

No. 70526-1-I

KUNG-DA CHANG,

Appellant,

v.

SHANGHAI COMMERCIAL BANK LTD,

Respondent.

APPEAL FROM THE WASHINGTON STATE SUPERIOR COURT
IN AND FOR THE COUNTY OF KING

Shanghai Commercial Bank v. Chang, et al

Case No. 12-2-21293-7

The Honorable Laura G. Middaugh

OPENING BRIEF OF APPELLANT KUNG-DA CHANG

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I. INTRODUCTION

Respondent was granted a judgment against Appellant in a Hong Kong court. Respondent filed a petition to enforce the Hong Kong judgment in Washington State. Respondents obtained an order on summary judgment recognizing the Hong Kong judgment. Appellants appeal because there are genuine issues of material facts concerning whether or not the Hong Kong judgment is recognizable under the Uniform Foreign-Country Money Judgments Recognition Act, RCW 6.40A, *et seq.* and whether the state action in this case was constitutional.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting SCB's Motion for Summary Judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the trial court's recognition of a foreign judgment "state action"?
2. Did the trial court error in recognizing the Hong Kong Judgment when there were multiple grounds for non-recognition under RCW 6.40A.030?
3. Does the Hong Kong security for costs rule violate substantive due process by denying the fundamental right of access to the courts?

4. Does the Hong Kong security for costs rule serve a compelling state interest?
5. Does the Hong Kong security for costs rule create an inherently suspect classification based on non-residency?
6. Did the Hong Kong proceedings deprive KD of his right to procedural due process?
7. Is the Hong Kong Judgment repugnant to the public policies of the United States and Washington State?
8. Was the Hong Kong Judgment rendered under circumstances that raise substantial doubt about the integrity of Hong Kong courts?

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

1. Daniel Chan uses his relationship of trust with Clark Chang to entice him to invest in high risk derivatives.

Clark Chang ("Clark") is 96 years old. At all times, when he was investing with SCB and BEA in Hong Kong, he was 85 years or older.¹ From 2004 through 2008, Clark opened accounts at Shanghai Commercial Bank ("SCB") and Bank of East Asia ("BEA") under the name of his son, Kung Da Chang ("KD"), because he

¹ CP 744 (Decl. of Clark Chang at ¶ 3).

trusted KD to distribute the contents of the accounts fairly to his siblings and himself should Clark pass away while he still had funds in the accounts. Clark did not gift the funds in the account to KD and he continued to make all decisions regarding the account with KD signing as needed. Daniel Chan looked solely to Clark for investment decisions regarding the SCB and BEA accounts and contacted KD only when he needed KD's signature.²

From 2004 through 2008, while employed at both Bank of East Asia (BEA) and Shanghai Commercial Bank (SCB), Daniel Chan orchestrated a scheme to systematically deceive Clark through actions that constituted securities fraud and other tortious acts, through doctored account statements and verbal misrepresentations and omissions, in order to prevent him from discovering large and continuous losses that had and were continuing to occur in Clark's SCB and BEA investment accounts.³ Daniel Chan capitalized on Clark's trust in him to guide Clark into investing in high risk accumulators, decumulators, and Equity Linked Notes of which he had no experience investing in and they

² CP744 and CP 746 (Decl. of Clark Chang at ¶ 3 and ¶ 9); and CP 1142 – CP 1143 (Decl. of KD Chang at ¶ 4).

³ CP 745 (Decl. of Clark Chang at ¶ 4); CP 1143 – CP 1144 (Decl. of KD Chang at ¶ 7 and ¶ 8). The motive for Chan's actions is unknown at this point in the case but could be financial. The amount of fees he received is not in the record.

were investments Clark did not understand because the transactions were extremely complex. Daniel Chan's recommendations were inappropriate for an elderly man, like Clark, in his late eighties and early nineties. Daniel Chan only recommended investment in high risk derivatives.⁴

2. Daniel Chan uses his position of trust to deceive Clark Chang regarding the true state of his BEA account in order to ensure that Clark Chang signed the \$16 Million Loan Facility that is the basis of SCB's current claim.

In early 2007, Daniel Chan informed Clark that he had accepted a position at SCB and would be returning to the bank. Clark, in ignorance of the true position of his investments at BEA, continued to trust Daniel Chan, and wished Daniel Chan to continue to manage Clark's investments. Clark instructed KD Chang to sign a USD \$16 Million Loan Facility in order to facilitate the transfer. On April 1, 2008, at the instruction of his father, KD, in Washington State, signed a facility letter, a revolving loan from SCB ("the USD \$16 Million Loan") for the purpose of facilitating the transfer of 11 ELNs in the BEA account to SCB by paying off the

⁴ CP 745 (Decl. of Clark Chang at ¶ 5; CP 1144 (Decl. of KD Chang at ¶ 8).

loans taken out at BEA to purchase the 11 ELNs.⁵ Neither Daniel Chan nor SCB informed Clark of the depleted nature of his BEA account being transferred or he would have not signed the loan facility and would have done all he could to protect what funds still remained in the BEA account.⁶ In fact, the last summary of the BEA accounts provided by Daniel Chan contained handwritten notes by him showing the account had assets worth more than USD \$22 Million.⁷

3. Daniel Chan's deception is so effective that Clark Chang did not learn that his account at SCB was running a deficit in October 2008.

Daniel Chan's systematic deceit, reckless high risk investments, and recommendations that Clark Chang borrow above his principal in his account to invest caused the loss of the account's USD \$22 Million principal. In addition, he owed more for outstanding loans to SCB than he had in his accounts at BEA and SCB including approximately USD \$6 Million on the \$16 Million

⁵ CP 1145-46 (Decl. of KD Chang ¶ 11).

⁶ CP 747 (Decl. of Clark Chang at ¶ 13 and ¶ 14) and CP 897 - 1124 (Exhibits 2, 3, and 4 explaining in more detail the deceptive actions of SCB and Daniel Chan regarding the acquisition of the USD \$16 Million Loan Facility). CP 1144 - 1145 (Decl. of KD Chang at ¶ 11 and ¶ 12).

⁷ CP 1145 (Decl. of KD at ¶ 12) and CP 1190 - 1193 (Exhibit 3 doctored statements by Daniel Chan).

Loan Facility.⁸ Clark and KD learned of the true state of the account in October of 2008.

4. Despite having obtained the \$16 Million Loan Facility by deception, in violation of Hong Kong Securities Laws, SCB sued Clark and KD.

On March 21 2009, in High Court Action (“HCA”) 806/2009 (“HCA 806”), SCB brought an action against Clark and KD in Hong Kong Court (“the High Court”) on the USD \$16 Million Loan Facility for sums outstanding of about USD \$8.84 Million plus interest.⁹ On September 24, 2009, Clark filed his Defence and Counterclaim to HCA 806.¹⁰ On September 24, 2009, Clark and KD Chang brought action HCA 1996/2009 (“HCA 1996”) against Defendants Shanghai Commercial Bank, Ltd. and Bank of East Asia, Ltd.¹¹ Counterclaims asserted by KD in HCA 806 were identical to the claims asserted by Clark and KD in HCA 1996.¹²

⁸ CP 746 (Decl. of Clark Chang at ¶ 7).

⁹ CP 748 – CP 749 (Decl. of Clark at ¶ 20) and CP 1128 - CP 1141 Exhibit 6 (SCB’s statement of claim filed in HCA 806).

¹⁰ CP 749 (Decl. of Clark at ¶ 21) and CP 897- CP 967 (Exhibit 2).

¹¹ CP 29-30 (Declaration of DSK Chiu ¶ 8) and CP 45 – 115 (Exhibit C) and CP 749 (Decl. of Clark at ¶ 22) and CP 968 - CP 1047 (Exhibit 3).

¹² CP 3 (SCB admits this fact in their Motion to Compel at 2); SCB cites also CP 45 - 115 (Decl. Chiu ¶ 8 and Exhibit C). A comparison of the filing in HCA 806 and HCA 1996 indicates that they are, SCB’s attorney admitted that the claims in HCA 1996 and the counterclaims in HCA 806 were identical. CP 29 – 30 (Decl. of DSK Chiu at ¶¶ 8 – 9) and CP 45 – CP 205 (Exhibits C and D), indeed, substantively identical.

5. BEA and SCB concurrently filed requests for security for costs against KD and Clark Chang for approximately USD \$2.2 Million.

BEA and SCB concurrently filed security for costs, in HCA 1996 and HCA 805, and requested security for costs totaling approximately USD \$2.2 Million. SCB requested security for costs of nearly USD \$1 Million for HCA 1996.¹³ At the time SCB and BEA had filed their applications, the Chang family had spent a total of USD \$500 Thousand on legal expenses for three cases (HCA 805, HCA 806, and HCA 1996).¹⁴

The loser pays in Hong Kong's legal system. Hong Kong statutes allow defendants to make applications for security for costs prior to the verdict against foreign plaintiffs to ensure any judgment in their favor is secure.¹⁵ No such provision exists in instances where the plaintiff is a Hong Kong resident.¹⁶

As part of their security for costs application, BEA and SCB

¹³ See Declaration of KD Chang CP 1148-1149 (Decl. KD Chang at ¶ 33) and CP 1407 (Exhibit 16, ¶ 18).

¹⁴ In HCA 805, SCB had sued KD's sister, Ching Ho Chang and his brother, Grant, on their alleged failure to pay a USD \$2 Million Loan. CP 1146 (Decl. of KD Chang at ¶ 19) and CP 1196 – 1205 (Exhibit 5 - Copy of HCA 805 Statement of Claim).

¹⁵ CP 31 (Declaration of Chiu ¶ 11 and CP 245 - CP 246 (Exhibit H – Copy of HK case explaining the rule).

¹⁶ *Id.*

provided skeleton billing.¹⁷ The Changs' attorney, Tanner DeWitt, submitted BEA's and SCB's skeleton billing to a forensic expert specializing in analyzing attorney billing, David Law. Mr. Law created spreadsheets detailing objections, excessive rates, engagement of excessive number of attorneys; unnecessary translation of documents; duplication and overlapping of work; work that should have been done by junior solicitor; etc.¹⁸ SCB and BEA did not provide any competing expert analysis.¹⁹ A part of their defense, the Chang's provided reasoning why they could not pay large security for costs order especially if it was in cash.²⁰

6. The Hong Kong Court issued an order approving USD \$838 Thousand in security for costs for the two Hong Kong Banks.

After two days of oral argument, the Court issued an order containing several provisions that favored the banks:

1. The Court ordered security for costs against the Changs totaling USD \$1.22 Million despite the

¹⁷ CP 1148 – CP 1149 (Decl. of KD Chang at ¶ 31 - ¶ 33) and CP 1353 – CP 1399 (Exhibits 14 - BEA's skeletal billings and 15 - SCB's skeletal billings).

¹⁸ CP 1147 (Decl. of KD at ¶¶ 22, 23 and 24) and CP 1240 – CP 1286 (Exhibit 8- David Law evaluation of SCB billing in HCA 1996; Exhibit 9 - David Law evaluation of BEA billing in HCA 1996; and Exhibit 10 - Objection to BEA and SCB Skeletal Billing).

¹⁹ CP 1147 (Decl. of KD at ¶ 21).

²⁰ CP 1147 (Decl. of KD at ¶ 25) and CP 1302 – CP 1303 (Exhibit 11 - Skeleton argument submitted by SCB for the hearing- at ¶¶ 60 - 64).

irregularities in the billing discovered by David Law and SCB's patently excessive request for fees regarding HCA 1996.²¹

2. Though KD had only been in the HCA 1996 and 805 for 5-7 months when BEA and SCB requested the security for costs against him, the Court made no attempt to parse-out his share which clearly should have been less than that allocated against his father. The Court made KD joint and severally liable for the USD \$838 Thousand ordered in HCA 1996.²²

3. The Court did not adequately take into consideration the strength of the non-residents' case.²³

4. The Court considered the following when determining the Changs' ability to pay: (1) did not address whether each individual could pay, but considered whether the entire family (father, sisters, and brothers)²⁴ including

²¹ CP 1148 – 1149 (Decl. of KD Chang at ¶ 33) and CP 1414 – CP 1415 (Exhibit 16 at ¶¶ 40, 41, and 42).

²² *Id.* (Exhibit 16 at ¶¶ 41, and 42).

²³ CP 366 (Decl. of Pamela Mak at ¶18) citing Security for Costs Order at ¶ 26. See also CP 1409 -1410 (Exhibit 16 of Decl. KD Chang at ¶ 26).

²⁴ SCB specifically informed the Court that Grant Chang was a brother of substantial means because he lent his father \$2 Million for a margin call. CP 1146 – CP 1147 (Decl. of KD at ¶ 20) and CP 1222 (Exhibits 6 and ¶ 8.19 – BEA states: "Clark's younger son and Kung Da's brother, Grant, evidently has means. He lent US\$2 million to them to satisfy a margin call"; and CP 1235 (Exhibit 7, ¶ 56 - Skeleton argument submitted by SCB for the hearing arguing: "The court should consider not only whether they can provide security out of their own resources to continue the litigation, but also whether they can raise

extended relatives and friends could pay;²⁵ (2) held the fact that they could pay their legal expenses of USD \$500 Thousand to date against them;²⁶ (3) held the fact that there were pension funds in the US against them;²⁷ (4) made no attempt to determine if each individual could pay the amount ordered against them.

5. The Court was deeply concerned that the Banks could have hurdles to cross in enforcing a judgment in the United States stating: "Further, in the absence of reciprocal enforcement of judgments of Hong Kong and the US, enforcement of any costs order against the Changs will mostly likely be costly and time consuming."²⁸

6. The Court showed its concern about the banks' reputations: "Given the enormous size of the claims and counterclaims and the fact that banks' reputation is at stake, heavy involvement of experienced counsel is inevitable."²⁹

the amounts needed from others"). SCB also pointed out that Grant Chang has a shoe factory just like his father had. *Id.*

²⁵ *Id.*

²⁶ CP 1148 – CP 1149 (Decl. of KD Chang at ¶ 33) and CP 1412 – CP 1413 (Exhibit 16, ¶ 32).

²⁷ CP 1148 – CP 1149 (Decl. of KD Chang at ¶ 33) and CP 1413 (Exhibit 16, ¶ 34).

²⁸ CP 1148 – CP 1149 (Decl. of KD Chang at ¶ 33) and CP 1412 – CP 1413 (Exhibit 16, ¶ 32).

²⁹ CP 1148 – CP 1149 (Decl. of KD Chang at ¶ 33) and CP 1413 (Exhibit 16, ¶ 34).

The Court ordered a cash bond of USD \$1.22 million (USD \$838 thousand joint and severally to be paid by KD and Clark) to be paid into the Court within 14 days.³⁰ The Chang's attorney, Pamela Mak, has opined regarding the size of the cash bond: "In my experience the amount of the security for costs ordered in Action 1996 was significantly higher than other cases in which I have been involved."³¹ The Changs did not make payment after an additional 14 days extension was granted.³² KD and Clark Chang did not pay the security costs award for HCA 1996.³³

7. SCB obtained a dismissal of HCA 1996 on June 21, 2011.

The Court issued an order on June 21, 2011 dismissing the claims of KD and Clark in Action 1996.³⁴ Once dismissed, according to the security for costs order, BEA and SCB were entitled to have the costs for bringing their security for costs applications taxed.³⁵

³⁰ CP 1148 – CP 1149 (Decl. of KD Chang at ¶ 33) and CP 1414 – CP 1415 (Exhibit 16, ¶¶ 41 and 42).

³¹ CP 366 (Decl. of Pamela Mak at ¶19).

³² This extension was granted in the form of an "unless" order requiring cash payment by June 15, 2011 or dismissal would occur. CP 31 - 32 (Decl. of SSK Chiu at ¶ 13) and CP 264- 267 (Exhibit J).

³³ See CP 32 (Decl. of DSK Chiu at ¶ 13).

³⁴ See CP 32 (Decl. of DSK Chiu at ¶ 13). A copy of this order was not attached to Mr. Chiu's declaration.

³⁵ CP 1148 – CP 1149 (Decl. of KD Chang at ¶ 33) CP 1415 (Exhibit 16, ¶ 45).

8. SCB obtained judgment in HCA 806 and 1996 on the same day.

Just a little over a month after the Hong Kong Court awarded security for costs,³⁶ because KD and Clark Chang did not contest HCA 806, SCB obtained judgments against KD and Clark Chang on the same day, June 28, 2011.³⁷ As a result, SCB obtained two identical USD \$9 Million judgments on the same claims totaling USD \$18 Million.³⁸

9. Even if KD and Clark had continued to defend HCA 806, SCB would have had recourse to the collection procedures creditors can employ against debtors.

KD and his father did not continue to contest HCA 1996 and HCA 806. As a result, SCB was able to obtain two judgments in short order because KD and his father did not participate in either case. However, if KD and his father had continued to contest HCA 806, despite a more than USD \$9 Million judgment being handed down in HCA 1996, it is reasonable to determine that KD and his father would have had to continue to prepare for trial and participate in a trial would have taken the case far beyond June

³⁶ CP 249 (Date on the security for costs order is May 17, 2011).

³⁷ CP 409 (Respondent's Motion).

³⁸ CP 210 (SCB Judgment for USD \$9 Million) and CP 38 – 41 (SCB Judgment for USD \$9 Million).

2011.³⁹

As a result, according to Attorney Pamela Mak, SCB would have been able to employ the severe debtor creditor mechanisms against KD and Clark, enforcing the judgment and costs received for HCA 1996, which include a prohibition order that would prohibit a person from leaving Hong Kong and incarceration to force a party to attend and comply with debtor examinations and orders.⁴⁰

B. Procedural History

On June 20, 2012, SCB filed a Petition for Recognition of and Enforcement of Foreign-Country Judgment (the "Petition") in King County Superior Court. On July 30, 2012, KD Chang filed his response to the Petition through his former counsel. KD Chang subsequently sought new counsel, Tollefsen Law PLLC, which filed an amended response to the Petition including additional affirmative defenses and counterclaims against SCB.

SCB sought summary judgment on issue of recognition and enforcement of the Hong Kong Judgment against KD Chang. The Motion also sought summary judgment on whether or not the Hong

³⁹ This is a practical fact which this Court could take judicial notice. Contested trials take far longer than uncontested trials. The Court below erred because it did not consider these facts.

⁴⁰ CP 368 (Decl. of Pamela Mak at ¶¶ 30 - ¶¶ 31) and CP 394 – CP 400 (Exhibit C). The plain language of the statute indicates that SCB could have requested a prohibition against KD and his father even before a judgment was rendered). Moreover, on CP 40, the statute indicates that the request may be made ex parte.

