice and fair dealing—an office which must have and demand the highest public respect. Many forms of activity which are permissible in the ordinary affairs of the everyday world are not permissible to the bench. A judge who embarks upon official nonjudicial activities in another branch of the Government lays himself open to the charge that he is undertaking "conflicting obligations" or "inconsistent duties";[14] that in spirit he is violating the doctrine of the separation of powers;[15] and that in discharging his nonjudicial duties he is neglecting the proper performance of the judicial ones.[16]

Such charges or beliefs, even if entertained only by a few, may readily bring the bench into reproach.[17] While it has been argued that a judge may properly act in two separate capacities, one judicial and one nonjudicial,[18] this ignores the human element that the same man is the tangible representative of intangible offices. He cannot be divided in fact or in spirit so that at one time he sits as judge and another as a public official of a nonjudicial character. The detachment with which judges normally surround themselves, and which the public expects, is one of the safeguards of the proper administration of justice.[19] The mantle of judicial probity cannot and should not be worn or laid aside as convenience suits. Particularly in matters of internal concern, to step from the justice seat to next day direct participation in controversial public activities "runs counter to accepted ideas of propriety" and brings judicial and other affairs into too close an association.[19]

FEDERAL JUDICIARY MUST MAINTAIN THE HIGHEST STANDARDS

The high standard demanded of the Federal judiciary and its complete attachment to things judicial should not be subjected to the disintegrating erosion of particular exceptions. The business of judges is and should remain judging. The great respect with which courts generally, and the Federal judiciary especially, are regarded has been attained through an unremitting devotion to the highest ideals. At one time in Anglo-American history, judges were

[12] Opinion No. 52, committee on professional ethics and grievances, American Bar Association, December 14, 1931.
[13] Andrews, Judicial Ethics—The Judge and His Relations to the Lawyer, the Jury, and the Public (1935), 9 Florida Law Journal, pp. 525, 529.
[14] Opinion No. 22, committee on professional ethics and grievances, American Bar Association, Jan. 24, 1930, Opinion No. 52, op. cit. supra, Dec. 14, 1931.
[15] See I. Warren, The Supreme Court in United States History (rev. ed. 1935), pp. 167-168.
[16] Opinion No. 52, op. cit. supra, Dec. 14, 1931.
[17] Carter, Ethics of the Legal Profession (1915), p. 78.
[18] Frank, If Men Were Angels (1942), pp. 218-219.
[19] Judicial Detachment (1935), 11 New Zealand Law Journal, p. 216.

in low repute because of their improper conduct both on and off the bench.[20] The personal touch in judicature may be a blighting touch, and even slight deviations from a superior norm of behavior may destroy the respect of courts as tribunals of impersonal justice. In the words of Judge Bond:

> Perhaps it is only by preserving the conception of a court of justice as something larger than the men who carry it on, as something which transcends them, and compels their reverence, that the ground gained through the centuries and left to us of the later generations, can be held secure.[21]

DUTY OF THE EXECUTIVE

Where there are no legal rules of conduct precisely laid down in statute law, and where the judge may be in a difficult position in declining the request to serve in an executive post, the burden of discretion falls heavily upon the Chief Executive. He must exercise exceptional care in making appointments of this kind.

The nominating power is far reaching; it has significances and implications not always easy to see. An Executive appointment praiseworthy in the public service may imperceptibly work greater harm to the judiciary. The Executive must forbear the temptation of using judges for their prestige. He must decline to use public opinion against the bench. Judicial eminence is the great intangible value of public faith in justice; and faith in public institutions is the very foundation of the good society.

UNDESIRABLE RESULTS

In cases where Federal judges accept the responsibility of extrajudicial duties or functions in the executive branch of the Government, several undesirable results may follow:

(1) Reward may be conferred or expected in the form of elevation to a higher judicial post.[22]

(2) The judicial and executive functions may be improperly merged.[23]

(3) The absence of the judge from his regular duties increases the work load of the other judges of the court, if any, and may result in an impairment of judicial efficiency in the disposition of cases.[24]

(4) Nonjudicial activities may produce dissension or criticism and may be destructive of the prestige and respect of the Federal judiciary.[25]

(5) A judge, upon resumption of his regular duties, may be called upon to justify or defend his activities under an Executive commission.[26]

CONCLUSION

The Committee on the Judiciary of the United States Senate declares that the practice of using Federal judges for nonjudicial activities is undesirable. The practice holds great danger of working