Kong Judgment was enforceable against KD Chang's community property. On June 7, 2013, the parties appeared before King County Superior Court Judge Laura Middaugh for oral argument on SCB's Motion for Summary Judgment. The court granted summary judgment with regards to recognition, but denied summary judgment on the community property issue.⁴¹

V. ARGUMENT SUMMARY

The trial court erred in granting SCB's Motion for Summary Judgment and recognizing the Hong Kong Judgment because there are multiple grounds for non-recognition. In particular, the Hong Kong Proceedings included a substantial security for costs order, in violation of Appellant's substantive and procedural due process rights, which ultimately stifled his claims and forced him to forgo defending SCB's action against him. This constituted a violation of Appellant's most fundamental right – the right of access to the courts and access to justice. Moreover, the Hong Kong rule on security for costs and its application in the Hong Kong Proceeding are repugnant to the public policy of the United States and Washington and the application in this case raises doubts about the integrity of Hong Kong courts.

⁴¹ CP 1480-1483 (Supplemental Declaration of Chiu).

VI. STANDARD OF REVIEW

This matter comes before the Court on review of the trial court's order granting SCB's Motion for Summary Judgment on the issue of recognition of a Hong Kong Judgment against KD Chang.⁴² The appellate court reviews all rulings made in conjunction with a summary judgment motion *de novo*.⁴³ The appellate court conducts the same inquiry as the trial court.⁴⁴ "An appellate court would not be properly accomplishing its charge if the appellate court did not examine all the evidence presented to the trial court[.]"⁴⁵ Furthermore, the determinations and decisions made by the trial court are not entitled to any deference.⁴⁶

Summary judgment is only proper when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁴⁷ The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact.⁴⁸ On a motion for summary judgment, "the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the

⁴² CP 1522-1523 (Judgment Summary and Judgment).

⁴³ *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

⁴⁴ *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

⁴⁵ *Folsom*, 135 Wn.2d at 663.

⁴⁶ *Jones*, 146 Wn.2d at 300.

⁴⁷ CR 56(c).

⁴⁸ *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982).

motion."⁴⁹ There are genuine issues of material fact in this case and SCB was not entitled to summary judgment as a matter of law.

In addition to raising genuine issues of material fact, Appellant's opposition to SCB's Motion for Summary Judgment presented several constitutional issues that the trial court declined to address. Constitutional issues are questions of law that the appellate court also reviews *de novo*.⁵⁰

VII. ARGUMENT

A. **Appellant presented strong factual evidence below that the Hong Kong Court's award of USD \$838,000 in security for costs in HCA 1996 effectively prevented KD and Clark Chang from continuing to assert its counterclaims in HCA 806.**

Appellant presented substantial evidence at the Motion for Summary Judgment hearing that the Hong Kong Court's granting of USD \$838,000 in costs against KD and Clark Chang prevented him from continuing to pursue his counterclaims in HCA 806. A cash security for costs order of USD \$838,000 was ordered against KD and Clark Chang.⁵¹ Neither KD Chang nor his father paid the cash into the court by the required date. As a result, his claims in HCA 1996 were dismissed and a \$9 million judgment was awarded against KD and Clark Chang in HCA 1996.⁵²

⁴⁹ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-588 (1986).

⁵⁰ *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

⁵¹ CP 265-267 (Exhibit J to Declaration of Chiu).

⁵² CP 211-213 (Exhibit F to Declaration of Chiu).

SCB argued that KD and his father could have continued to assert their counterclaims in HCA 806 despite failing to pay the security for costs order.⁵³ However, SCB was able to obtain a \$9 million judgment in HCA 1996 just over one month after the security for costs order because it was uncontested.⁵⁴ This Court can take judicial notice that had KD Chang and his father continued to assert their counterclaims in HCA 806, then the pretrial procedures, trial, and post-trial matters would have taken far beyond June 2011 to complete. SCB would have obtained a USD \$9 Million against KD and his father long before the trial was complete and could then use the draconian judgment creditor mechanisms, including incarceration, available in Hong Kong⁵⁵ against KD and Clark Chang as they continued to pursue HCA 806.

KD Chang plainly produced sufficient evidence below to raise issues of material fact as to whether the order on security for costs in HCA 1996 had a substantial effect on KD Chang's ability to continue to pursue his counterclaims in HCA 806.⁵⁶

⁵³ CP 4:25 – 6:26 (Motion for Summary Judgment).

⁵⁴ CP 264-267 and 210-213 (Exhibits F and J to Declaration of Chiu).

⁵⁵ CP 368, ¶ 30 and 31 (Declaration of Pamela Mak).

⁵⁶ SCB argued extensively below that Appellant should be penalized for not declaring why he did not continue to pursue HCA 806. However, it is sufficient and reasonable to conclude that it was because of the large security for costs order and Appellants failure to pay and the consequences of its failure to pay including the likelihood of SCB's use of the draconian debtor creditor laws in Hong Kong to enforce any judgment received in HCA 1996. See CP 1-26 and June 7, 2013 hearing transcript.

B. The trial court erred in granting SCB's Motion for Summary Judgment because there are genuine issues of material fact regarding whether or not the Security for Costs Order in HCA 1996 also constituted a security for costs order in HCA 806.

The Hong Kong Proceedings consisted of three interrelated cases: HCA 805, HCA 806, and HCA 1996.⁵⁷ As admitted by SCB, the claims in HCA 1996 by KD and Clark Chang and the counterclaims in HCA 806 asserted by KD and Clark Chang were identical.⁵⁸ Likewise, the claims asserted by SCB against KD in HCA 806 were the same as the counterclaims it asserted against KD in HCA 1996.⁵⁹ The fact that SCB received identical judgments in the same amounts in the two cases further affirms that HCA 806 and HCA 1996 were essentially one and the same matter.⁶⁰

Since HCA 806 and HCA 1996 were comprised of identical claims and counterclaims by KD and his father, any ruling in one matter should be considered by the Court to be a ruling in the other matter. In particular, the Security for Costs Order in HCA 1996 should have been considered a security for costs order in HCA 806.

⁵⁷ CP 897-967 (Clark Chang Exhibit 2), 968-1047 (Clark Chang Exhibit 3), and 1128-1141 (Clark Chang Exhibit 6).

⁵⁸ CP 3 at 21-22.

⁵⁹ CP 897-967 (Clark Chang Exhibit 2) and 968-1047 (Clark Chang Exhibit 3).

⁶⁰ CP 38-41 and CP 210-213 (Exhibits A and J to Declaration of Chiu).

C. The trial court erred in recognizing the Hong Kong Judgment under RCW 6.40A.030 because evidence was presented by Appellant raising genuine issues of material fact relating to the grounds for non-recognition.

SCB's Motion for Summary Judgment sought recognition of the Hong Kong Judgment under the Uniform Foreign-Country Money Judgments Recognition Act, RCW 6.40A, *et seq.*⁶¹ KD's Response opposed recognition of the Hong Kong Judgment under four different provisions set forth in RCW 6.40A.030, which defines the grounds for non-recognition of a foreign-country judgment.⁶²

Under RCW 6.40A.030(2)(a), a Washington court "**may** not recognize a foreign-country judgment if... [t]he judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." In addition, under RCW 6.40A.030(3), a Washington court "need not recognize a foreign-country judgment if:

...

(c) The judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or of the United States;

...

(g) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(h) The specific proceeding in the foreign court leading to the judgment was not compatible with the

⁶¹ CP 1-26 (SCB's Motion for Summary Judgment).

⁶² CP 401-429 (Response to Motion for Summary Judgment).

requirements of due process of law.”⁶³

The evidence presented in support of KD’s Opposition to SCB’s Motion Summary Judgment raised genuine issues of material fact relating to each of these grounds for non-recognition and, therefore, the trial court erroneously granted SCB’s Motion for Summary Judgment.

- 1. The trial court’s recognition of the Hong Kong Judgment constitutes an unconstitutional taking of property in violation of the Fourteenth Amendment of the U.S. Constitution because the Hong Kong proceedings did not comply with the requirements of due process of law.**

First and foremost, the Hong Kong Judgment should not be recognized because the Hong Kong Proceedings were not compatible with the requirements of due process of law. When a Washington court recognizes a judgment from a foreign country, it grants the foreign judgment the same legal effect as a judgment obtained in Washington.⁶⁴ More importantly, the court is also giving the foreign creditor the ability to enforce the foreign judgment using the various collection mechanisms set forth in Title 6 of the RCW, which includes seizure, attachment, and garnishment.⁶⁵ By recognizing a foreign judgment, the Washington court acts jointly

⁶³ Although the provisions under RCW 6.40A.030(3) give courts discretion to deny recognition, non-recognition should be mandatory because the provisions raise constitutional issues of due process and equal protection violations.

⁶⁴ RCW 6.40A.060.

⁶⁵ RCW 6.40A.060(2). See generally RCW 6.17, 6.25, and 6.27.

with the foreign creditor to deprive the debtor of his property.⁶⁶ Therefore, recognition of a foreign judgment constitutes state action and thereby implicates the Fourteenth Amendment of the U.S. Constitution.⁶⁷

The Due Process Clause of the Fourteenth Amendment prohibits any State from depriving “any person of life, liberty, or property, without due process of law[.]” Washington has codified this principle in its Uniform Foreign-Country Money Judgments Recognition Act. RCW 6.40A.030(2)(a) and (3)(h) plainly state that Washington courts are not required to recognize a judgment from a foreign country if the foreign proceedings were not compatible with the requirements of due process of law.

The Hong Kong Proceedings leading to the Hong Kong Judgment against KD violated due process in several respects. The trial court erred by disregarding facts indicative of due process violations under the United States and Washington State Constitutions and raising genuine issues of material fact whether a due process violation had occurred. Instead, the trial court erroneously recognized the Hong Kong Judgment.

⁶⁶ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982).

⁶⁷ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932-33 (1982).

- a. **The Hong Kong security for costs rule violates substantive due process because it unconstitutionally denies non-resident plaintiffs' their fundamental right of access to the courts.**

The due process guaranteed by the Fifth and Fourteenth Amendments⁶⁸ requires more than procedural due process,⁶⁹ and the protection of liberties is not limited to protection against arbitrary arrest.⁷⁰ Due process of law also requires substantive due process. Substantive due process prohibits government actions that infringe upon fundamental rights and liberties,⁷¹ "regardless of the fairness of the procedures used to implement them."⁷² A substantive due process violation occurs unless the infringement is narrowly tailored to serve a compelling government interest.⁷³

(1) The right of access to the courts is the most fundamental right of the People.⁷⁴

Fundamental rights and liberties are the interests of the

⁶⁸ The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

⁶⁹ *Collins v. Harker Heights*, 503 U.S. 115, 125 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992).

⁷⁰ *Wash. v. Glucksberg*, 521 U.S. 702, 719, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997).

⁷¹ *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); *Wash. v. Glucksberg*, at 720.

⁷² *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

⁷³ *Reno*, 507 U.S. at 301-302.

⁷⁴ The fundamental right of access to the courts is rooted in the First, Fifth, and Fourteenth Amendments of the United States Constitution. See *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 2179, 135 L.Ed.2d 606 (1996); See also *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72 (1977), *Griffin v. Illinois*, 351 U.S. 12, 17, 76 S.Ct. 585, 590, 100 L.Ed.2d 891 (1956); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 612, 30 L.Ed.2d 641 (1971); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989).

People that are “deeply rooted in this Nation’s history and tradition,”⁷⁵ without which “neither liberty nor justice would exist if they were sacrificed.”⁷⁶ In *Marbury v. Madison*, the United States Supreme Court stated, “No constitutional right is safe without effective access to the courts, which, under our system of government, are the ultimate interpreters and guardians of these rights.”⁷⁷ Access to the courts is not just a fundamental right, it is *the* fundamental right of the People:

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution.⁷⁸

The fundamental right of access to courts is also inherent in Article I, Section 10 of the Washington State Constitution.⁷⁹ The Washington State Supreme Court has found, “The people have a

⁷⁵ *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977).

⁷⁶ *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

⁷⁷ *Marbury v. Madison*, 1 Cranch 137 (1803).

⁷⁸ *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

⁷⁹ *Putnam v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009).

right of access to courts; indeed, it is *'the bedrock foundation upon which rest all the people's rights and obligations.'*⁸⁰

By requiring non-resident plaintiffs and counterclaimants to post security for costs, including attorney fees, the Hong Kong security for costs rule unavoidably impacts each and every non-resident claimant's fundamental right of access to the courts. In addition to worrying about their own costs of litigation, the non-resident plaintiff is faced with having to post his opponent's costs and attorney fees. The immediate effect is two-fold: 1) the non-resident plaintiff may be altogether dissuaded from even pursuing justice due to the hurdle and likelihood of a looming security for costs order; and 2) the non-resident plaintiff's case is compromised because he cannot dedicate all of his resources towards the prosecution of his own case.

The hurdle of security for costs rises as the complexity of a case rises,⁸¹ especially when the defendant is a deep pocket entity which can drive up a plaintiff's costs through discovery, etc. With

⁸⁰ *Id.* at 979 (emphasis added) (quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). See also *Hunter v. North Mason High School*, 85 Wn.2d 810, 539 P.2d 845 (1975) ("The right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life.").

⁸¹ In the Hong Kong actions, complex issues of securities fraud were asserted. By the time the security for costs application had been made, KD and Clark Chang had already accrued attorney fees of approximately USD \$500,000 (see CP 1148-1149 at ¶¶ 26 and 27, Declaration of Kung-Da Chang).

security for costs, that entity has another mechanism to stifle its opponent – incurring extensive attorney fees and then seeking a security for costs order against the non-resident plaintiff. Should a non-resident plaintiff choose to move forward, the security for costs rule permits the Hong Kong court to dismiss the non-resident plaintiff's claims if the non-resident claimant cannot post the security for costs ordered. In sum, security for costs is a bar at the beginning of the case and can be effectively used to end a case, as it did here, by a substantial security for costs award in the middle of the case.⁸² As a result, the non-resident plaintiff is arbitrarily denied his fundamental right of access to the courts.⁸³

Access to the courts is the basis for all other rights. There is no sufficiently compelling reason why a person should ever be forced to pay significant costs just for the chance to exercise this fundamental right. Undoubtedly, the reason these unconstitutional statutes still exist is that they are very effective. They deny those persons who cannot afford security for costs access to the courts. If you cannot afford the security for costs, you cannot afford to

⁸² In Hong Kong, security for costs are almost always ordered against foreign plaintiffs (see CP 365 at ¶ 17).

⁸³ In this case, there is evidence the amount was arbitrarily favoring the banks (see CP 365 at ¶ 19, Declaration of Mak).

challenge the constitutionality of the statute on an appeal.⁸⁴ Even when a person can afford security for costs, it is purely unjust that he must compromise the strength/strategies of his own case to do so.

However, the Hong Kong security for costs rule does so and did just that in this case. The Security for Costs Order denied KD Chang access to justice in Hong Kong in HCA 1996 and then provided the means by which SCB could thwart any efforts by KD Chang to continue to pursue his counterclaims in HCA 806. The above analysis raises genuine issues of material fact whether the security for costs mechanism in Hong Kong does not comport with the due process rules of the U.S. and Washington State Constitutions. Therefore, the trial court erred in granting SCB's Motion for Summary Judgment.

(2) The Hong Kong security for costs rule does not survive strict scrutiny because security for costs statutes are archaic and unnecessary and serve no compelling interest.

Since the Hong Kong security for costs rule infringes upon a fundamental right, the rule is subject to strict judicial scrutiny.⁸⁵

⁸⁴ Washington has a security for costs statute similar to the Hong Kong rule (see RCW 4.84.210). The statute was originally passed in 1854, but has never been constitutionally challenged.

⁸⁵ *Witt v. Dep't of the Air Force*, 527 F.3d 806, 817 (9th Cir. 2008).

Few statutes survive strict scrutiny.⁸⁶ A rule will only pass strict scrutiny if it has been narrowly tailored to serve a compelling government interest.⁸⁷ The government interest must be “sufficiently compelling to place within the realm of the reasonable refusal to recognize the individual right asserted.”⁸⁸ There are only two purposes the Hong Kong security for costs rule that can be advanced: 1) assuring that a Hong Kong party entitled to recover costs from a foreign plaintiff can do so; and 2) dissuading frivolous lawsuits.⁸⁹ Neither constitutes a compelling interest and neither survives strict scrutiny.

In his 2000 article in the *St. John's Law Review*, *Access to Federal Courts and Security for Costs and Fees*, John A. Gliedman provides a concise and enlightening history of security of costs in England and the United States:

A. Security for Costs in England

Under early English law, a prevailing party could not recover its litigation costs. In the late thirteenth century, however, England enacted the Statute of Gloucester, which permitted the prevailing party in certain actions to recover costs. Under the English rule as to costs and fees, the prevailing party could recover litigation costs, including attorney fees. Security for costs, however, did not become routine practice until several centuries after the Statute of Gloucester. Security bonds were considered ill

⁸⁶ *Id.*

⁸⁷ *Reno*, 507 U.S. at 301-302.

⁸⁸ *Wash. v. Glucksberg*, 521 U.S. at 760 (Souter, J., concurring).

⁸⁹ If dissuading frivolous lawsuits were actually a legitimate and compelling interest, security for costs would be allowable in all cases, including those brought by domestic plaintiffs.

advised because they were viewed as an unfair barrier to trade and to the courts. By the late eighteenth century other European courts were requiring security for costs. In light of this development, English judges thought it would be appropriate to require foreign plaintiffs, including those from Ireland and Scotland, to post security.

The practice of requiring foreign plaintiffs to post security for costs must be viewed against the background of the courts' limited power to require foreigners to appear before them, e.g., the development of limited in rem jurisdiction. At common law, a judgment was often regarded as the grounds to levy an execution against a party's person or land. The party's presence within the jurisdiction of the court was a key element to the enforcement of a judgment. Because the courts' jurisdiction was limited to property within England, the purpose of a bond was to secure payment of potential costs from non-English litigants. Courts routinely stayed proceedings until the plaintiff posted a bond. Security was not required, however, in circumstances where a party could not afford to post a bond.

B. Development of Security in the United States

In the early years of the United States, a number of jurisdictions required security for costs, continuing the English practice. Courts required security bonds to ensure that prevailing defendants could recover costs from non-resident plaintiffs at the conclusion of an action. "Costs" included attorney fees only where specified by statute or by prior agreement between the parties.