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[20] Bond, The Growth of Judicial Ethics (1925), 10 Massachusetts Law Quarterly, p. 1.
[21] Bond, The Growth of Judicial Ethics (1925), 10 Massachusetts Law Quarterly, p. 20.
[22] See also 1 Warren, The Supreme Court in United States History (rev. ed. 1935), pp. 120-121.
[23] Ibid., pp. 119-120.
[24] See 15 L. W. 3109, "Review of Supreme Court's Docket," pointing out that with the resumption of a full bench at the beginning of the 1946-47 term, 14 cases from the previous term were scheduled for reargument before the full bench.
[25] 1 Warren, op. cit., pp. 119-121, 167-168.
[26] 1 Warren, op. cit. supra, pp. 119-120.

diminution of the prestige of the judiciary. It is a deterrent to the proper functioning of the judicial branch of the Government.

The committee is not now disposed to recommend legislative action. It believes the remedy lies, in the first instance, in the good sense and discretion of the Chief Executive. His is the prime initiative in the matter of these appointments and that is the point where the independence of the judges and the prestige of the judiciary may best be preserved.

LIST OF SOME FEDERAL JUDGES WHO HAVE BEEN COMMISSIONED BY THE PRESIDENT FOR DUTIES OTHER THAN THOSE OF THE FEDERAL BENCH

Although the following list is not exhaustive, it contains some of the more recent appointments of Federal judges to executive and nonjudicial posts:

Associate Justice Owen J. Roberts: In 1942 acted as chairman of a committee to investigate the Pearl Harbor disaster.[27]

Associate Justice Robert H. Jackson: Appointed on May 2, 1945, as United States chief counsel for the prosecution of Axis criminality before an international military tribunal.[28]

Circuit Judge John J. Parker: Appointed October 15, 1943, as member of Advisory Board on Just Compensation, to assist the War Shipping Administration; reappointed September 10, 1945.[29] Also appointed in 1945 as alternate judicial member of the International Military Tribunal for trial of persons charged with war crimes; no compensation.[30]

Circuit Judge Learned Hand: Appointed October 15, 1943, as member of Advisory Board on Just Compensation, to assist the War Shipping Administration.[31]

Circuit Judge Joseph C. Hutcheson, Jr.: Appointed October 15, 1943, as member of Advisory Board on Just Compensation, to assist the War Shipping Administration; reappointed September 10, 1945.[32]

District Judge John C. Collet: Acted as Chairman of Economic Stabilization Board.[33] Later, in 1946, undertook further duties as "over-all associate" of Director John R. Steelman, in Office of War Mobilization and Reconversion.[34]

Justice Marvin Jones, of the Court of Claims, served as assistant adviser to the Honorable James F. Byrnes, chairman of the American delegation to the United Nations Conference on Food and Agriculture. On June 28, 1943, he was appointed United States Food Administrator. After an absence of some 3 years he was appointed chief justice of the United States Court of Claims.

Judges Mathew McGuire and Alexander Holtzoff, of the United States District Court for the District of Columbia, left the bench to assist the Army and Navy in the renovation of their court-martial systems.

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[27] 40 Op. Atty. Gen. No. 99 (1945); Frank, op. cit. supra, p. 219.
[28] See Gregory, Murder is Murder and the Guilty Can Be Punished (1946), 32 American Bar Association Journal, pp. 545, 546.
[29] Executive Order 9387, 8 Fed. Reg., p. 14105; Executive Order 9611, 10 Fed. Reg., p. 11637.
[30] 40 Op. Atty. Gen. No. 99 (1945); 31 American Bar Association Journal, p. 515 (1945).
[31] Executive Order 9387, 8 Fed. Reg., p. 14105.
[32] Executive Order 9387, 8 Fed. Reg., p. 14105; Executive Order 9611, 10 Fed. Reg., p. 11637.
[33] 32 American Bar Association Journal, p. 279 (1946).
[34] 32 American Bar Association Journal, p. 682 (1946).

Judge Simeon Riskind, of the District Court for the Southern District of New York, aided a survey of the problem of the Jews in Germany.

Judge Peirson Hall, of the District Court of the Southern District of California, assisted the Army in the review of court-martial sentences.

Judge Joseph W. Madden, of the Court of Claims, went to Germany in July 1945 on leave of absence to become a legal adviser to the United States Military Governor of Germany.