The courts' power to compel non-residents to appear before them is analogous to the limited reach of national courts over individuals residing overseas. It is this territorial-based concept of jurisdiction that the United States Supreme Court adopted in *Pennoyer v. Neff*. In *Pennoyer*, the Court was confronted with the issue of the effect of a default judgment against an out-of-state defendant. The Court held that a state could not exercise process, and thereby exert jurisdiction, over a person or property beyond its territory. Writing for the majority, Justice Field stated that "no tribunal established by [a state] can extend its process beyond that territory so as to subject either persons or property to its decisions." The principle that state and federal courts may not extend their process beyond a limited territorial area has prevailed.⁹⁰

⁹⁰ John A. Gliedman, *Access to Federal Courts and Security for Costs and Fees*, 74 St. John's L. Rev. 953, 957-960 (notations omitted).

The English courts recognized the importance of access to the courts, even when a plaintiff resided outside of England.⁹¹ Unfortunately, this principle gave way to requiring security for costs. However, as Gliedman points out, it is important to understand that security for costs laws and statutes arose in a time when a judgment for costs against a foreign plaintiff was worthless anywhere other than the jurisdiction in which the case was filed.⁹² With the adoption of foreign judgment recognition statutes, though, foreign judgments became readily transferrable amongst jurisdictions, making security for costs obsolete and unnecessary.⁹³

b. The Hong Kong security for costs rule violates the Equal Protection and Privileges and Immunities Clauses of the Washington State and U.S. Constitution because it creates an inherently suspect classification based on wealth and non-residency, making access to the courts easier for the wealthy and almost impossible for the poor.

The purpose of the Equal Protection Clause is to protect persons against intentional and arbitrary discrimination by state actors.⁹⁴ It requires that all similarly situated persons be treated

⁹¹ *Id.* at Footnote 13.

⁹² *Id.* at 958-959.

⁹³ Even if the Court finds a compelling interest, the statute fails the “narrowly tailored” test because a prevailing party is no longer without recourse. The judgment holder has the ability to enforce a judgment for costs by simply transferring the judgment to any jurisdiction where the foreign plaintiff maintains real and/or personal property.

⁹⁴ *Sunday Lake Iron Co. v Wakefield*, 247 U.S. 350, 62 L. Ed. 1154, 38 S. Ct. 495 (1918); *Frost v. Corporation Com. of Oklahoma*, 278 U.S. 515, 73 L. Ed. 483, 49 S. Ct. 235 (1929).

alike unless there is a compelling government interest.⁹⁵ Any statute that creates a suspect classification of individuals will be subjected to strict judicial scrutiny.⁹⁶ Classifications based upon race, nationality, and/or alienage are inherently suspect.⁹⁷ Even if the classification is not deemed “suspect,” any classification that affects a fundamental right (like access to the courts) will also be subjected to strict judicial scrutiny.⁹⁸

When government action infringes on constitutionally protected personal rights of some people, but not others similarly situated, those laws are subjected to strict scrutiny and will be sustained only if the classifications are suitably tailored to serve a compelling state interest.⁹⁹ Government action burdening the fundamental rights of one group more than that of another group subjects the classification to strict scrutiny.¹⁰⁰ A compelling government interest will only be found if the purpose and interest behind the statute are constitutionally permissible and substantial.¹⁰¹ In addition, the use of the classification must be

⁹⁵ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1984).

⁹⁶ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978); *Nielsen v. Washington State Bar Ass'n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978).

⁹⁷ *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

⁹⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978); *Nielsen v. Washington State Bar Ass'n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978).

⁹⁹ *Cleburne*, 473 U.S. at 440.

¹⁰⁰ *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967).

¹⁰¹ *Nielsen v. State Bar Ass'n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978).

necessary to accomplish the purpose and interest and the challenged statute must be the least restrictive means of furthering that interest.¹⁰²

In this case, the Hong Kong security for costs rule clearly distinguishes between resident and non-resident defendants and plaintiffs. Resident defendants are permitted to move for security for costs against a non-resident plaintiff, but non-resident defendants cannot. As such, resident plaintiffs can freely file suit without worrying about having to post security for costs, while non-resident plaintiffs are subject to security for costs. Hong Kong's classification based on non-residency is suspect because non-residents of Hong Kong are in "a position of political powerlessness as to command extraordinary protection from the majoritarian political process."¹⁰³ In addition, the classification is akin to one based upon nationality and alienage, which are both inherently suspect classifications.

As noted above, the Hong Kong security for costs rule infringes upon non-resident plaintiffs' fundamental right of access to the court. Since the rule burdens the fundamental right of one class of citizens, but not another, whether or not the classification is suspect is actually irrelevant. There still must be a compelling government interest to justify the infringement upon non-resident

¹⁰² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978).

¹⁰³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

plaintiffs' fundamental right of access to the courts. There is no sufficiently compelling reason why a person should ever be forced to pay significant costs just for the opportunity to exercise this fundamental right. Thus, the Hong Kong security for costs rule does not comport with the Equal Protection and Privileges and Immunities Clauses of the U.S. and Washington State Constitutions, and Washington courts cannot recognize the Hong Kong Judgment.

c. The Hong Kong court violated Due Process in its application of the security for costs rule in the Hong Kong proceedings by depriving KD of his property without a meaningful opportunity to be heard.

When imposing security for costs, courts are necessarily infringing upon a claimant's fundamental right of access to the court. Yet, various courts in the U.S. have upheld security for costs rules.¹⁰⁴ Under the Fourteenth Amendment, though, the States are still obligated to ensure that each individual receives due process.¹⁰⁵ Thus, even though a rule or statute is valid on its face, the court's application of the rule or statute may nonetheless offend due process.¹⁰⁶

¹⁰⁴ The Washington State security for costs statute was codified in the mid-1800s and there have been many developments in both constitutional and state law that make it ripe for challenge. See RCW 4.84.210.

¹⁰⁵ *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

¹⁰⁶ *Id.*

A person cannot be deprived of property without due process of law.¹⁰⁷ Property includes not only one's assets, but also any cause of action a person may have against another.¹⁰⁸ "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."¹⁰⁹ The hearing must be appropriate for the nature of case.¹¹⁰ Due process includes the fundamental of right of access to the courts¹¹¹ and the right to be heard in one's defense.¹¹²

In the case at hand, the Hong Kong court twice deprived KD of property by foreclosing his meaningful opportunity to be heard. The Hong Kong court did so through its application of the Hong Kong security for costs rule. First, the Hong Kong court deprived KD of his right to have a meaningful hearing on his claims against SCB (as well as BEA) in HCA 1996. Second, the Hong Kong court denied KD his right to present a meaningful defense to SCB's

¹⁰⁷ *Id.*

¹⁰⁸ See Section 70a of the Bankruptcy Act. See also *Sanner v. Trustees of Sheppard and Enoch Pratt Hospital*, 278 F. Supp. 138, 142 (D.Md. 1968); *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576, 577 (N.D.Ill. 1936); *City of Phoenix v. Dickson*, 40 Ariz. 403, 12 P.2d 618, 619 (1932); *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372, 375 (1944).

¹⁰⁹ *Boddie*, 401 U.S. at 378.

¹¹⁰ *Id.*

¹¹¹ See section VII.C.1.a *supra*.

¹¹² *Boddie*, 401 U.S. at 378.

claims against him and to pursue his counterclaims against SCB in HCA 806.

A security for costs order that impedes a claimant's ability to prosecute his claims violates due process.¹¹³ During the security for costs proceedings, KD informed the Hong Kong court that he would be unable to post any significant security for costs in the form of cash. His attorney also informed the Hong Kong court that posting security for costs would stifle KD's ability to move forward with his claims. Despite KD's statements, the Hong Kong court imposed an extraordinarily large security for costs order upon KD in the amount of US\$838,000 *cash* in just 14 days. As result, KD's claims in HCA 1996 were stifled. By issuing an order that stifled KD's claims, the Hong Kong court denied him the opportunity to have his claims heard, in violation of due process.

Additionally, the Security for Costs Order ultimately resulted in the dismissal of KD's claims in HCA 1996. At that time, SCB would have been entitled to their costs for bringing the security for costs application *and* all costs incurred in defending HCA 1996. Once those costs judgments were in hand, SCB would have been able to seek an order prohibiting KD from leaving Hong Kong or

¹¹³ See *Mann v. Levy*, 776 F. Supp. 808 (S.D.N.Y. 1991); see also *Atlanta Shipping Corp. v. Chemical Bank*, 631 F. Supp. 335 (S.D.N.Y. 1986).

even seeking incarceration.¹¹⁴ In order to defend HCA 806, KD would have had to subject himself to such risks. As a result, the Security for Costs Order effectively denied KD the right to present a meaningful defense in HCA 806 and pursue his own claims, another significant violation of due process. SCB's judgment in HCA 806 was directly obtained because of SCB's use of the security for costs statute in HCA 1996 to bludgeon KD Chang's due process rights.

Not only did the Security for Costs Order deny KD his due process, the security for costs proceedings themselves violated due process because they were not "meaningful." In awarding security for costs, courts must be fair in exercising its discretion in light of the circumstances in the case.¹¹⁵ It, however, is apparent from the Security for Costs Order, that the Hong Kong court cared more about protecting the Hong Kong banks than showing fairness to non-resident individuals.¹¹⁶

First, despite SCB initiating the litigation and dragging KD into court, the Hong Kong court ordered security for costs on what would be considered ***compulsory counterclaims*** in the United States.¹¹⁷ Second, the Hong Kong court specifically remarked in its

¹¹⁴ CP 368 at ¶ 30 and 31 (Declaration of Mak).

¹¹⁵ *Aggarwal v. Ponce School of Medicine*, 745 F.2d 723, 727-28 (1st Cir. 1984).

¹¹⁶ See Section IV.A.VI *supra* and CP 1400-1417 (Exhibit 16 to Declaration of KD Chang).

¹¹⁷ *Lattomus v. General Business Servs. Corp.*, 911 F.2d 723 (4th Cir. 1990).

order, "Given the enormous size of the claims and counterclaims and ***the fact that the banks' reputation is at stake***, heavy involvement of experienced counsel is inevitable."¹¹⁸ Third, the Hong Kong court ignored the individuals' ability to pay and, instead, looked to the Chang family as a whole. Clearly, the Hong Kong court was heeding the banks' advice that it should force KD to beg others to finance his *fundamental right to pursue justice*. Fourth, the court apparently ignored the suspect billings by SCB and BEA, which were shown to be excessive and should have been an adequate basis for denial of SCB's application. Last, the sheer size of the security for costs orders demonstrates the court's intent to be unfair to KD. Since the security for costs proceedings lacked fairness, they were not meaningful, and, therefore, violated due process.

2. The trial court should not have recognized the Hong Kong Judgment because the Hong Kong Judgment is repugnant to the public policies of Washington State and the United States.

a. The Hong Kong Judgment violates the public policy of access to the courts embodied in the U.S. and Washington State Constitutions.

When a foreign judgment is repugnant to a public policy embodied in the U.S. Constitution, the refusal to recognize the judgment is 'constitutionally mandatory.'¹¹⁹ As set forth above, the

¹¹⁸ CP 1400-1417 (Exhibit 16 to Declaration of KD Chang) at CP 1414, ¶ 37.

¹¹⁹ See *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992) (quoting Siegel, Practice Commentaries, McKinney's Cons Laws

Hong Kong security for costs rule infringes upon non-resident plaintiffs' fundamental right of access to the courts. The fundamental right of access to the courts is inherent not only in the Fifth and Fourteenth Amendments, but also in the First Amendment. The First Amendment prohibits Congress from making any law abridging the People's right to petition the government for a redress of grievances.¹²⁰ The right to petition is one of "the most precious of the liberties safeguarded by the Bill of Rights."¹²¹ "[T]he right to petition extends to all departments of the Government." "[T]he right of access to the courts is...but one aspect of the right of petition."¹²² Access to the courts is clearly a public policy embodied by the U.S. and Washington Constitutions. The Hong Kong security for costs rule and the Hong Kong court's application thereof violated KD's right of access to the courts. Therefore, the Hong Kong judgment is repugnant to public policy and the Judgment should not be recognized.

b. The Hong Kong court system improperly favors its residents over non-residents.

As the actions by Hong Kong court at issue show, the Hong Kong court system improperly favors its residents over non-residents, which violates Washington and U.S. public policy. Both

of NY, Book 7B, CPLR C5304:1, at 492.).

¹²⁰ *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967).

¹²¹ *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 612, 30 L.Ed.2d 641 (1971).

¹²² *Id.*

SCB and BEA are multi-billion dollar Hong Kong banks. Still, the Hong Kong court saw it fit to impose an extraordinarily large, case-stifling security for costs order on a non-resident family.

c. Washington public policy eschews large corporations using wealth to manipulate the court system.

Washington's privileges and immunities clause protects not only against the majoritarian threat of invidious discrimination against non-majorities, but is also concerned with laws "serving the interest of special classes of citizens to the detriment of the interests of all citizens."¹²³ Referring to the language of the Privileges and Immunities Clause, the Washington State Supreme Court has said, "Washington's addition of the reference to corporations demonstrates that our framers were concerned with undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority."¹²⁴

As noted in this response, SCB is an extremely wealthy Hong Kong bank. Undoubtedly, SCB dedicates millions of dollars each year to litigation, and surely maintains a litigation fund adequate to cover those costs. Yet, the Hong Kong court ordered

¹²³ *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806-807 (2004).

¹²⁴ *Grant County*, 150 Wn.2d at 808. Article I, Section 12 of the Washington State Constitution states, "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

security for costs because **“the banks' reputation is at stake”** and the court wanted to ensure SCB had “experienced counsel.” Yet, the court did not care that the costs would stifle KD's claims. This clearly goes against Washington public policy.

d. Hong Kong's prohibition ordinance violates the right to travel.

The U.S. Supreme Court has consistently held that statutes affecting the fundamental right to travel must pass the compelling government interest test.¹²⁵ Freedom of movement is basic in our scheme of values.¹²⁶ As noted above, Hong Kong has an ordinance which allows any judgment creditor, or in some cases a plaintiff who not even filed suit yet, to seek an order prohibiting any debtor from leaving Hong Kong.¹²⁷ The prohibition ordinance would never pass constitutional muster in the U.S. and is repugnant to U.S. and Washington public policy. Although no prohibition order was issued in this case, the availability of such an order, which could be freely wielded by SCB if KD Chang chose to continue to pursue his counterclaims in HCA 806, should dissuade this Court and all U.S. courts from recognizing Hong Kong judgments.

¹²⁵ *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257-258 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 339-341 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹²⁶ *Kent v. Dulles*, 357 U.S. 116, 125 (1985).

¹²⁷ See CP 394-400 (Exhibit C to Declaration of Pamela Mak).

3. The trial court should not have recognized the Hong Kong Judgment because the Hong Kong Judgment was rendered in circumstances that raise substantial doubt about the integrity of the Hong Kong court rendering the judgment.

Under RCW 6.40.030(3)(g), a Washington court need not recognize a foreign-country judgment that was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment. This is true even though the court may not have found the foreign judicial system to be defective as a whole.¹²⁸ Instead, the focus is on the specific court rendering the judgment and the proceedings leading up to the judgment.¹²⁹ Of particular concern to the courts are partiality, bribery, and overall lack of fairness during the foreign proceedings.¹³⁰ The circumstances surrounding the Hong Kong Judgment that SCB has now been allowed to enforce clearly raise doubts about the integrity of the Hong Kong court. Specifically, it overtly favored the Hong Kong bank, ordered a substantial cash bond to be paid within two weeks, and failed to take into consideration overt irregularities in SCB's billing sufficient to deny its application for security for costs.

a. The Hong Kong court failed to demonstrate impartiality by favoring SCB, a large, Hong Kong bank, throughout the proceedings.

The Hong Kong court catered to the needs of the banks by

¹²⁸ 2005 Recognition Act § 4(c)(7) cmt. 11.

¹²⁹ *Id.*

¹³⁰ *Id.*

issuing a security for costs order against KD in the amount of \$878,000. In its Order, the Hong Kong court displayed its impartiality by stating, "Given the enormous size of the claims and counterclaims and **the fact that banks' reputation is at stake**, heavy involvement of experienced counsel is inevitable."¹³¹ SCB took KD and his family to court. Its claims against KD were substantial and his entire livelihood was at stake. Although KD informed the HK court that a large cash security for costs would stifle his claims (as well as defenses), the court still ordered the astronomical security for costs amount. This lack of partiality and overall unfairness towards KD and his family demonstrates that the Hong Kong court lacked integrity.

VIII. CONCLUSION

KD Chang's father lost his entire fortune due to fraud perpetrated by an officer of SCB. He was denied the opportunity to prove his case by the Hong Kong security for costs statute.

The trial court erred in granting SCB's Motion for Summary Judgment. There are genuine issues of material fact regarding reasons for non-recognition of the Hong Kong Judgment under RCW 6.40A.030. The Hong Kong Proceedings included a substantial security for costs order. As set forth above, the Hong

¹³¹ CP 1400-1417 (Exhibit 16 to Declaration of KD Chang) at CP 1414, ¶ 37.

Kong security for costs rule is unconstitutional and the Hong Kong court's application of the rule violated Appellant's rights to due process. The security for costs rule denies a claimant its fundamental right of access to the court. In this case, it was also used to prevent KD Chang from being able to defend SCB's claims against him. Since there are genuine issues of material fact regarding reasons for non-recognition of the Hong Kong Judgment, the trial court order granting summary judgment should be reversed.

DATED this 15th day of November, 2013.

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APPENDIX 1

11 USC § 541 - PROPERTY OF THE ESTATE

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)

(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)

(i)the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii)but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5)funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A)only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B)only to the extent that such funds—

(i)are not pledged or promised to any entity in connection with any extension of credit; and

(ii)are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C)in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;

(6)funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A)only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B)with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C)in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;

(7)any amount—

(A)withheld by an employer from the wages of employees for payment as contributions—

(i)to—

(I)an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II)a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III)a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii)to a health insurance plan regulated by State law whether or not subject to such title; or

(B)received by an employer from employees for payment as contributions—

(i)to—

(I)an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II)a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III)a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii)to a health insurance plan regulated by State law whether or not subject to such title;

(8)subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A)the tangible personal property is in the possession of the pledgee or transferee;

(B)the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C)neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9)any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A)on or after the date that is 14 days prior to the date on which the petition is filed; and

(B)under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)

(1)Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A)that restricts or conditions transfer of such interest by the debtor; or

(B)that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and

that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2)A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d)Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e)In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f)Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

APPENDIX 2



RULE 56
SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by

depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

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APPENDIX 3

U.S. Constitution Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX 4

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX 5

U. S. CONSTITUTION AMENDMENT XIV

SECTION 1.