EXHIBIT 61

Calendar No. 1963

86TH CONGRESS, 2d Session | SENATE | REPORT No. 1893

EXPRESSING THE SENSE OF THE SENATE THAT RECESS APPOINTMENTS TO THE SUPREME COURT OF THE UNITED STATES SHOULD NOT BE MADE EXCEPT UNDER UNUSUAL CIRCUMSTANCES

AUGUST 22, 1960.—Ordered to be printed

Mr. HART, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. Res. 334]

The Committee on the Judiciary, to which was referred the resolution (S. Res. 334) having considered the same, reports favorably thereon, with amendments, and recommends that the resolution as amended do pass.

PURPOSE

The purpose of the resolution is to express the sense of the Senate that recess appointments to the Supreme Court of the United States should not be made except under unusual circumstances.

STATEMENT

The resolution, as amended by the committee, would resolve:

> That it is the sense of the Senate that the making of recess appointments to the Supreme Court of the United States may not be wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States, and that such appointments, therefore, should not be made except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business.

The resolution, as amended by the committee, sets forth that—

> One of the solemn constitutional tasks enjoined upon the Senate is to give or withhold its advice and consent with respect to nominations made to the Supreme Court of the United States, doing so, if possible, in an atmosphere free from pressures inimical to due deliberations; and

The nomination of a person to the office of Justice of the Supreme Court should be considered only in the light of the qualifications the person brings to the threshold of the office; and

Presidents of the United States have from time to time made recess appointments to the Supreme Court, which actions were unquestionably taken in good faith and with a desire to promote the public interest, but without a full appreciation of the difficulties thereby caused the members of this body; and

There is inevitably public speculation on the independence of a Justice serving by recess appointment who sits in judgment upon cases prior to his confirmation by this body, which speculation, however ill founded, is distressing to the Court, to the Justice, to the litigants, and to the Senate of the United States.

In introducing the resolution, the Senator from Michigan (Mr. Hart), commented on the Senate floor, on June 16, 1960, that on May 5, 1959, the Senate had debated and consented to the nomination of Mr. Justice Potter Stewart to be an Associate Justice of the Supreme Court of the United States and that Mr. Justice Stewart had then taken his seat on the Court under an appointment by the President on October 14, 1958. The Justice had accordingly participated in decisions of the Court from that date, was acting as an Associate Justice of the Court when he testified on April 9 and April 14, 1959, before the Committee on the Judiciary, and was sitting as an Associate Justice when the Senate advised and consented on May 5, 1959.

Senator Hart commented further that when the Senate debated this nomination the Senator had described the concern which he felt and the problem which he faced as a member of the Committee on the Judiciary, and as a Member of the Senate, who had the responsibility to pass on the nomination of a Justice of the Supreme Court when the nominee is sitting on that Court. Senator Hart pointed out that it was difficult to criticize or comment on problems of this nature at the time there is an actual nomination pending before the Senate because the general proposition then becomes inseparable from the individual, no matter how worthy, and that in the year following the debate on the nomination he had given thought to what course the Senate should follow to avoid, as far as is constitutionally possible, the difficulties faced when it must act on the nomination of a Justice, who, under a recess appointment, has been, and is participating in the work of the Supreme Court.

Fourteen Justices of the Supreme Court have been granted recess appointments and were subsequently confirmed by the Senate. A 15th, John Rutledge, of South Carolina, was issued a commission by the President on July 1, 1795, as Chief Justice of the United States, to serve "until the end of the next session of the Senate." He was seated on August 12, 1795. The Senate next met on December 9, 1795, and the following day the nomination of Mr. Rutledge was transmitted. On December 17, 1795, the Senate rejected the nomination by 14 nays to 10 yeas.

For a half century after the appointment of Mr. Chief Justice Rutledge no recess appointee to the Supreme Court took his seat in advance of Senate confirmation. Mr. Justice Benjamin Curtis was

the second. He was appointed on September 22, 1851, took his seat on December 1, 1851, the same day Congress reconvened, and was confirmed December 20, 1851.

In the 100 years between the appointment of Mr. Benjamin Curtis and the appointment of Chief Justice Earl Warren, who was seated October 5, 1953, and confirmed March 1, 1954, no other recess appointee to the Supreme Court took his seat in advance of confirmation.