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.

SECTION 2.

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

SECTION 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX 6



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RCW 4.84.210

Security for costs.

When a plaintiff in an action, or in a garnishment or other proceeding, resides out of the county, or is a foreign corporation, or begins such action or proceeding as the assignee of some other person or of a firm or corporation, as to all causes of action sued upon, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant or garnishee defendant. When required, all proceedings in the action or proceeding shall be stayed until a bond, executed by two or more persons, or by a surety company authorized to do business in this state be filed with the clerk, conditioned that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or proceeding, not exceeding the sum of two hundred dollars. A new or additional bond may be ordered by the court or judge, upon proof that the original bond is insufficient security, and proceedings in the action or proceeding stayed until such new or additional bond be executed and filed. The plaintiff may deposit with the clerk the sum of two hundred dollars in lieu of a bond.

[1929 c 103 § 1; Code 1881 § 527; 1877 p 111 § 531; 1854 p 204 § 389; RRS § 495.]



APPENDIX 7

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[RCWs](#) > [Title 6](#) > [Chapter 6.40A](#) > [Section 6.40A.030](#)

[6.40A.020](#) << [6.40A.030](#) >> [6.40A.040](#)

RCW 6.40A.030

Recognition of foreign-country judgments — Grounds for nonrecognition.

(1) Except as otherwise provided in subsections (2) and (3) of this section, a court of this state shall recognize a foreign-country judgment to which this chapter applies.

(2) A court of this state may not recognize a foreign-country judgment if:

(a) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(b) The foreign court did not have personal jurisdiction over the defendant; or

(c) The foreign court did not have jurisdiction over the subject matter.

(3) A court of this state need not recognize a foreign-country judgment if:

(a) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(b) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;

(c) The judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or of the United States;

(d) The judgment conflicts with another final and conclusive judgment;

(e) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(f) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(g) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(h) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(4) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (2) or (3) of this section exists.

[2009 c 363 § 4.]

APPENDIX 8



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[RCWs](#) > [Title 6](#) > [Chapter 6.40A](#) > [Section 6.40A.060](#)

[6.40A.050](#) << [6.40A.060](#) >> [6.40A.070](#)

RCW 6.40A.060
Judgments entitled to recognition — Enforceability.

If the court in a proceeding under RCW [6.40A.050](#) finds that the foreign-country judgment is entitled to recognition under this chapter then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is:

- (1) Conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and
- (2) Enforceable in the same manner and to the same extent as a judgment rendered in this state.

[2009 c 363 § 7.]



APPENDIX 9

UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR
PITTSBURGH, PENNSYLVANIA

July 21-28, 2005

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

February 10, 2006

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UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

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UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

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UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

PREFATORY NOTE

This Act is a revision of the Uniform Foreign Money-Judgments Recognition Act of 1962. That Act codified the most prevalent common law rules with regard to the recognition of money judgments rendered in other countries. The hope was that codification by a state of its rules on the recognition of foreign-country money judgments, by satisfying reciprocity concerns of foreign courts, would make it more likely that money judgments rendered in that state would be recognized in other countries. Towards this end, the Act sets out the circumstances in which the courts in states that have adopted the Act must recognize foreign-country money judgments. It delineates a minimum of foreign-country judgments that must be recognized by the courts of adopting states, leaving those courts free to recognize other foreign-country judgments not covered by the Act under principles of comity or otherwise. Since its promulgation over forty years ago, the 1962 Act has been adopted in a majority of the states and has been in large part successful in carrying out its purpose of establishing uniform and clear standards under which state courts will enforce the foreign-country money judgments that come within its scope.

This Act continues the basic policies and approach of the 1962 Act. Its purpose is not to depart from the basic rules or approach of the 1962 Act, which have withstood well the test of time, but rather to update the 1962 Act, to clarify its provisions, and to correct problems created by the interpretation of the provisions of that Act by the courts over the years since its promulgation. Among the more significant issues that have arisen under the 1962 Act which are addressed in this Revised Act are (1) the need to update and clarify the definitions section; (2) the need to reorganize and clarify the scope provisions, and to allocate the burden of proof with regard to establishing application of the Act; (3) the need to set out the procedure by which recognition of a foreign-country money judgment under the Act must be sought; (4) the need to clarify and, to a limited extent, expand upon the grounds for denying recognition in light of differing interpretations of those provisions in the current case law; (5) the need to expressly allocate the burden of proof with regard to the grounds for denying recognition; and (6) the need to establish a statute of limitations for recognition actions.

In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act not to require reciprocity as a condition to recognition of the foreign-country money judgments covered by the Act. After much discussion, the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue. While recognition of U.S. judgments continues to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of U.S. judgments than does the approach taken by the Act. At the same time, the certainty and uniformity provided by the approach of the 1962 Act, and continued in this Act, creates a stability in this area that facilitates international commercial transactions.

UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the [Uniform Foreign-Country Money Judgments Recognition Act].

Comment

Source: This section is an updated version of Section 9 of the Uniform Foreign Money-Judgments Recognition Act of 1962.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Foreign country” means a government other than:

(A) the United States;

(B) a state, district, commonwealth, territory, or insular possession of the

United States; or

(C) any other government with regard to which the decision in this state

as to whether to recognize a judgment of that government’s courts is initially subject to

determination under the Full Faith and Credit Clause of the United States Constitution.

(2) “Foreign-country judgment” means a judgment of a court of a foreign country.

Comment

Source: This section is derived from Section 1 of the Uniform Foreign Money-Judgments Recognition Act of 1962.

1. The defined terms “foreign state” and “foreign judgment” in the 1962 Act have been changed to “foreign country” and “foreign-country judgment” in order to make it clear that the Act does not apply to recognition of sister-state judgments. Some courts have noted that the “foreign state” and “foreign judgment” definitions of the 1962 Act have caused confusion as to whether the Act should apply to sister-state judgments because “foreign state” and “foreign judgment” are terms of art generally used in connection with recognition and enforcement of

sister-state judgments. *See, e.g., Eagle Leasing v. Amandus*, 476 N.W.2d 35 (S.Ct. Iowa 1991) (reversing lower court's application of UFMJRA to a sister-state judgment, but noting lower court's confusion was understandable as "foreign judgment" is term of art normally applied to sister-state judgments). *See also*, Uniform Enforcement of Foreign Judgments Act §1 (defining "foreign judgment" as the judgment of a sister state or federal court).

The 1962 Act defines a "foreign state" as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryuku Islands." Rather than simply updating the list in the 1962 Act's definition of "foreign state," the new definition of "foreign country" in this Act combines the "listing" approach of the 1962 Act's "foreign state" definition with a provision that defines "foreign country" in terms of whether the judgments of the particular government's courts are initially subject to the Full Faith and Credit Clause standards for determining whether those judgments will be recognized. Under this new definition, a governmental unit is a "foreign country" if it is (1) not the United States or a state, district, commonwealth, territory or insular possession of the United States; and (2) its judgments are not initially subject to Full Faith and Credit Clause standards.

The Full Faith and Credit Clause, Art. IV, section 1, provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Whether the judgments of a governmental unit are subject to the Full Faith and Credit Clause may be determined by judicial interpretation of the Full Faith and Credit Clause or by statute, or by a combination of these two sources. For example, pursuant to the authority granted by the second sentence of the Full Faith and Credit Clause, Congress has passed 28 U.S.C.A. §1738, which provides *inter alia* that court records from "any State, Territory, or Possession of the United States" are entitled to full faith and credit under the Full Faith and Credit Clause. In *Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938), the United States Supreme Court held that this statute also requires that full faith and credit be given to judgments of federal courts. States also have made determinations as to whether certain types of judgments are subject to the Full Faith and Credit Clause. *E.g.* *Day v. Montana Dept. Of Social & Rehab. Servs.*, 900 P.2d 296 (Mont. 1995) (tribal court judgment not subject to Full Faith and Credit, and should be treated with same deference shown foreign-country judgments). Under the definition of "foreign country" in this Act, the determination as to whether a governmental unit's judgments are subject to full faith and credit standards should be made by reference to any relevant law, whether statutory or decisional, that is applicable "in this state."

The definition of "foreign country" in terms of those judgments not subject to Full Faith and Credit standards also has the advantage of more effectively coordinating the Act with the Uniform Enforcement of Foreign Judgments Act. That Act, which establishes a registration procedure for the enforcement of sister state and equivalent judgments, defines a "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." Uniform Enforcement of Foreign

Judgments Act, §1 (1964). By defining “foreign country” in the Recognition Act in terms of those judgments not subject to full faith and credit standards, this Act makes it clear that the Enforcement Act and the Recognition Act are mutually exclusive – if a foreign money judgment is subject to full faith and credit standards, then the Enforcement Act’s registration procedure is available with regard to its enforcement; if the foreign money judgment is not subject to full faith and credit standards, then the foreign money judgment may not be enforced until recognition of it has been obtained in accordance with the provisions of the Recognition Act.

2. The definition of “foreign-country judgment” in this Act differs significantly from the 1962 Act’s definition of “foreign judgment.” The 1962 Act’s definition served in large part as a scope provision for the Act. The part of the definition defining the scope of the Act has been moved to section 3, which is the scope section.

3. The definition of “foreign-country judgment” in this Act refers to “a judgment” of “a court” of the foreign country. The foreign-country judgment need not take a particular form – any order or decree that meets the requirements of this section and comes within the scope of the Act under Section 3 is subject to the Act. Similarly, any competent government tribunal that issues such a “judgment” comes within the term “court” for purposes of this Act. The judgment, however, must be a judgment of an adjudicative body of the foreign country, and not the result of an alternative dispute mechanism chosen by the parties. Thus, foreign arbitral awards and agreements to arbitrate are not covered by this Act. They are governed instead by federal law. Chapter 2 of the U.S. Arbitration Act, 9 U.S.C. §§ 201-208, implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chapter 3 of the U.S. Arbitration Act, 9 U.S.C. §§301-307, implementing the Inter-American Convention on International Commercial Arbitration. A judgment of a foreign court confirming or setting aside an arbitral award, however, would be covered by this Act.

4. The definition of “foreign-country judgment” does not limit foreign-country judgments to those rendered in litigation between private parties. Judgments in which a governmental entity is a party also are included, and are subject to this Act if they meet the requirements of this section and are within the scope of the Act under Section 3.

SECTION 3. APPLICABILITY.

(a) Except as otherwise provided in subsection (b), this [act] applies to a foreign-country judgment to the extent that the judgment:

- (1) grants or denies recovery of a sum of money; and
- (2) under the law of the foreign country where rendered, is final.

conclusive, and enforceable.

(b) This [act] does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is:

- (1) a judgment for taxes;
- (2) a fine or other penalty; or
- (3) a judgment for divorce, support, or maintenance, or other judgment

rendered in connection with domestic relations.

(c) A party seeking recognition of a foreign-country judgment has the burden of establishing that this [act] applies to the foreign-country judgment.

Comment

Source: This section is based on Section 2 of the 1962 Act. Subsection (b) contains material that was included as part of the definition of “foreign judgment” in Section 1(2) of the 1962 Act. Subsection (c) is new.

1. Like the 1962 Act, this Act sets out in subsection 3(a) two basic requirements that a foreign-country judgment must meet before it comes within the scope of this Act – the foreign-country judgment must (1) grant or deny recovery of a sum of money and (2) be final, conclusive and enforceable under the law of the foreign country where it was rendered. Subsection 3(b) then sets out three types of foreign-country judgments that are excluded from the coverage of this Act, even though they meet the criteria of subsection 3(a) – judgments for taxes, judgments constituting fines and other penalties, and judgments in domestic relations matters. These exclusions are comparable to those contained in Section 1(2) of the 1962 Act.

2. This Act applies to a foreign-country judgment only to the extent the foreign-country judgment grants or denies recovery of a sum of money. If a foreign-country judgment both grants or denies recovery of a sum money and provides for some other form of relief, this Act would apply to the portion of the judgment that grants or denies monetary relief, but not to the portion that provides for some other form of relief. The U.S. court, however, would be left free to decide to recognize and enforce the non-monetary portion of the judgment under principles of comity or other applicable law. See Section 11.

3. In order to come within the scope of this Act, a foreign-country judgment must be final, conclusive, and enforceable under the law of the foreign country in which it was rendered.

This requirement contains three distinct, although inter-related concepts. A judgment is final when it is not subject to additional proceedings in the rendering court other than execution. A judgment is conclusive when it is given effect between the parties as a determination of their legal rights and obligations. A judgment is enforceable when the legal procedures of the state to ensure that the judgment debtor complies with the judgment are available to the judgment creditor to assist in collection of the judgment.

While the first two of these requirements – finality and conclusiveness – will apply with regard to every foreign-country money judgment, the requirement of enforceability is only relevant when the judgment is one granting recovery of a sum of money. A judgment denying a sum of money obviously is not subject to enforcement procedures, as there is no monetary award to enforce. This Act, however, covers both judgments granting and those denying recovery of a sum of money. Thus, the fact that a foreign-country judgment denying recovery of a sum of money is not enforceable does not mean that such judgments are not within the scope of the Act. Instead, the requirement that the judgment be enforceable should be read to mean that, if the foreign-country judgment grants recovery of a sum of money, it must be enforceable in the foreign country in order to be within the scope of the Act.

Like the 1962 Act, subsection 3(b) requires that the determinations as to finality, conclusiveness and enforceability be made using the law of the foreign country in which the judgment was rendered. Unless the foreign-country judgment is final, conclusive, and (to the extent it grants recovery of a sum of money) enforceable in the foreign country where it was rendered, it will not be within the scope of this Act.

4. Subsection 3(b) follows the 1962 Act by excluding three categories of foreign-country money judgments from the scope of the Act – judgments for taxes, judgments that constitute fines and penalties, and judgments in domestic relations matters. The domestic relations exclusion has been redrafted to make it clear that all judgments in domestic relations matters are excluded from the Act, not just judgments “for support” as provided in the 1962 Act. This is consistent with interpretation of the 1962 Act by the courts, which extended the “support” exclusion in the 1962 Act beyond its literal wording to exclude other money judgments in connection with domestic matters. *E.g.*, *Wolff v. Wolff*, 389 A.2d 413 (My. App. 1978) (“support” includes alimony).

Recognition and enforcement of domestic relations judgments traditionally has been treated differently from recognition and enforcement of other judgments. The considerations with regard to those judgments, particularly with regard to jurisdiction and finality, differ from those with regard to other money judgments. Further, national laws with regard to domestic relations vary widely, and recognition and enforcement of such judgments thus is more appropriately handled through comity than through use of this uniform Act. Finally, other statutes, such as the Uniform Interstate Family Support Act and the federal International Child Support Enforcement Act, 42 U.S.C. §659a (1996), address various aspects of the recognition and enforcement of domestic relations awards. Under Section 11 of this Act, courts are free to

recognize money judgments in domestic relations matters under principles of comity or otherwise, and U.S. courts routinely enforce money judgments in domestic relations matters under comity principles.

Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts. *See, e.g.*, Restatement Third of the Foreign Relations Law of the United States §483 (1986). Both the “revenue rule,” under which the courts of one country will not enforce the revenue laws of another country, and the prohibition on enforcement of penal judgments seem to be grounded in the idea that one country does not enforce the public laws of another. *See id.* Reporters’ Note 2. The exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 11, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

A judgment for taxes is a judgment in favor of a foreign country or one of its subdivisions based on a claim for an assessment of a tax. Thus, a judgment awarding a plaintiff restitution of the purchase price paid for an item would not be considered in any part a judgment for taxes, even though one element of the recovery was the sales tax paid by the plaintiff at the time of purchase. Such a judgment would not be one designed to enforce the revenue laws of the foreign country, but rather one designed to compensate the plaintiff. Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. *E.g.*, *Chase Manhattan Bank, N.A. v. Hoffman*, 665 F.Supp 73 (D. Mass. 1987) (finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium). Thus, a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature and therefore outside the scope of the Act simply because the action is brought on behalf of the private individuals by a government entity. *Cf.* U.S.-Australia Free Trade Agreement, art.14.7.2, U.S.-Austl., May 18, 2004 (providing that when government agency obtains a civil monetary judgment for purpose of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, judgment generally should not be denied recognition and enforcement on ground that it is penal or revenue in nature, or based on other foreign public law).

5. Under subsection 3(b), a foreign-country money judgment is not within the scope of this Act “to the extent” that it comes within one of the excluded categories. Therefore, if a foreign-country money judgment is only partially within one of the excluded categories, the non-excluded portion will be subject to this Act.

6. Subsection 3(c) is new. The 1962 Act does not expressly allocate the burden of proof with regard to establishing whether a foreign-country judgment is within the scope of the Act.

Courts applying the 1962 Act generally have held that the burden of proof is on the person seeking recognition to establish that the judgment is final, conclusive and enforceable where rendered. *E.g.*, *Mayekawa Mfg. Co. Ltd. v. Sasaki*, 888 P.2d 183, 189 (Wash. App. 1995) (burden of proof on creditor to establish judgment is final, conclusive, and enforceable where rendered); *Bridgeway Corp. v. Citibank*, 45 F.Supp.2d 276, 285 (S.D.N.Y. 1999) (party seeking recognition must establish that there is a final judgment, conclusive and enforceable where rendered); *S.C.Chimexim S.A. v. Velco Enterprises, Ltd.*, 36 F. Supp.2d 206, 212 (S.D.N.Y. 1999) (Plaintiff has the burden of establishing conclusive effect). Subsection (3)(c) places the burden of proof to establish whether a foreign-country judgment is within the scope of the Act on the party seeking recognition of the foreign-country judgment with regard to both subsection (a) and subsection (b).

SECTION 4. STANDARDS FOR RECOGNITION OF FOREIGN-COUNTRY

JUDGMENT.

(a) Except as otherwise provided in subsections (b) and (c), a court of this state shall recognize a foreign-country judgment to which this [act] applies.

(b) A court of this state may not recognize a foreign-country judgment if:

(1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant;

or

(3) the foreign court did not have jurisdiction over the subject matter.

(c) A court of this state need not recognize a foreign-country judgment if:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the judgment was obtained by fraud that deprived the losing party of

an adequate opportunity to present its case;

(3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(d) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (b) or (c) exists.