Following the Warren precedent, Mr. Justice Brennan, appointed October 15, 1956, took his seat the next day and was confirmed March 19, 1957 and Mr. Potter Stewart, appointed October 14, 1958, took his seat the same day and was confirmed May 5, 1959.

In introducing Senate Resolution 334, Senator Hart commented further on the Senate floor on June 16, 1960:

> Many of my colleagues, Mr. President, who have far more service than I in the Senate and on the Committee on the Judiciary, have expressed the very real difficulties of fulfilling the constitutional responsibilities placed on Members of the Senate when they must interrogate and consider the qualifications of the nominees to the Supreme Court at the time they are sitting on the bench.
>
> The resolution I submit today would record this to be the sense of the Senate. In the confirmation proceedings of Justice Potter Stewart, I felt a considerable handicap in questioning the nominee when before the Committee on the Judiciary and a restraint in the debate during the consideration of his appointment by the Senate. I believe others suffered this same limitation as we sought to discharge our constitutional duty. This in no way should be taken to indicate that I believed Justice Stewart other than completely qualified, and he has fulfilled his responsibilities subsequently with great ability.
>
> In summary, Mr. President, there would seem to be three very serious questions which argue against recess appointments:
>
> First, there is the knowledge by the Justice that his decisions made prior to Senate scrutiny of his appointment could—indeed, almost must—come under study and be factors in the Senate's consideration. This in turn may suggest pressures on the nominee surely not in accord with objective justice for all involved.
>
> Second, the Justice serving under recess appointment is not exempt from the possibility that he would be removed by the President from his recess post and replaced by another nominee, and thus necessarily lacks the independence with which we seek to invest our Federal judges.
>
> Finally, the very opposite of the first and second points is possible; not wanting to appear to decide a case in a manner that might be misinterpreted as resulting from the timing of the situation, the Justice bends over backward to prove independence of both the Senate and the President and a litigant may suffer.
>
> It is for these reasons that the Senate resolution I submit seems to be a direct and proper action. Hopefully, the next President, in all but the most exceptional circumstances, will

refrain from making such recess appointments. I believe adoption by the Senate of this resolution would clearly advise the President, whoever he is, that this is the sense of the Senate. My regret is that I did not submit the resolution earlier. But a few weeks of the session remain, with much of importance and priority to be considered. I will understand if time for action on this matter should not be found. However, especially since it affects the whole country and not one State or region, the leadership may be able to bring it to decision.

The literature on the subject of recess appointments to the Supreme Court is not extensive, but in those instances where a conclusion has been reached, it is uniformly against the practice.

In an article attributed to the board of editors and appearing at 10 Stanford Law Review 124 (1957) the author, after exhaustive analysis wrote: "It appears fair to conclude that although the President has power to make recess appointments, the exercise of that power today is unwise." To the same effect was an article by John R. Thompson, former professor of law at Yale, which appeared in Reporter magazine February 5, 1959.

Similar positions have been taken by Leon H. Wallace and Vernon X. Miller, deans of the law schools at Indiana University and Catholic University respectively, by Philip B. Kurland, professor of law at the University of Chicago, Jefferson B. Fordham, of the University of Pennsylvania, and E. Blythe Stason, of the University of Michigan.

The committee believes that the resolution, as amended by the committee, is meritorious and recommends it favorably.

Attached and made a part of this report is an article entitled "Judicial Appointments in the Absence of the Senate," by Arthur Krock, from the New York Times, May 7, 1959, which article was inserted in the Congressional Record on June 16, 1960, by Senator Hart to accompany the introduction of Senate Resolution 334.

RECESS APPOINTMENTS TO THE SUPREME COURT

Mr. HART. Mr. President, on May 5, 1959, the Senate debated and consented to the nomination of Mr. Justice Potter Stewart to be an Associate Justice of the Supreme Court of the United States. Mr. Justice Stewart had taken his seat on the Court under an appointment by the President on October 14, 1958. He had participated in decisions of the Court from that date, was acting as an Associate Justice of the Court when he testified April 9 and 14, 1959, before the Committee on the Judiciary, and was sitting as an Associate Justice when the Senate advised and consented on May 5, 1959.

When the Senate debated this nomination, I described the concern and problem of a member of the Committee on the Judiciary and a Member of the Senate, who must pass on the nomination of a Justice of the Supreme Court when the nominee is sitting on that Court.