Comment

Source: This section is based on Section 4 of the 1962 Act.

1. This Section provides the standards for recognition of a foreign-country money judgment. Section 7 sets out the effect of recognition of a foreign-country money judgment under this Act.

2. Recognition of a judgment means that the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country. *See, e.g.* Restatement (Second) of Conflicts of Laws, Ch. 5, Topic 3, Introductory Note (recognition of foreign judgment occurs to the extent the forum court gives the judgment “the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the

state where it was rendered.”) Recognition of a foreign-country judgment must be distinguished from enforcement of that judgment. Enforcement of the foreign-country judgment involves the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign-country judgment. Recognition of a foreign-country money judgment often is associated with enforcement of the judgment, as the judgment creditor usually seeks recognition of the foreign-country judgment primarily for the purpose of invoking the enforcement procedures of the forum state to assist the judgment creditor’s collection of the judgment from the judgment debtor. Because the forum court cannot enforce the foreign-country judgment until it has determined that the judgment will be given effect, recognition is a prerequisite to enforcement of the foreign-country judgment. Recognition, however, also has significance outside the enforcement context because a foreign-country judgment also must be recognized before it can be given preclusive effect under *res judicata* and collateral estoppel principles. The issue of whether a foreign-country judgment will be recognized is distinct from both the issue of whether the judgment will be enforced, and the issue of the extent to which it will be given preclusive effect.

3. Subsection 4(a) places an affirmative duty on the forum court to recognize a foreign-country money judgment unless one of the grounds for nonrecognition stated in subsection (b) or (c) applies. Subsection (b) states three mandatory grounds for denying recognition to a foreign-country money judgment. If the forum court finds that one of the grounds listed in subsection (b) exists, then it must deny recognition to the foreign-country money judgment. Subsection (c) states eight nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. Subsection (d) places the burden of proof on the party resisting recognition of the foreign-country judgment to establish that one of the grounds for nonrecognition exists.

4. The mandatory grounds for nonrecognition stated in subsection (b) are identical to the mandatory grounds stated in Section 4 of the 1962 Act. The discretionary grounds stated in subsection 4(c)(1) through (6) are based on subsection 4(b)(1) through (6) of the 1962 Act. The discretionary grounds stated in subsection 4(c)(7) and (8) are new.

5. Under subsection (b)(1), the forum court must deny recognition to the foreign-country money judgment if that judgment was “rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.” The standard for this ground for nonrecognition “has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S.113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved.” Cmt §4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure. *Kam-Tech Systems, Ltd. V. Yardeni*, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord*, *Society of Lloyd’s v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept

of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under subsection (b)(1), so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding. As the U.S. Supreme Court stated in *Hilton*:

Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized. *Hilton*, 159 U.S. at 202.

6. Under section 4(b)(2), the forum court must deny recognition to the foreign-country judgment if the foreign court did not have personal jurisdiction over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes clear that other grounds for personal jurisdiction may be found sufficient.

7. Subsection 4(c)(2) limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case — is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the foreign-country judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding. Intrinsic fraud does not provide a basis for denying recognition under subsection 4(c)(2), as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in subsection 4(c)(3) is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether “the [cause of action] [claim for relief] on which the judgment is based” is repugnant to public policy. Based on this “cause

of action” language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on something other than repugnancy of the foreign cause of action comes within this exception. *E.g.*, *Southwest Livestock & Trucking Co., Inc. v. Ramon*, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy); *Guinness PLC v. Ward*, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); *The Society of Lloyd’s v. Turner*, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *cf.* *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). Subsection 4(c)(3) rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although subsection 4(c)(3) of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine “that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.” *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language “or of the United States” in subsection 4(c)(3), which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.*, *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. Subsection 4(c)(5) allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing the foreign-country judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

10. Subsection 4(c)(6) authorizes the forum court to refuse recognition of a foreign-country judgment that was rendered in the foreign country solely on the basis of personal service

when the forum court believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens*.

11. Subsection 4(c)(7) is new. Under this subsection, the forum court may deny recognition to a foreign-country judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with subsection 4(b)(1), which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, subsection 4(b)(1) focuses on the judicial system of the foreign country as a whole, rather than on whether the particular judicial proceeding leading to the foreign-country judgment was impartial and fair. *See, e.g.,* The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962 Act); CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, subsection 4(c)(7) allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the foreign-country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. Subsection 4(c)(8) also is new. It allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness. Like subsection 4(c)(7), it can be contrasted with subsection 4(b)(1), which requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of subsection 4(b)(1) is on the foreign country's judicial system as a whole, the focus of subsection 4(c)(8) is on the particular proceeding that resulted in the specific foreign-country judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment.

Subsections 4(c)(7) and (8) both are discretionary grounds for denying recognition, while subsection 4(b)(1) is mandatory. Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in

that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. Under subsection 4(d), the party opposing recognition of the foreign-country judgment has the burden of establishing that one of the grounds for nonrecognition set out in subsection 4(b) or (c) applies. The 1962 Act was silent as to who had the burden of proof to establish a ground for nonrecognition and courts applying the 1962 Act took different positions on the issue. *Compare* *Bridgeway Corp. v. Citibank*, 45 F.Supp. 2d 276, 285 (S.D.N.Y. 1999) (plaintiff has burden to show no mandatory basis under 4(a) for nonrecognition exists; defendant has burden regarding discretionary bases) *with* *The Courage Co. LLC v. The ChemShare Corp.*, 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition). Because the grounds for nonrecognition in Section 4 are in the nature of defenses to recognition, the burden of proof is most appropriately allocated to the party opposing recognition of the foreign-country judgment.

SECTION 5. PERSONAL JURISDICTION.

(a) A foreign-country judgment may not be refused recognition for lack of personal jurisdiction if:

(1) the defendant was served with process personally in the foreign country;

(2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;

(3) the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter

involved;

(4) the defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;

(5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country; or

(6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of that operation.

(b) The list of bases for personal jurisdiction in subsection (a) is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subsection(a) as sufficient to support a foreign-country judgment.

Comment

Source: This provision is based on Section 5 of the 1962 Act. Its substance is the same as that of Section 5 of the 1962 Act, except as noted in Comment 2 below with regard to subsection 5(a)(4).

1. Under section 4(b)(2), the forum court must deny recognition to the foreign-country judgment if the foreign court did not have personal jurisdiction over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes it clear that these bases of personal jurisdiction are not exclusive. The forum court may find that the foreign court had personal jurisdiction over the defendant on some other basis.

2. Subsection 5(a)(4) of the 1962 Act provides that the foreign court had personal jurisdiction over the defendant if the defendant was “a body corporate” that “had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state.” Subsection 5(a)(4) of this Act extends that concept to forms of business organization other

than corporations.

3. Subsection 5(a)(3) provides that the foreign court has personal jurisdiction over the defendant if the defendant agreed before commencement of the proceeding leading to the foreign-country judgment to submit to the jurisdiction of the foreign court with regard to the subject matter involved. Under this provision, the forum court must find both the existence of a valid agreement to submit to the foreign court's jurisdiction and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

SECTION 6. PROCEDURE FOR RECOGNITION OF FOREIGN-COUNTRY JUDGMENT.

(a) If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment.

(b) If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense.

Comment

Source: This section is new.

1. Unlike the 1962 Act, which was silent as to the proper procedure for seeking recognition of a foreign-country judgment, Section 6 of this Act expressly sets out the ways in which the issue of recognition may be raised. Under section 6, the issue of recognition always must be raised in a court proceeding. Thus, section 6 rejects decisions under the 1962 Act holding that the registration procedure found in the Uniform Enforcement of Foreign Judgments Act could be utilized with regard to recognition of a foreign-country judgment. *E.g.* *Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000). The Enforcement Act deals solely with the *enforcement* of sister-state judgments and other judgments entitled to full faith and credit, not with the *recognition* of foreign-country judgments.

More broadly, section 6 rejects the use of any registration procedure in the context of the foreign-country judgments covered by this Act. A registration procedure represents a balance between the interest of the judgment creditor in obtaining quick and efficient recognition and enforcement of a judgment when the judgment debtor has already been provided with an opportunity to litigate the underlying issues, and the interest of the judgment debtor in being

provided an adequate opportunity to raise and litigate issues regarding whether the foreign-country judgment should be recognized. In the context of sister-state judgments, this balance favors use of a truncated procedure such as that found in the Enforcement Act. Recognition of sister-state judgments normally is mandated by the Full Faith and Credit Clause. Courts recognize only a very limited number of grounds for denying full faith and credit to a sister-state judgment – that the rendering court lacked jurisdiction, that the judgment was procured by fraud, that the judgment has been satisfied, or that the limitations period has expired. Thus, the judgment debtor with regard to a sister-state judgment normally does not have any grounds for opposing recognition and enforcement of the judgment. The extremely limited grounds for denying full faith and credit to a sister-state judgment reflect the fact such judgments will have been rendered by a court that is subject to the same due process limitations and the same overlap of federal statutory and constitutional law as the forum state’s courts, and, to a large extent, the same body of court precedent and socio-economic ideas as those shaping the law of the forum state. Therefore, there is a strong presumption of fairness and competence attached to a sister-state judgment that justifies use of a registration procedure.

The balance between the benefits and costs of a registration procedure is significantly different, however, in the context of recognition and enforcement of foreign-country judgments. Unlike the limited grounds for denying full faith and credit to a sister-state judgment, this Act provides a number of grounds upon which recognition of a foreign-country judgment may be denied. Determination of whether these grounds apply requires the forum court to look behind the foreign-country judgment to evaluate the law and the judicial system under which the foreign-country judgment was rendered. The existence of these grounds for nonrecognition reflects the fact there is less expectation that foreign-country courts will follow procedures comporting with U.S. notions of fundamental fairness and jurisdiction or that those courts will apply laws viewed as substantively tolerable by U.S. standards than there is with regard to sister-state courts. In some situations, there also may be suspicions of corruption or fraud in the foreign-country proceedings. These differences between sister-state judgments and foreign-country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign-country judgment in all cases in which that issue is raised. Although the threshold for establishing that a foreign-country judgment is not entitled to recognition under Section 4 is high, there is a sufficiently greater likelihood that significant recognition issues will be raised so as to require a judicial proceeding.

2. This Section contemplates that the issue of recognition may be raised either as an original matter or in the context of a pending proceeding. Subsection 6(a) provides that in order to raise the issue of recognition of a foreign-country judgment as an initial matter, the party seeking recognition must file an action for recognition of the foreign-country judgment. Subsection 6(b) provides that when the recognition issue is raised in a pending proceeding, it may be raised by counterclaim, cross-claim or affirmative defense, depending on the context in which it is raised. These rules are consistent with the way the issue of recognition most often was raised in most states under the 1962 Act.

3. An action seeking recognition of a foreign-country judgment under this Section is an action on the foreign-country judgment itself, not an action on the underlying cause of action that gave rise to that judgment. The parties to an action under Section 6 may not relitigate the merits of the underlying dispute that gave rise to the foreign-country judgment.

4. While this Section sets out the ways in which the issue of recognition of a foreign-country judgment may be raised, it is not intended to create any new procedure not currently existing in the state or to otherwise effect existing state procedural requirements. The parties to an action in which recognition of a foreign-country judgment is sought under Section 6 must comply with all state procedural rules with regard to that type of action. Nor does this Act address the question of what constitutes a sufficient basis for jurisdiction to adjudicate with regard to an action under Section 6. Courts have split over the issue of whether the presence of assets of the debtor in a state is a sufficient basis for jurisdiction in light of footnote 36 of the U.S. Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977). This Act takes no position on that issue.

5. In states that have adopted the Uniform Foreign-Money Claims Act, that Act will apply to the determination of the amount of a money judgment recognized under this Act.

SECTION 7. EFFECT OF RECOGNITION OF FOREIGN-COUNTRY

JUDGMENT. If the court in a proceeding under Section 6 finds that the foreign-country judgment is entitled to recognition under this [act] then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is:

(1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

(2) enforceable in the same manner and to the same extent as a judgment rendered in this state.

Comment

Source: The substance of subsection 7(1) is based on Section 3 of the 1962 Act. Subsection 7(2) is new.

1. Section 5 of this Act sets out the standards for the recognition of foreign-country judgments within the scope of this Act, and places an affirmative duty on the forum court to

recognize any foreign-country judgment that meets those standards. Section 6 of this Act sets out the procedures by which the issue of recognition may be raised. This Section sets out the consequences of the decision by the forum court that the foreign-country judgment is entitled to recognition.

2. Under subsection 7(1), the first consequence of recognition of a foreign-country judgment is that it is treated as conclusive between the parties in the forum state. Section 7(1) does not attempt to establish directly the extent of that conclusiveness. Instead, it provides that the foreign-country judgment is treated as conclusive to the same extent that a judgment of a sister state that had been determined to be entitled to full faith and credit would be conclusive. This means that the foreign-country judgment generally will be given the same effect in the forum state that it has in the foreign country where it was rendered. Subsection 7(1), however, sets out the minimum effect that must be given to the foreign-country judgment once recognized. The forum court remains free to give the foreign-country judgment a greater preclusive effect in the forum state than the judgment would have in the foreign country where it was rendered. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 481 *comment c* (1986).

3. Under subsection 7(2), the second consequence of recognition of a foreign-country judgment is that, to the extent it grants a sum of money, it is enforceable in the forum state in accordance with the procedures for enforcement in the forum state and to the same extent that a judgment of the forum state would be enforceable. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States §481 (1986) (judgment entitled to recognition is enforceable in accordance with the procedure for enforcement of judgments applicable where enforcement is sought). Thus, under subsection 7(2), once recognized, the foreign-country judgment has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying a judgment of a comparable court in the forum state, and can be enforced or satisfied in the same manner as such a judgment of the forum state.

SECTION 8. STAY OF PROCEEDINGS PENDING APPEAL OF FOREIGN-COUNTRY JUDGMENT. If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires, or the appellant has had sufficient time to prosecute the appeal and has failed to do so.

Comment

Source: This section is the same substantively as section 6 of the 1962 Act, except that it adds as an additional measure for the duration of the stay “the time for appeal expires.”

1. Under Section 3 of this Act, a foreign-country judgment is not within the scope of this Act unless it is conclusive and enforceable where rendered. Thus, if the effect of appeal under the law of the foreign country in which the judgment was rendered is to prevent it from being conclusive or enforceable between the parties, the existence of a pending appeal in the foreign country would prevent the application of this Act. Section 8 addresses a different situation. It deals with the situation in which either (1) the party seeking a stay has demonstrated that it intends to file an appeal in the foreign country, although the appeal has not yet been filed or (2) an appeal has been filed in the foreign country, but under the law of the foreign country filing of an appeal does not affect the conclusiveness or enforceability of the judgment. Section 8 allows the forum court in those situations to determine in its discretion that a stay of proceedings is appropriate.

SECTION 9. STATUTE OF LIMITATIONS. An action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country.

Comment

Source: This Section is new. The 1962 Act did not contain a statute of limitations. Some courts applying the 1962 Act have used the state's general statute of limitations, *e.g.*, *Vrozos v. Sarantopoulos*, 552 N.E.2d 1053 (Ill. App. 1990) (as Recognition Act contains no statute of limitations, general five-year statute of limitations applies), while others have used the statute of limitations applicable with regard to enforcement of a domestic judgment, *e.g.*, *La Societe Anonyme Goro v. Conveyor Accessories, Inc.*, 677 N.E. 2d 30 (Ill. App. 1997).

1. Under Section 3 of this Act, this Act only applies to foreign-country judgments that are conclusive, and if the judgment grants recovery of a sum of money, enforceable where rendered. Thus, if the period of effectiveness of the foreign-country judgment has expired in the foreign country where the judgment was rendered, the foreign-country judgment would not be subject to this Act. This means that the period of time during which a foreign-country judgment may be recognized under this Act normally is measured by the period of time during which that judgment is effective (that is, conclusive and, if applicable, enforceable) in the foreign country that rendered the judgment. If, however, the foreign-country judgment remains effective for more than fifteen years after the date on which it became effective in the foreign country, Section 9 places an additional time limit on recognition of a foreign-country judgment. It provides that, if the foreign-country judgment remains effective between the parties for more than fifteen years, then an action to recognize the foreign-country judgment under this Act must be commenced within that fifteen year period.

2. Section 9 does not address the issue of whether a foreign-country judgment that can no longer be the basis of a recognition action under this Act because of the application of the fifteen-year limitations period in Section 9 may be used for other purposes. For example, a common rule with regard to judgments barred by a statute of limitations is that they still may be used defensively for purposes of offset and for their preclusive effect. The extent to which a foreign-country judgment with regard to which a recognition action is barred by Section 9 may be used for these or other purposes is left to the other law of the forum state.

SECTION 10. UNIFORMITY OF INTERPRETATION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

Source: This Section is substantively the same as Section 8 of the 1962 Act. The section has been rewritten to reflect current NCCUSL practice.

SECTION 11. SAVING CLAUSE. This [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act].

Comment

Source: This section is based on Section 7 of the 1962 Act.

1. Section 3 of this Act provides that this Act applies only to certain foreign-country judgments that grant or deny recovery of a sum of money. The purpose of this Act is to establish the minimum standards for recognition of those judgments. Section 11 makes clear that no negative implication should be read from the fact that this Act does not provide for recognition of other foreign-country judgments. Rather, this Act simply does not address the issue of whether foreign-country judgments not within its scope under Section 3 should be recognized. Courts are free to recognize those foreign-country judgments not within the scope of this Act under common law principles of comity or other applicable law.

SECTION 12. EFFECTIVE DATE.

[(a) This [act] takes effect

[(b) This [act] applies to all actions commenced on or after the effective date of this [act] in which the issue of recognition of a foreign-country judgment is raised.]

Comment

Source: Subsection 12(a) is the same as Section 11 of the 1962 Act. Subsection 12(b) is new.

1. Subsection 12(b) provides that this Act will apply to all actions in which the issue of recognition of a foreign-country judgment is raised that are commenced on or after the effective date of this Act. Thus, the application of this Act is measured not from the time the original action leading to the foreign-country judgment was commenced in the foreign country, but rather from the time the action in which the issue of recognition is raised is commenced in the forum court. Subsection 12(b) does not distinguish between whether the purpose of the action commenced in the forum court was to seek recognition as an original matter under Subsection 6(a) or was an action that was already pending when the issue of recognition was raised under Subsection 6(b).

SECTION 13. REPEAL. The following [acts] are repealed:

- (a) Uniform Foreign Money-Judgments Recognition Act,
- (b)

.]

Comment

Source: This Section is an updated version of Section 10 of the 1962 Act.

APPENDIX 10



1 of 1 DOCUMENT

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ARTICLE: ACCESS TO FEDERAL COURTS AND SECURITY FOR COSTS AND FEES

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LEXISNEXIS SUMMARY:

This article presents the historical development of the practice of requiring security for costs and attorney fees, and suggests the necessity of a method that promotes the satisfaction of costs and fees and that is consistent and fair to all parties. Part I examines the development of the law in this area. Part II examines and critiques the procedures that some courts have used to decide whether a litigant is obligated to post a cost bond. Lastly, Part III maintains that authorizing federal courts to extend their judicial reach beyond current jurisdictional limits would obviate much of the need for security, while promoting the satisfaction of awards of costs and attorney fees. In addition, Part III suggests alternative methods of furthering the efficient satisfaction of awards of costs and fees.

TEXT:

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Well before summary judgment motion practice, courts often entertain motions as to whether security should be posted for potential costs and attorney fees that may be awarded at the end of the action. n1 Some courts have deemed a plaintiff's failure to post such security to be grounds for dismissing the action, n2 so the consequences of such motions can be important indeed. It is also important to note that courts decide the outcome of motions for security before it is finally determined how much, or whether, fees and costs will be awarded. n3

[*954] Many federal courts have enacted local rules n4 authorizing the imposition of security for costs and fees. n5 While bonds as low [*955] as a few hundred dollars have been required, courts have also imposed bonds exceeding

ten thousand dollars, particularly in certain intellectual property cases where a prevailing party may be awarded attorney fees pursuant to statute. n6

Although the general concept of requiring security for fees and costs has been adopted by courts over the years, commentators have not addressed the subject. As we will see, the requirement of cost bonds by federal courts, and the decision to dismiss a case for failure to post such bonds, raise issues of efficiency and basic fairness.

Is arranging for the satisfaction of a potential judgment of costs and fees by requiring security a good thing? Does the value of requiring security outweigh other considerations, and could the process' goals be accomplished in a more satisfactory way? For example, are non-resident litigants and resident litigants treated equally? Is the practice of requiring security solely of non-resident plaintiffs fair? Does equal protection require altering or even eliminating the practice of requiring security solely from non-resident plaintiffs?

Furthermore, upon a motion for security raised at the early stages of a lawsuit, should a court consider the merits of the underlying claims? In a number of cases, courts have made fairly lengthy determinations regarding the likelihood that the plaintiff will fail on the merits of the underlying claim and that, consequently, an adverse judgment of costs or fees will arise. n7 An issue arises as to whether debating the merits of the underlying claim before the close of discovery is a sound practice. Moreover, if it is a sound practice in the context of a motion for security, then what standards of proof should apply?

This article presents the historical development of the practice of requiring security for costs and attorney fees, and [*956] suggests the necessity of a method that promotes the satisfaction of costs and fees and that is consistent and fair to all parties. Part I examines the development of the law in this area. Part II examines and critiques the procedures that some courts have used to decide whether a litigant is obligated to post a cost bond. Lastly, Part III maintains that authorizing federal courts to extend their judicial reach beyond current jurisdictional limits would obviate much of the need for security, while promoting the satisfaction of awards of costs and attorney fees. In addition, Part III suggests alternative methods of furthering the efficient satisfaction of awards of costs and fees.

I. Historical Background

A. Security for Costs in England

Under early English law, a prevailing party could not recover its litigation costs. n8 In the late thirteenth century, however, England enacted the Statute of Gloucester, n9 which permitted the prevailing party in certain actions to recover costs. n10 Under the English rule as to costs and fees, the [*957] prevailing party could recover litigation costs, including attorney fees. n11 Security for costs, however, did not become routine practice until several centuries after the Statute of Gloucester. n12 Security bonds were considered ill advised because they were viewed as an unfair barrier to trade and to the courts. n13 By the late eighteenth century other European courts were requiring security for costs. n14 In light of this development, English judges thought it would be appropriate to require foreign plaintiffs, including those from Ireland and Scotland, to post security. n15

[*958] The practice of requiring foreign plaintiffs to post security for costs must be viewed against the background of the courts' limited power to require foreigners to appear before them, e.g., the development of limited in rem jurisdiction. n16 At common law, a judgment was often regarded as the grounds to levy an execution against a party's person or land. The party's presence within the jurisdiction of the court was a key element to the enforcement of a judgment. n17 Because the courts' jurisdiction was limited to property within England, the purpose of a bond was to secure payment of potential costs from non-English litigants. n18 Courts routinely stayed proceedings until the plaintiff posted a bond. n19 Security was not required, however, in circumstances where a party could not afford to post a bond. n20

B. Development of Security in the United States

In the early years of the United States, a number of jurisdictions required security for costs, continuing the English practice. n21 Courts required security bonds to ensure that prevailing defendants could recover costs from non-resident [*959] plaintiffs at the conclusion of an action. n22 "Costs" included attorney fees only where specified by statute or by prior agreement between the parties. n23

The courts' power to compel non-residents to appear before them is analogous to the limited reach of national courts over individuals residing overseas. n24 It is this territorial-based concept of jurisdiction that the United States Supreme Court adopted in *Pennoyer v. Neff*. n25 In *Pennoyer*, the Court was confronted with the issue of the effect of a default judgment against an out-of-state defendant. The Court held that a state could not exercise process, and thereby exert jurisdiction, over a person or property beyond its territory. n26 Writing for the majority, Justice Field stated that "no tribunal established by [a state] can extend its process beyond that territory so as to subject either persons or property to its decisions." n27 The [*960] principle that state and federal courts may not extend their process beyond a limited territorial area has prevailed. n28

II. Requirements for Security in Federal Practice

A. Security in the Federal System

Prior to enactment of the Federal Rules of Civil Procedure in 1938, n29 the Conformity Act of 1872 n30 required federal district courts to apply state law in various procedural matters. n31 Thus, the Act obligated courts to apply state law in determining whether to require security for costs. n32 With the enactment of the Federal Rules of Civil Procedure, however, district courts were permitted to adopt their own local rules of practice in the absence of an applicable conflicting Federal Rule. n33 [*961] Accordingly, the federal courts enacted local rules providing for security for costs. n34

We have seen that the general concept of security for costs or fees is well established. A court should be able to arrange for its ability to enforce awards of costs or fees. But as discussed below, the actual practices of choosing when to require security and dismissing a case because of the failure to post security, raise fairness issues for federal courts. These issues are similar to the concerns of the English courts that also hesitated to require security. In particular, is a bond based on non-residence fair? If not, should other factors be considered, and if so, in what manner?

B. Federal Practice of Requiring Security

1. Development of Criteria for Requiring Security

In the 1950s and 1960s, courts began to tentatively address the complex issues surrounding security for costs. Addressing a trial order for bond for costs, the Second Circuit held that "there does not seem justification for a court of the United States to put an arbitrary and unbending clog on suits by one of its own citizens merely because he does not have the good fortune to live in New York." n35 Some courts, citing to the Equal Protection Clause of the United States Constitution, n36 have implied or stated that requiring a bond solely based on the residence of a litigant is unconstitutional, but this view has not been adopted or elaborated upon to a great degree. n37

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2. Factors Considered by the Courts Under a Multi-Factored Approach

In 1976, the United States Court of Appeals for the First Circuit synthesized relevant factors considered by courts in determining whether security for costs should be imposed. n38 The First Circuit enumerated the following factors: "Ownership by a non-domicillary plaintiff of attachable property in the district, the likelihood of success on the merits, the presence of a co-plaintiff who is domiciled in the district, the probable length and complexity of the litigation, the

conduct of the litigants, and the purposes of the litigation." n39

[*963] The United States Court of Appeals for the Ninth Circuit and the district courts in the Second Circuit have discussed similar multi-factored criteria. n40 Appellate courts in the First, Second, and Ninth circuits have reviewed the application of these factors under an abuse of discretion standard. n41

The use of various factors in deciding whether security for costs is warranted has left the law somewhat unsettled. What follows is a discussion of the development of the case law regarding this multi-factored approach.

a. Ownership of Attachable Property Within the Forum

Cases touching on the issue of security for costs typically focus on plaintiffs domiciled outside of the forum jurisdiction who are without attachable assets to satisfy a potential award of costs and fees. n42 But the precise type of proof necessary to [*964] establish that a plaintiff will be unable to satisfy an award of costs and fees is not always clear. n43 Indeed, appellate courts generally have not set clear standards as to how a court should proceed when the plaintiff lacks assets or credit to post a bond for costs and fees. Some appellate courts have stressed that the financial ability of the party to post a bond must be considered, n44 and, upon considering a plaintiff's income status, have waived the imposition of fees and costs and the requirement of posting a [*965] bond. n45 Other courts, however, have taken the exact opposite approach, concluding that the circumstances of a plaintiff's financial shortcomings justify the need for security for costs and fees. n46 Still other courts have required a bond, but only after concluding that the amount of the bond would not seriously impede the plaintiff's ability to prosecute the action. n47

b. Likelihood of Success on the Merits

Some courts have found that a plaintiff's likelihood of success on the merits is worth considering with respect to a motion for security for costs. n48 Courts, however, have not set formal thresholds of proof when considering the merits of an action in such circumstances. n49 In addition, courts have not addressed the situation that arises when, in the early stages of [*966] the litigation, there is an insufficient record to determine whether a case lacks merit. n50 Similarly, it is not clear which party on a motion for security bears the burden of proof regarding the merits of the claim.

Some district courts have refused to consider the likelihood of success on the merits in the calculus of whether a bond should be required. n51 Courts often hold that a bond is required even though the case may survive a motion to dismiss for plaintiff's failure to state a cognizable cause of action. n52 In *Thompson v. Avco Corp.*, n53 the district court held that even though the plaintiff's amended complaint withstood dismissal for failure to state a claim, a \$ 10,000 bond was appropriate because the amended complaint was "not in all the circumstances a likely harbinger of ultimate success." n54 In *Fisch v. Fidelcor Business Credit Corp.*, n55 the district court granted the defendant's motion for an order requiring the plaintiffs to post a \$ 10,000 bond for costs, stating that "there appears to be unusually serious problems with the merits of plaintiffs' case" because the plaintiff initially refused to comply with deposition requests. n56

c. The Conduct of the Litigants and Purposes of the Litigation

There are two categories of cases where the conduct of one of the parties indicates bad faith justifying a requirement that such [*967] party post a bond as a condition of continuing to litigate. The first category involves cases where the litigant had repeatedly advanced similar claims that were previously dismissed. n57 Similarly, a substantial bond may be required when the court determines that it likely will award attorney fees based on the plaintiff's demonstrated bad faith in pursuing the action. n58 In *Bressler v. Liebman*, n59 a substantial bond was required after the court observed that the plaintiff's claims were previously rejected in state court. n60 In addition, the court noted the plaintiff's misrepresentation of the judge's statements as another example of the plaintiff's bad faith and as further grounds for imposing a substantial bond to secure the defendant's ability to recover attorney fees. n61

The second category of cases involves misconduct in disobeying court orders. n62 In *Argonaut Insurance Co. v. Goepfert*, n63 the court required the defendant to post a bond, noting that the defendant had "procrastinated and engaged in dilatory tactics." n64 In *Selletti v. Carey*, n65 the court found that a plaintiff, with only \$ 500 in identifiable assets, offered virtually no evidence to support his copyright claim. n66 In addition, the court found that the plaintiff violated the district court's discovery orders and provided information to the media that he withheld from discovery. n67 The court held that, under these circumstances, requiring the plaintiff to post a bond was warranted. In requiring the defendant to post security, the district court stated: "it is difficult to understand why [the plaintiff] would not have pursued this case more aggressively and produced in discovery, as required both by the Federal Rules and my orders, the evidence he contends supports his claims, if he actually had a good faith belief in the validity of those claims." n68

d. The Probable Length and Complexity of the Litigation

Security for costs may range from a few hundred dollars to ten thousand dollars or more, depending on the court's opinion regarding specific litigation expenses. n69 In contemplating litigation expense, courts consider such factors as the extent of discovery, the general complexity of the litigation, and whether the litigation will involve extensive travel. n70

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3. Cost Bonds and Attorney Fees

Costs typically include outlays for litigation expenses such as "the stenographic costs of the depositions, witness fees, notarial certificates, and postage, as well as the costs of preparing maps, charts, graphs, financial summaries and surveys, and drawings." n71 The amount of the bond, however, can rise dramatically when the party seeking the bond may be entitled to attorney fees as provided in a statute or in a prior agreement between the parties. n72 For example, the Copyright Act n73 provides for the recovery of attorney fees by the prevailing party. n74 In copyright cases, courts have required plaintiffs to post substantial bonds, including attorney fees. n75

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4. Description of a Motion for Security

In jurisdictions that focus on the factors set forth in section II.B.2, the party moving for security for costs will typically provide the court with proof that its adversary lacks substantial assets within the court's jurisdiction so that a judgment of costs and fees cannot be satisfied. n76 In addition, the moving party will attempt to demonstrate that its adversary's case lacks merit. n77 Furthermore, motion papers typically provide justification for the proposed amount of the bond. n78 Some courts look to the moving party's estimate of the length of discovery, number of depositions, travel-time, and other costs to justify the proposed amount of the bond. n79

5. Constitutional Framework

The United States Supreme Court has not specifically addressed the constitutionality of imposing security for costs solely based upon the non-resident status of a plaintiff. Citing the Equal Protection Clause of the Constitution, n80 the United States Courts of Appeals for the First and Second Circuits have questioned the imposition of cost bonds solely based on a plaintiff's non-resident status. n81 Nevertheless, numerous district courts provide for a mechanism of requiring non-residents to post security for costs. n82

[*971] The Supreme Court has held that, in general, an individual has a fundamental right of access to the courts. n83 This right may be curtailed, however, upon a showing of an overriding state interest. n84 In *Boddie v. Connecticut*, n85 the Supreme Court struck down a state law that required a party, despite being indigent, to pay a filing fee to procure a divorce. n86 On several occasions, however, courts have refrained from extending the right of access to the

courts beyond the facts of *Boddie*.ⁿ⁸⁷ Several appellate courts have upheld the constitutionality of laws requiring prisoners, proceeding in *forma pauperis*, to provide a portion of their average monthly income toward filing fees.ⁿ⁸⁸ [*972] Courts have also upheld the constitutionality of injunctions imposed to prevent litigants from filing nuisance suits.ⁿ⁸⁹ Indeed, the First Circuit has refused to extend *Boddie* to invalidate a court rule that requires security only from nondomiciliary plaintiffs.ⁿ⁹⁰

III. Critique of the Current Law of Requiring Security

A. Difficulties with the Current Practice

Is arranging for the satisfaction of a potential judgment of costs and fees by requiring security a good thing? The answer is yes and no. While there may be value in ascertaining a party's ability to pay potential fees and costs in advance, the process also raises problems. Most fundamentally, a bond requirement solely for non-residents reflects a conflict between federal courts' limited power to enforce a judgment and the principle of equality among litigants. Litigation between a resident of the forum and a non-resident is treated differently from litigation between two residents of the forum. Indeed, the First and Second Circuits have suggested that requiring a bond solely based on a litigant's non-resident status violates the Equal Protection Clause of the United States Constitution.ⁿ⁹¹

The practice of commenting upon the merits of a case also presents a problem when such comments are made without a hearing and prior to the close of discovery. If the court conditions continued progress of the case upon posting of security, the [*973] impact upon the case is obvious: the plaintiff must post security or face dismissal. Moreover, even without ordering the case to be dismissed, the court may tacitly convince the plaintiff to withdraw from prosecuting its claim by telegraphing the court's views on the merits of the case. All this could occur without a hearing and full discovery.

The impact of a court's comments on the merits of a claim can be demonstrated with the use of an algebraic model. Let us assume that a theoretical plaintiff expects a positive return on his lawsuit. The plaintiff seeks recovery in an amount labeled A , believes his or her probability of success is P , and has a projected cost of litigation, including attorney fees, of C . First, assume that the court requires the plaintiff to post a bond solely based on the plaintiff's non-resident status - without commenting on the merits of the case - and that the plaintiff will have to post a bond in the amount B . The opportunity cost to the plaintiff of its tying up this amount is Y . The plaintiff will prosecute its claim if $P \times A - ((100\% - P) \times B) - Y - C > 0$.ⁿ⁹² If the plaintiff has brought a lawsuit pursuant to a statute that provides for the recovery of costs and attorney fees, the plaintiff will consider C to approach zero if P is greater than 50%.ⁿ⁹³

On the other hand, assume that a court requires the plaintiff to post a bond because, among other things, the court finds that the plaintiff's claim appears to lack merit. Since the court has now telegraphed its views on the plaintiff's case, the plaintiff may consider P to approach zero. Under these circumstances, the plaintiff will assume that it will not be able to recover costs and attorney fees. $P \times A - ((100\% - P) \times B) - Y - C$ is now less than zero and, therefore, the plaintiff is likely not to proceed to prosecute its claim.

The fact that requiring such security may be a condition of allowing the case to continue, or may cause a plaintiff to withdraw the case, as demonstrated above, shows that the repercussions of the security requirements are quite significant. In light of the significant consequences of requiring a plaintiff to [*974] post a bond and the lack of uniform procedure for imposing costs bonds, courts are left with the task of finding a workable solution that provides for the satisfaction of a judgment for costs and fees, while ensuring that a plaintiff has the benefits of discovery and a hearing prior to a determination on the merits of its case.

B. Abandoning Jurisdictional Limitations on the Collection of Costs in Federal Court

The limited jurisdictional power of federal courts, pursuant to *Pennoyer* and its progeny,ⁿ⁹⁴ has prompted several commentators to suggest the benefits of expanded, or even nationwide, service of process and subpoena power in

federal actions. n95 As noted by several commentators, limited jurisdiction in the federal court system was not an inevitable development, particularly in light of the American concept of dual sovereignty. n96 Nevertheless, the notion that a state or federal court may not extend its process beyond a limited territorial area endures. n97

Extending the courts' power to enforce a judgment of costs and fees in foreign jurisdictions presents one method of eliminating the need for security for costs in most cases. A judgment rendered in a federal district court in New York would thus be received and enforced in California with the same [*975] efficiency, and in the same manner, as a judgment rendered in California. Therefore, abandoning jurisdictional limitations on the ability to enforce a judgment for costs would lower the risk of a premature determination of the merits that could arise in a determination on whether security was appropriate, and avoid the necessity of a separate action in a foreign jurisdiction to enforce a judgment for costs and fees.