It is difficult to criticize or comment on problems of this nature at the time there is an actual nomination pending before the Senate because the general proposition then becomes inseparable from the individual, no matter how worthy. So in the year since that debate I have given thought to what course the Senate could follow to avoid, as far as is constitutionally possible, the difficulties faced when it must act on the nomination of a Justice who, under a recess appointment, has been and is participating in the work of the Supreme Court.

The history of recess or interim appointments to the High Bench is interesting. Fifteen Justices of the Supreme Court have been given recess appointments and were subsequently confirmed by the Senate. But for more than 100 years prior to the recess appointment of Chief Justice Warren in 1953, no recess appointee ever took his seat on the Court before he had been confirmed by the Senate. And only twice prior to that did an interim appointee take his seat on the Court before confirmation. For 52 years, no recess appointments were made at all. Since the breaking of a century's precedent in the case of Chief Justice Warren, there have been two more instances, Justice Brennan and Justice Stewart, where an interim appointee has taken his seat on the Court before confirmation.

Many of my colleagues, Mr. President, who have far more service than I in the Senate and on the Committee on the Judiciary, have expressed the very real difficulties of fulfilling the constitutional responsibilities placed on Members of the Senate when they must interrogate and consider the qualifications of the nominees to the Supreme Court at the time they are sitting on the Bench.

The 86th Congress approaches its close. Whatever the outcome of the presidential election in November, a new administration will take office. None of us knows which political party will direct that administration. I suggest this is a most appropriate time for the Senate to record its extreme reluctance to see recess appointments made to the Supreme Court and its opposition to a recess appointee taking his seat on the Court until confirmed by the Senate.

The resolution I submit today would record this to be the sense of the Senate. In the confirmation proceedings of Justice Potter Stewart, I felt a considerable handicap in questioning the nominee when before the Committee on the Judiciary and a restraint in the debate during the consideration of his appointment by the Senate. I believe others suffered this same limitation as we sought to discharge our constitutional duty. This in no way should be taken to indicate that I believed Justice Stewart other than completely qualified, and he has fulfilled his responsibilities subsequently with great ability.

In summary, Mr. President, there would seem to be three very serious questions which argue against recess appointments:

First, there is the knowledge by the Justice that his decisions made prior to Senate scrutiny of his appointment could—indeed, almost must—come under study and be factors in the Senate's consideration. This in turn may suggest pressures on the nominee surely not in accord with objective justice for all involved.

Second, the Justice serving under recess appointment is not exempt from the possibility that he would be removed by the President from his recess post and replaced by another nominee, and thus necessarily lacks the independence with which we seek to invest our Federal judges.

Finally, the very opposite of the first and second points is possible: not wanting to appear to decide a case in a manner that might be misinterpreted as resulting from the timing of the situation, the Justice bends over backward to prove independence of both the Senate and the President and a litigant may suffer.

It is for these reasons that the Senate resolution I submit seems to be a direct and proper action. Hopefully, the next President, in all but the most exceptional circumstances, will refrain from making such recess appointments. I believe adoption by the Senate of this resolution would clearly advise the President, whoever he is, that this is the sense of the Senate. My regret is that I did not submit the resolution earlier. But a few weeks of the session remain, with much of importance and priority to be considered. I will understand if time for action on this matter should not be found. However, especially since it affects the whole country and not one State or region, the leadership may be able to bring it to decision.

I ask unanimous consent that the text of the Senate resolution be printed at this point in my remarks, together with an article by Mr. Arthur Krock, appearing in the New York Times of May 7, 1959.

The PRESIDING OFFICER. The resolution will be received and appropriately referred, and, under the rule, will be printed in the Record; and, without objection, the article will be printed in the Record.

The resolution (S. Res. 334) opposing the making of recess appointments to the Supreme Court was referred to the Committee on the Judiciary, as follows:

"SENATE RESOLUTION 334

"Whereas the governmental power of the United States has been entrusted by the Constitution to three coequal branches, the legislative, the executive, and the judicial; and

"Whereas the judicial power of the United States is vested primarily in one United States Supreme Court; and

"Whereas a Justice of that Court may serve for life after he has been nominated by the President and, by and with the advice and consent of the Senate, appointed to his office; and

"Whereas the duties and responsibilities of the Senate with respect to giving or withholding its advise and consent to such appointments are most serious and most solemn and should be exercised in an atmosphere free from any pressures which are inimical to due deliberation; and