C. Elimination/Modification of Consideration of the Merits from Security Determination

An alternative approach to ameliorate some of the shortcomings of the current practice of requiring security for costs would require reasonable security for costs from all non-resident plaintiffs, except those financially unable to post security. n98 If reasonably valued bonds were required of all non-resident plaintiffs, judicial determinations of the merits of a claim to determine whether security was appropriate would be unnecessary.

Additionally, courts should consider modifying the manner in which they examine the merits of an action in the context of a motion for security for costs and fees. Upon a motion for significant security, a judicial determination of the merits of a claim should not be made without a court hearing. Furthermore, the courts could postpone considering the merits of a claim until the parties have been afforded a reasonable amount of discovery. Where, however, the litigant's claim has already been dismissed in a prior lawsuit and a full record has been established, such as in the case of a clearly vexatious litigant, the court might eliminate the prerequisite of additional discovery.

Conclusion

Security for costs is a common and often significant aspect of civil litigation in the federal district courts. English courts began requiring security in the late eighteenth century, and this practice continued in the United States to ensure that plaintiffs would satisfy potential judgments for costs. As the law in this [*976] area developed in the United States, courts began conditioning a requirement that a plaintiff post security upon the relative merits of the plaintiff's underlying claims.

The subject of requiring security for costs and fees has not been addressed by commentators. Is arranging for the satisfaction of a potential judgment of costs and fees by requiring security a good thing? As has been pointed out, the answer is yes and no. As discussed above, the courts have understandably found value in ascertaining a party's ability to pay potential fees and costs in advance. However, the process also raises problems. First, the courts have not adequately addressed the fairness of considering and discussing the merits of the plaintiff's case at a relatively early stage of the litigation. Second, the courts have not resolved the issue of whether it is fair to require security solely based on a litigant's residence, or whether security is precisely necessary to ensure the ability to enforce a judgment of costs and fees against non-residents to the same extent as against residents.

Extending the courts' power to enforce a judgment of costs and fees in foreign jurisdictions would, in many instances, eliminate the need for security. Alternatively, upon a motion for security, courts should conduct a hearing regarding the merits of the claims after the parties have been afforded a reasonable amount of discovery so that a full record may be established before a bond is required.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Judgments Entry of Judgments Enforcement & Execution Writs of Execution Constitutional Law Equal Protection Scope of Protection Criminal Law & Procedure Bail General Overview

FOOTNOTES:

n1. See, e.g., *Van Bui v. Children's Hosp.*, 178 F.R.D. 54, 56 (E.D. Pa. 1998) (dismissing plaintiff's complaint for failure to file security for costs), *aff'd*, 178 F.3d 1278 (3d Cir. 1999); *Selletti v. Carey*, 173 F.3d 104, 112 (2d Cir. 1999) (discussing whether plaintiff's inability to post security warrants dismissal); *Johnson v. Kassovitz*, No. 97 Civ. 5789 (DLC), 1998 U.S. Dist. LEXIS 15059, at 5 (S.D.N.Y. Sept. 17, 1998) (requiring plaintiff to file a \$ 50,000 bond for potential costs); *Bressler v. Liebman*, No. 96 Civ. 9310 (LAP), 1997 U.S. Dist. LEXIS 11963, at 26 (S.D.N.Y. Aug. 14, 1997) (ordering dismissal of plaintiff's action unless, within five days, plaintiff files a \$ 50,000 bond as security for defendants' fees and costs).

n2. See *Van Bui*, 178 F.R.D. at 56; *Bressler*, 1997 U.S. Dist. LEXIS 11963, at 26.

n3. The terms "security for costs" and "cost bond" refer to a bond posted as security for payment of a potential adverse award of costs, which may or may not include attorney fees. Security for costs is the "payment into court in the form of cash, property or bond by a plaintiff or an appellant to secure the payment of costs if such person does not prevail." Black's Law Dictionary 1357 (6th ed. 1990). A cost bond is "[a] bond given by a party to an action to secure the eventual payment of such costs as may be awarded against him." *Id.* at 346. They are distinguishable from supercedas bonds, which are posted prior to appeal, and are defined as being "required of one who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is unsuccessful". See *id.* at 1438.

n4. See, e.g., D. Alaska Adm. R. 6 (providing that any party to a litigation can file a demand for security for costs); D. Ariz. R. 2.19(c) (security for costs may be demanded from non-resident plaintiffs); E.D. Ark. and W.D. Ark. L.R. 4.2(b) ("The Court, on motion or of its own initiative, may order any party plaintiff, either resident or non-resident, to file an original bond for costs ..."); C.D. Cal. L. Civ. R. 27A.2 (stating that the court, on motion or its own initiative, may order any party to post security for costs); E.D. Cal. L. Civ. R. 65.1-151(b) (same); N.D. Cal. L. Civ. R. 65.1-1(a) (upon demand by a party, and for good cause shown, a party may be required to post a security); S.D. Cal. L. Civ. R. 65.1.2(a) (same); D. Conn. L. Civ. R. 8(a) (defendants, or plaintiffs if there is a counterclaim, are entitled, upon request to the clerk, to an order for security); M.D. Fla. Adm. and Mar. R. 7.05(e)(2)-(3) (any party to an action may request security for costs); S.D. Ga. Adm. and Mar. L.R. 5(a) (providing for mandatory filing of security in certain maritime claims); D. Haw. L.R. 65.1.1 ("The court, on motion or of its own initiative, may order any party to file an original bond or additional security for costs ..."); Bankr. N.D. Ill. R. 419 ("Upon good cause shown, the court may order the filing of a bond as security for costs"); E.D., M.D. and W.D. La. L.R. 54.6 ("The court, on motion or its own initiative, may order any party to file bond for costs ..."); E.D., M.D. and W.D. La. L.R. 65.1.1 (delineating acceptable sureties for bonds furnished in connection with a civil proceeding); D. Me. Civ. R. 54.1 (providing that a defendant may request security for costs from a non-resident plaintiff); D. Md. Civ. R. 103(4) (a non-resident plaintiff may be

required to post a security for costs); D. Neb. L.R. 67.1(f) ("The court on motion or on its own initiative may order any party to file an original bond for costs ..."); D.N.H. L.R. 67.1(a) ("The court, either on its own initiative or on the motion of a party, may order any party except the United States to file an original bond for costs ..."); D.N.J. L. Adm. and Mar. R. (e)(7) ("[A] party may move ... to compel an adverse party to post security for costs ..."); E.D.N.Y. and S.D.N.Y. L.R. 54.2 ("The court on motion or on its own initiative, may order any party to file an original bond for costs ..."); N.D.N.Y. L.R. 67.3(e) (same); W.D.N.C. L.R. 3.1(B) ("In both civil and criminal actions, bonds shall be allowed and taken with security ..."); N.D. Ohio L.R. 65.1.1(a) ("The Court, on motion or its own initiative, may order any party to file an original bond ..."); E.D. Okla. L.R. 65.1.1(B) ("The court may at any time order any party to give security..."); N.D. Okla. L.R. 65.1.1(B) (same); D. Or. Adm. L.R. 1020-1 ("Any party may file and serve upon an adverse party a demand for security for costs ..."); E.D. Pa. Civ. R. 54.1(a) (an order for security for costs may be entered against a non-resident plaintiff); W.D. Pa. L.R. 67.1(A) (same); D.R.I. R. 25(a) (the court may order any party to furnish security for costs); E.D. Wis. R. 3 3.01 (the court may order the posting of security from any party); E.D. Wis. R. 22 22.05 (requiring filing security for costs in admiralty and maritime claims).

n5. Even in the absence of a local rule, courts have imposed security. See *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 143 (1st Cir. 1976) ("Even in the absence of a standing local rule, a federal district court has the inherent power to require security for costs when warranted by the circumstances of the case.").

n6. See *Selletti*, 173 F.3d at 111 (holding that the requirement of a security bond in the amount of \$ 50,000 in an action brought in violation of the Copyright Act, was "well within the district court's discretion"); *Beverly Hills Design Studio (N.Y.) Inc. v. Morris*, 126 F.R.D. 33, 39 (S.D.N.Y. 1989) (requiring security for costs and attorney fees in the amount of \$ 20,000 in an action to recover damages for copyright and trademark infringement); see also *Anderson v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495, 496 (7th Cir. 1993) (affirming a \$ 10,000 bond requirement in an action brought to recover damages for trademark infringement and unfair competition).

n7. See *Anderson*, 998 F.2d at 496 (noting the apparent "frivolous character" of plaintiff's claims); *Beverly Hills Design Studio*, 126 F.R.D. at 39 (noting that "plaintiffs' federal claims seem to be of dubious merit").

n8. See 4 William Holdsworth, *A History of English Law* 536-37 (3d ed. 1945) (commenting that the "amercement of the vanquished party was ... considered a sufficient punishment" at common law therefore costs were not necessary); 2 William Tidd, *The Practice of the Courts of King's Bench and Common Pleas* 945 (9th ed. 1828) ("No final costs were recoverable, by the plaintiff or defendant, at common law."); 6 Charles Viner, *A General Abridgment of Law and Equity* 321-25 (2d ed. 1792) (discussing the evolution of cost recovery under English law and the eventual inclusion of costs as an element of damages through the passage of the Statute of Gloucester); see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (commenting that at common law "costs were not allowed").

n9. 6 *Edw. 1*, c. 11 (1278), reprinted in 1 *The Statutes of The Realm* 47 (1993).

n10. See *id.* (providing for recovery of damages and costs in particular property actions); 4 Holdsworth, *supra* note 8, at 537 (noting the Statute of Gloucester "laid down the rule that a plaintiff who recovered damages should always be entitled to costs"); 2 Tidd, *supra* note 8, at 945 (explaining the Statute of Gloucester extended to cases where damages were recoverable at common law or by the provisions of the statute such as "covenant, debt on contract, case, trover, trespass, assault and battery, replevin, ejectment [and] dower"); 6 Viner, *supra* note 8, at 321-33 (discussing the development of recovery of litigation costs in England and to whom such costs are awarded under the Statute of Gloucester); see also *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (commenting that "as early as 1278, the courts of England were authorized to award counsel fees ...").

n11. See Arthur L. Goodhart, *Costs*, 38 *Yale L.J.* 849, 856 (1929) ("It is common understanding in America that the difference between the American and the English rules as to costs lies in the fact that under the English system the successful party may recover the charges he has to pay his own lawyer."); see also *Fleischmann, 386 U.S. at 717 n.7* ("This statute ... was from the outset liberally construed to encompass all legal costs of suit ...").

n12. See, e.g., Access to Justice Act, 1999, c. 22, 11 (Eng.) (stating that security may be required); Land Registry Act, 1862, 9 10 Vict., c. 53, 44 (Eng.) (providing that a court may require applicants to give security); see also 1 William Tidd, *Practice of the Courts of King's Bench and Common Pleas* 61-62 (1793).

n13. See 1 Tidd, *supra* note 12 at 61-62; see also *Nuncomar v. Burdett*, 98 *Eng. Rep.* 1020 (*K.B.* 1774) (refusing to stay an action until security is given for costs, even though the plaintiff resided in the East Indies noting "it is every day refused. I have many notes of its being so"); *Golding v. Barlow*, 98 *Eng. Rep.* 948 (*K.B.* 1774) ("Lord Mansfield said, that the Court would not do it in the case of a foreigner's being a plaintiff; nor in matters of property, except in ejectment, where the lessor of the plaintiff is an infant."); *Bosewell v. Irish*, 98 *Eng. Rep.* 98 (*K.B.* 1767) (denying a defendant's motion seeking to impose security for costs upon a non-resident plaintiff and stating that such motions were altogether "contrary to rule" and "clogging the course of justice"); *Lamii v. Sewell*, 95 *Eng. Rep.* 610 (*K.B.* 1750) (denying a defendant's motion to compel a non-resident plaintiff to post a security for costs, or a stay of proceedings until security is posted, "because it would affect trade, and be excluding foreigners from obtaining justice in our Courts"); *Cowell v. Taylor*, 31 L.R. 34, 38 (Ch. App. 1885) (holding that there is no requirement of security for costs from a bankrupt trustee because poverty should not bar a litigant from the courts).

n14. See 1 Tidd, *supra* note 12 at 61-62; *Fitzgerald v. Whitmore*, 99 *Eng. Rep.* 1140 (*K.B.* 1786) (noting that English residents were required to give security for costs when pursuing claims in European countries); see also Burkhard Bastuck & Burkhard Gopfert, *Admission and Presentation of Evidence in Germany*, 16 *Loy L.A. Int'l & Comp. L.J.* 609, 627 (1994).

n15. See *Fitzgerald*, 99 Eng. Rep. at 1140.

The reason why such a rule had lately been adopted, contrary to the former determinations, in the case of foreigners, was, because English subjects who sued in most of the foreign countries in Europe were under a similar necessity of giving security for costs... The same reason which induced the court to lay down the rule with respect to foreigners, namely, because the process of our courts would not reach them in case an execution issued for the costs, held equally with respect to Irishmen.

Id. (footnotes omitted).

n16. See *Picquet v. Swan*, 19 F. Cas. 609, 612-13 (D. Mass. 1828) (No. 11,134) (explaining that although a party may not be personally bound to a judgment if he is not within the territory, if his property is within such territory the judgment will bind him to the extent of the value of the property).

n17. See 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 1070 (2d ed. 1987) (explaining that physical power over a defendant or its property is a prerequisite to a judgment's validity); *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877) (ruling a personal judgment against a non-resident party invalid); *Lafayette Ins. Co. v. French*, 18 U.S. 404, 406 (1855) (stating that defendant must be personally within the jurisdiction of the state, or have legal notice of the suit, for the judgment against him to be valid).

n18. See *Fitzgerald*, 99 Eng. Rep. at 1140 (noting that process of the English courts could not reach foreign litigants to secure costs).

n19. See *id.* (staying further proceedings until the plaintiff, a resident of Ireland, gives security for costs); see also 1 Edmund Robert Daniell, *Pleading and practice of the High Court of Chancery* 28 (6th ed. 1894) (noting the English rule that if the plaintiff "is resident abroad, the Court will, on the application of the defendant ... order [the plaintiff] to give security ... and in the mean time direct all proceedings to be stayed").

n20. See Goodhart, *supra* note 11, at 875 ("The English Rules of Court are specific that security shall never be required in the court of first instance on the ground of the plaintiff's poverty."); 4 Holdsworth, *supra* note 8, at 538 (explaining poor persons should be entitled to access to the courts regardless of their ability to pay costs).

n21. See, e.g., *McEwen v. Gibbs*, 4 Dall. 137, 137 (Pa. 1794) (requiring security for costs from a "certified bankrupt" plaintiff); *Shaw v. Wallace*, 2 Dall. 179, 179-80 (Pa. 1792) (requiring security for costs from a New York plaintiff).

n22. See 1 Daniell, *supra* note 19, at 27-28 ("In order ... to prevent the defendant or respondent ... from being defeated of his right to costs, it is a rule, that if the plaintiff ... is resident abroad, the Court will ... order him to give security"); see also *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 561 (1920) (commenting that "security for costs has very generally been required of a non-resident, but not of a resident").

n23. In England, costs were highly regulated by law and included not only fees for ministerial items such as clerks' fees, but also, attorney fees. On the other hand, in the United States the situation was different. In the states' courts, a prevailing party could recover costs, which were often regulated by statute. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *Law & Contemp. Probs.* 9, 12-14 (1984) (reviewing the history of the English and American rules regarding attorney fees collection). The United States Supreme Court held, however, that attorney fees were not ordinarily recoverable costs. See *Arcambel v. Wiseman*, 3 Dall. 306 (Pa. 1796) (noting that it was the general practice of the courts of the United States to deny recovery of attorney fees). While the practice of attorney fees regulation continued in the early years of the United States, the scale of taxable attorney fees did not increase with inflation and, over time, regulation of attorney fees ended. See Leubsdorf, *supra*, at 12-14.

n24. See 4 Wright & Miller, *supra* note 17, 1064, at 229 (noting that courts in the United States "adopted the territorial principle of jurisdiction ... by viewing sister states as foreign nations for jurisdictional purposes and imposing geographic limitations on the exercise of judicial jurisdiction"); see also *Picquet v. Swan*, 19 *F. Cas.* 609, 612-13 (*D. Mass* 1828) (No. 11,134) (noting the jurisdictional limitations of the courts).

n25. 95 U.S. 714 (1877).

n26. See *Pennoyer*, 95 U.S. at 734 ("It follows ... that the personal judgment recovered in the ... court ... against the plaintiff ... then a non-resident of the State, was without any validity"). The Court explained that defendant's property outside the state did not give rise to personal jurisdiction over the defendant. See *id.*

n27. *Id.* at 722.

n28. Of course, Pennoyer had other wide-ranging implications for jurisdiction in the federal courts, including the early twentieth century doctrine that, in the absence of a waiver, the exercise of personal jurisdiction is restricted to instances when the defendant is present within the state. See 4 Wright & Miller, *supra* note 17, 1064, at 229 (noting the historical rule that a person was not be subject to a court's jurisdiction unless actually served with process within a court's territorial jurisdiction or consented to the court's jurisdiction). This territorial-based doctrine of personal jurisdiction was effectively eliminated by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny.

n29. Act of June 19, 1934, ch. 651, 1, 48 Stat. 1064 (1934) (authorizing the Supreme Court of the United States to prescribe rules in civil actions at law for the district courts and for the courts of the District of Columbia). These rules, known as the Federal Rules of Civil Procedure, went into effect on September 16, 1938.

n30. Act of June 1, 1872, ch. 255, 5, 17 Stat. 196 (1872) (superseded) [hereinafter Conformity Act] (delineating when state law should apply in federal actions).

n31. See generally 1 James Wm. Moore et al., *Moore's Federal Practice* 2 App.101[2] (3d ed. 2000) (explaining that the Conformity Act, which required district courts to apply state law, remained unchanged and in effect until it was superceded by the Federal Rules of Civil Procedure in 1938); *Stapleton v. Reading Co.*, 26 F.2d 242, 243 (3d Cir. 1928) (holding that the Conformity Act mandates that the proceedings in federal court should conform to the practice of proceedings in the courts of the state where district court is located).