"Whereas the nomination of a person to the office of Justice of the Supreme Court of the United States should be considered only in the light of the qualifications and person brings to the threshold of the office; and

"Whereas our Constitution recognizes and all of the lessons of history teach us that justice is best served and most likely to be achieved when cases are heard by Judges whose tenure is in nowise dependent upon their decisions in particular cases; and

"Whereas there has from time to time been public speculation on the independence of a Justice who sits in judgment upon cases prior to his confirmation by this body, which speculation, however ill founded, is distressing to the Court, to the Justice, to the litigants, and to the Senate of the United States: Now, therefore, be it

"*Resolved*, That it is the sense of the Senate that the making of recess appointments to the Supreme Court, though authorized by the Constitution, is not wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States, and that such appointments, therefore, should be avoided except under most unusual and urgent circumstances. And, in all cases, such appointee should not take his seat on the Court until the Senate has advised and consented to the nomination."

The article presented by Mr. Hart is as follows:

[From the New York Times, May 7, 1959]

"JUDICIAL APPOINTMENTS IN THE ABSENCE OF THE SENATE

"(By Arthur Krock)

"WASHINGTON, May 6.—In the Senate debate that preceded the vote which confirmed the President's recess appointment last fall of Potter Stewart to the Supreme Court, in whose decisions, however, he has been participating as an unconfirmed judge, this administration's practice of creating such a dubious situation was critically reviewed. The prevailing judgment was expressed as follows by Senator Hart, of Michigan:

" 'Interim appointments to the Court are most unfortunate and should be avoided except in the most extreme cases. Certainly the participation of such an appointee in Court work prior to Senate confirmation is unwise.'

"The unwisdom, of course, is implicit in the fact that the Senate may terminate a recess appointment by rejection, or simply by not acting on it before adjournment. As the event demonstrated, there was never any probability the

Senate would reject Justice Stewart or the other two members of the Court to whom the President gave recess appointments: Chief Justice Warren and Justice Brennan. But there is always a possibility of rejection by either the positive or negative method. And if an unconfirmed judge has been participating in the work of the Court, the mental shadow of this possibility could impair the sense of total emancipation from worry over the effects of his decisions in the political community that life tenure for judges was intended to bestow.

"And if ultimately he was rejected, his part in controversial decisions, particularly when he had been one of the five that made the opinions binding, would revive the public and legal controversy such rulings evoke.

"A 5 TO 4 RULING

"This week there was such a decision by a majority that included Justice Stewart and would have been a minority without him. It was the 5-to-4 holding, by Justice Frankfurter for the Court, that health inspectors may enter a private home without a warrant to search for sanitation conditions (suspected in this instance of violating a Baltimore City ordinance). The central issue was the fourth amendment, which forbids 'unreasonable searches and seizures' by Federal officials and has been established by the Court as applicable to State and local officials as well.

"The deep nature of the controversy among the Justices was revealed in this comment by Justice Douglas, writing for himself and three others: 'The decision * * * greatly dilutes the right of privacy which every homeowner had the right to believe was part of our American heritage.' And this protest was strengthened by the facts that a search warrant was readily available to the health officer, and that the householder lives in a community where, like others in the United States, there are police records that would justify the fear of admitting strangers into private houses, even in daylight, the time this inspector demanded admittance.

"PROPOSED SOLUTION

"Justice Stewart's confirmation removed from this particular decision the liability of its having been made possible by a member of the Court whose brief tenure, and by recess appointment, the Senate had constitutionally terminated. But this liability is always present in decisions by unconfirmed judges. And that properly was concerning Senator Hart and others in a debate on a level worthy of this issue.

"Hart realized, he said, that abstention by an unconfirmed Supreme Court appointee may cause difficulties when the Court is evenly divided on many crucial cases, or undermanned for a crushing workload. He conceded this as a comprehensible reason for the President's recess appointments in the three instances. But he argued for a sounder

practice in which this consideration would be obviated. So far as the Supreme Court is concerned several excellent suggestions to this purpose have been made to Chairman Celler of the House Judiciary Committee by Cyril F. Brickfield of his staff and Louis Loeb of the Library of Congress.

"Among these suggestions are: special Senate sessions; Senate rules revisions to provide for committee action during recess, committee disapproval being tantamount to rejection and a subsequent time limit for Senate action if the committee has approved the recess appointment. Meanwhile, the recess appointee would be barred from participation in the work of the Court."

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