n32. See *Green v. Me-Tex Supply Co.*, 29 F. Supp. 851, 851-52 (S.D. Tex. 1939) (noting that while the Conformity Act was in force, Texas state law governed the rules for costs).

n33. See *Fed. R. Civ. P. 83* (stating district courts may make and amend rules governing their practice as long as the local rule is consistent with the Federal Rules of Civil Procedure); *Green*, 29 F. Supp. at 852 (noting that the absence of an applicable Federal Rule of Civil Procedure permits the application of local court rules); *Cavicchi v. Mohawk Mfg. Co.*, 27 F. Supp. 981, 982 (S.D.N.Y. 1939) (noting the local court rule provided that in the absence of a federal rule or local court rule the court looks to the "procedure which shall then prevail in the Supreme Court of the State of New York"); see generally 1 Moore, *supra* note 31, 83 (discussing *Rule 83 of the Federal Rules of Civil Procedure* and the manner in which a local district court may enact rules). The Federal Rules of Civil Procedure were enacted pursuant to the Rules Enabling Act of 1934, which grants the Supreme Court of the United States "the power to prescribe general rules of practice and procedure" for the federal court system. 28 U.S.C. 2072(a) (1994). The statute further provides that "all laws in conflict with such rules shall be of no further force." 28 U.S.C. 2072(b).

n34. See *supra* note 4 (identifying local court rules of federal district courts that provide for the posting of security for costs).

n35. *Farmer v. Arabian Am. Oil Co.*, 285 F.2d 720, 722 (2d Cir. 1960).

n36. U.S. Const. amend. XIV, 1.

n37. See, e.g., *Aggarwal v. Ponce Sch. of Med.*, 745 F.2d 723, 727 (1st Cir. 1984) (discussing the equal protection challenge to the non-resident bond requirement); *Coady v. Aguadilla Terminal Inc.*, 456 F.2d 677, 679 (1st Cir. 1972) (stating that "to require all foreign plaintiffs ... to post substantial security as a condition to access to the courts may well be an unconstitutional denial of equal protection"); *Cleveland v. Wilken*, 917 F. Supp. 794 (S.D. Fl. 1996) (challenging the constitutionality of a state statute imposing a bond requirement for non-resident plaintiffs). See also, *Sittig v. Tallahassee Mem'l Reg'l Med. Ctr.*, 567 So. 2d 486 (Fla. Dist. Ct. App. 1990) (commenting on the district court's holding that the "statutory bond requirement effectively operated to preclude [plaintiff] from exercising her state constitutional right"); *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1377 (Alaska 1988) (analyzing the requirement of non-resident security bond on equal protection grounds). While some courts have suggested that a residency requirement violates the Constitution, a number of district courts in the Southern District of New York have ignored the *Farmer* holding and have held that the mandatory requirement for cost bonds for non-residents imposed by *N.Y. C.P.L.R. 8501* (McKinney 1998) should be followed by the federal courts sitting in New York State. See, e.g., *Fertilizantes Fosfatados Mexicanos, S.A. v. C.Y. Chen, Chem. Carriers, Inc.*, No. 91 Civ. 2048 (MJL), 1992 U.S. Dist. LEXIS 12277, at 18-19 (S.D.N.Y. Aug. 11, 1992) (requiring both plaintiff and defendant to post security pursuant to *N.Y. C.P.L.R. Section 8501*); *Ilro Prods., Ltd. v. Music Fair Enters.*, 94 F.R.D. 76, 81-83 (S.D.N.Y. 1982) (stating that *N.Y. C.P.L.R. Section 8501* is an important public policy statement of New York's legislature to ensure payment of costs and, therefore, should apply to a motion for security for costs). But see *Atlanta Shipping Corp. v. Chem. Bank*, 818 F.2d 240, 251 (2d Cir. 1987) (stating that "in diversity actions, federal courts are not bound to follow state rules on security for costs where a federal local rule granting discretion is applicable, although they may look to state rules for guidance") (quotations and citations omitted).

n38. See *Hawes v. Club Ecuestre el Comandante*, 535 F.2d 140, 144 (1st Cir. 1976) (noting that under appropriate circumstances a court has the inherent authority to require security for costs, and discussing the relevant factors to be considered in deciding whether to require security). Two cases decided by the United States Court of Appeals for the Second Circuit, in the late 1950s and 1960s indicated that cost bonds could be required as a matter of the court's discretion, and declared that cost bonds could be required in instances where prior litigation involving the same party suggests that an award of costs is likely. See *Leighton v. Paramount Pictures Corp.*, 340 F.2d 859, 861 (2d Cir. 1965) (noting that because the plaintiff "was an habitual pro se litigant whose claims were often conclusory and lacking in legal merit" it was reasonable to require plaintiff to post a modest amount of security); *Miller v. Town of Suffield*, 249 F.2d 16, 16-17 (2d Cir. 1957) (justifying

security for costs on the grounds that the plaintiff's "vague charges ... have always lacked substance and substantiation").

n39. *Hawes*, 535 F.2d at 144. Interestingly, the plaintiff's prior litigation efforts, considered in *Miller and Leighton*, expanded to include consideration of the underlying merits of the plaintiff's case.

n40. See *Simulnet E. Assocs. v. Ramada Hotel Operating Co.*, 37 F.3d 573, 576 (9th Cir. 1994) (adopting factors discussed in *Aggarwal v. Ponce School of Medicine*, 745 F.2d 723, 727-28 (1st Cir. 1984)). The factors include:

- (i) the degree of probability/improbability of success on the merits, and the background and purpose of the suit;
- (ii) the reasonable extent of the security to be posted, if any, viewed from the defendant's perspective; and (iii)
- the reasonable extent of the security to be posted, if any, viewed from the nondomiciliary plaintiff's perspective

Aggarwal, 745 F.2d at 727-28; see also *Selletti v. Carey*, 173 F.R.D. 96, 100-01 (S.D.N.Y. 1997) (listing generally considered factors such as: "the financial condition and ability to pay of the party at issue; whether that party is a non-resident or foreign corporation; the merits of the underlying claims; the extent and scope of discovery; the legal costs expected to be incurred; and compliance with past court orders"); *Herbstein v. Bruetman*, 141 F.R.D. 246, 247 (S.D.N.Y. 1992) (listing such criteria as: (1) whether the litigant has the ability to pay costs; (2) whether the litigant is present within the United States; (3) whether there is merit to the litigant's underlying claims; (4) the extent and scope of discovery; and (5) whether the litigant has complied with the court's past orders).

n41. See *Simulnet*, 37 F.3d at 574 ("We review for abuse of discretion the district court's order requiring security for fees and costs."); *Atlanta Shipping Corp.*, 818 F.2d at 252 (holding that the lower court judge "acted within his discretion" in requiring the plaintiff to post a security bond); *Montserrat Overseas Holdings, S.A. v. Larsen*, 709 F.2d 22, 24 (9th Cir. 1983) ("It cannot be said that requiring a bond to be posted ... constituted abuse of discretion."); *Hawes*, 535 F.2d at 143-44 (regarding security for costs, "the [trial] court is vested with a large measure of discretion in applying such rules").

n42. See, e.g., *Beverly Hills Design Studio (N.Y.) Inc. v. Morris*, 126 F.R.D. 33, 39 (S.D.N.Y. 1989) (ordering a \$ 20,000 bond where the plaintiff could not identify assets that could satisfy a potential award of costs and fees); *Oilex A.G. v. Mitsui & Co. (U.S.A.)*, 669 F. Supp. 85, 88 (S.D.N.Y. 1987) (ordering the plaintiff, out of business or lacking assets, to post a \$ 25,000 bond); *Knight v. Yerkes and Assocs., Inc.*, 675 F. Supp. 139, 142 (S.D.N.Y. 1987) (requiring security for costs after finding that the property of the plaintiff, a resident of Thailand, has already been the subject of attachment proceedings in another action); *Atlanta Shipping Corp. v. Chem. Bank*, 631 F. Supp. 335, 354 (S.D.N.Y. 1986), aff'd, 818 F.2d 240 (2d Cir. 1987) (ordering the plaintiff, a

Liberian corporation and a debtor in bankruptcy without reachable assets, to post a \$ 10,000 bond in its action to recover unpaid judgments); *A. and R. Theatre Corp. v. Azteca Films, Inc.* 32 F.R.D. 47, 48 (S.D.N.Y. 1962) (explaining that although security for costs is not ordinarily required from a domestic corporation, security is warranted because, among other things, the plaintiffs have been dissolved by the State of New York for non-payment of franchise taxes). But see *Acom Computer Sys. Ltd. v. Hilton Int'l Co.*, No. 88 Civ. 8474 (JMW), 1989 U.S. Dist. LEXIS 11498, at 6-7 (S.D.N.Y. Sept. 29, 1989) ("The mere fact that [plaintiff] is a foreign corporation does not warrant the imposition of a bond. [Defendant] must convince this court that additional factors ... demonstrate that [defendant] would be unable to recover costs from [plaintiff] should [defendant] prevail."); *Shepherd Agency, Inc. v. Mansfield Bldg. Sys., Inc.*, No. 85 Civ. 0971 (CSH), 1988 U.S. Dist. LEXIS 7220, at 5-6 (S.D.N.Y. July 13, 1988) (noting that the plaintiff's "claims of solvency and plaintiff's presence in the United States distinguish this case from the more typical case where courts have required foreign plaintiffs or debtors known to be in bankruptcy to post security for costs"); *Canning v. Star Publ'g Co.*, 130 F. Supp. 697, 699 (D. Del. 1955) (explaining that although the plaintiff was a non-resident of the district, there where no "extraordinary circumstances" present to warrant a bond); *Newell v. O.A. Newton & Son Co.*, 95 F. Supp. 355, 360 (D. Del. 1950) (declining to require a bond despite the plaintiff's status of a non-resident of the district).

n43. See generally *Beverly Hills Design Studio*, 126 F.R.D. at 36 (noting that "cases requiring a security bond generally involve plaintiffs with no reachable assets") (emphasis added).

n44. See, e.g., *Selletti v. Carey*, 173 F.3d 104, 111 (2d Cir. 1999) (holding that the district court abused its discretion by dismissing the plaintiff's action for failure to comply with an order to post a security for costs without "accord[ing] any significant weight to plaintiff's inability to ... post security"); *Aggarwal*, 745 F.2d at 728 (stating that upon deciding whether to dismiss a suit due to the plaintiff's failure to comply with an order for security, "a plaintiff's ability to post security for costs must weigh in the balance"); cf. *Hornbuckle v. Arco Oil & Gas Co.*, 732 F.2d 1233, 1237 (5th Cir. 1984) (noting that a finding of fact as to the ability to pay sanctions for failure to proceed with trial on a scheduled date is "essential" for appellate consideration of whether dismissal for failure to pay the sanctions was an abuse of discretion).

n45. See, e.g., *Carollo-Gardner v. Diners Club*, 628 F. Supp. 1253, 1255 (E.D.N.Y. 1986) (noting that the court considers the pro se plaintiff's economic status when deciding whether to waive court fees and costs); *Gift Stars, Inc. v. Alexander*, 245 F. Supp. 697, 700-01 (S.D.N.Y. 1965) (holding that an indigent party need not post a security bond).

n46. See, e.g., *Beverly Hills Design Studio*, 126 F.R.D. at 36 (requiring a bond because the plaintiff did not identify any assets which could satisfy an award of costs); *Tri-Ex Enters., Inc. v. Morgan Guar. Trust Co. of N.Y.*, No. 80 Civ. 3856 (WCC), 1985 U.S. Dist. LEXIS 23502, at 2 (S.D.N.Y. Jan. 11, 1985) (observing that the plaintiff "argued, with no small degree of irony, that the motion should be denied precisely because it has no funds with which to post a bond. The Court finds little merit in this self-defeating argument").

n47. See, e.g., *Mann v. Levy*, 776 F. Supp. 808, 815 (S.D.N.Y. 1991) ("The amount of the bond should not 'seriously impede' plaintiff's ability to prosecute the action."); *Atlanta Shipping*, 631 F. Supp. at 353 ("The [bond] requirement should not ... impede [the plaintiff's] ability to prosecute this action."); *Leslie One-Stop In Pa. Inc. v. Audiofidelity, Inc.*, 33 F.R.D. 16, 17 (S.D.N.Y. 1963) ("I cannot believe that [posting a security bond] will make it impossible for plaintiff to continue its action...").

n48. See, e.g., *Johnson v. Kassovitz*, No. 97 Civ. 5789 (DLC), 1998 U.S. Dist. LEXIS 15059, at 5 (S.D.N.Y. Sept. 17, 1998) (justifying the imposition of a security for costs on, among other things, the plaintiff's failure to "challenge in writing [the defendants'] contentions that her case is without merit"); *Selletti*, 173 F.R.D. at 100-01 (stating that one of the factors to be considered in a motion for a bond for costs is the merits of the underlying claim); *Herbstein v. Bruetman*, 141 F.R.D. 246, 247 (S.D.N.Y. 1992) (stating same).

n49. See, e.g., *Jernryd v. Nilsson*, No. 84 PV. 7551, 1988 U.S. Dist. LEXIS 11985, at 5 (N.D. Ill. Oct. 20, 1988) (noting, loosely, "that there appears to be a factual basis for the [plaintiff's] claim," and concluding that "[a] security bond is not warranted on the grounds that the action lacks merit"); *Vesco & Co., Inc. v. Hannoch, Weisman, Stern & Besser*, No. 78 Civ. 4667 (RWS), 1979 U.S. Dist. LEXIS 12009, at 5 (S.D.N.Y. Jun. 1, 1979) (granting defendant's motion to require plaintiff to post a bond but observing, without discussion, that "it cannot be said from reading the papers that this action is completely without merit<?extend ascii 148>").

n50. See, e.g., *Selletti*, 173 F.R.D. at 100-01 (citing local rule and district court case law when describing the factors considered in a motion to post bond); *Bressler v. Liebman*, No. 96 Civ. 9310 (LAP), 1997 U.S. Dist. LEXIS, at 7-8 (S.D.N.Y. Aug. 14, 1997).

n51. See, e.g., *Jernryd*, 1988 U.S. Dist. LEXIS 11985, at 4-5 (regarding the merits of the claim, the court stated that <?extend ascii 147>at this stage of the litigation the court is not in a position to make any factual findings<?extend ascii 148>); *Atlanta Shipping*, 631 F. Supp. at 353 n.25 (<?extend ascii 147>The plaintiff asks us to make a preliminary determination on the merits in order to decide whether to require costs. At this stage, that determination is neither possible nor necessary.<?extend ascii 148>).

n52. See *Thompson v. Avco Corp.*, No. 74 Civ. 731 (M.E.F.), 1975 U.S. Dist. LEXIS 14578, at 11-12 (S.D.N.Y. Dec. 31, 1975) (holding that although the suit withstands dismissal, New York law mandates that a non-resident post security for costs); *Saylor v. Lindsley*, 302 F. Supp. 1174, 1187 (S.D.N.Y. 1969) (denying defendants' motion for summary judgment, but requiring, pursuant to state law, plaintiff to give security for reasonable expenses and attorney fees).

n53. 1975 U.S. Dist. LEXIS 14578, at 1.

n54. Id. at 11.

n55. No. 91 Civ. 5047 (TPG), 1994 U.S. Dist. LEXIS 3419, at 1 (S.D.N.Y. Mar. 23, 1994).

n56. See id. at 5 (holding that the plaintiff was required "to post a bond or other security ... as a condition for proceeding further with this action").

n57. See *Miller v. Town of Suffield*, 249 F.2d 16, 16 (2d Cir. 1957) (noting plaintiff's history of pursuing "vague charges ... lacking substance and substantiation" against defendants); *Klein v. Spear, Leeds, & Kellogg*, 306 F. Supp. 743, 752 (S.D.N.Y. 1969) (citing plaintiff's "litigious nature" as justification for requiring security for costs).

n58. See *Bressler v. Liebman*, No. 96 Civ. 9310 (LAP), 1997 U.S. Dist. LEXIS 11963, at 20-22 (S.D.N.Y. 1997) (discussing instances of the plaintiff's bad faith leading to the imposition of a security bond including attorney fees); *Tri-Star Pictures, Inc. v. Kurt Unger*, 32 F. Supp. 2d 144, 148 (S.D.N.Y. 1999) ("It is also proper to require the posting of a bond ... when a party has engaged in a course of 'vexatious' conduct throughout a litigation."); *Haberman v. Tobin*, No. 74 Civ. 5740 (RWS), 1981 U.S. Dist. LEXIS 11358, (S.D.N.Y. Mar. 4, 1981) (holding that posting of a bond is necessary to protect the defendant "based on the general history of [plaintiff's] conduct throughout this litigation" which was characterized by the court as "vexatious").

n59. No. 96 Civ. 9310 (LAP) 1997 U.S. Dist. LEXIS 11963, at 1.

n60. See id. at 21 (noting the prior rejection of plaintiff's claims as an example of plaintiff's bad faith litigation).

n61. See id. at 22 (explaining that "willful misrepresentation [of a judge's comments] is the very essence of bad faith").

n62. See, e.g., *Selletti v. Carey*, 173 F.3d 104, 106 (2d Cir. 1999) (justifying a security bond when the plaintiff violated the court's discovery orders); *Haberman*, 626 F.2d at 1101 (dismissing action of plaintiff who repeatedly disregarded orders from the court); *Herbstein v. Bruetman*, 141 F.R.D. 246, 247 (S.D.N.Y. 1992) (stating that, as a result of the defendants' failure to comply with court orders and the existence of a prior default judgment against the defendants, it was appropriate to require the defendants to a post security for costs of defending against a motion for summary judgment); *Argonaut Ins. Co. v. Goepfert*, No. 76 Civ. 802 (CHT), 1980 U.S. Dist. LEXIS 13284, at 15 (S.D.N.Y. Aug. 26, 1980) (citing the dilatory tactics engaged in by the third-party plaintiffs as one of the grounds for requiring security for costs).

n63. 1980 U.S. Dist. LEXIS 13284, at 1.

n64. See *id.* at 15.

n65. 173 F.3d 104 (2d Cir. 1999).

n66. See *id.* at 111 (observing that the district court found the merits of the plaintiff's case to be questionable, and that the defendant's ability to recover costs, which might be awarded, was in doubt).

n67. See *id.* at 106 (indicating that the plaintiff was actively seeking publicity about his lawsuit).

n68. *Selletti v. Carey*, 173 F.R.D. 96, 102 (S.D.N.Y. 1997).

n69. See, e.g., *Lawford v. New York Life Ins. Co.*, 739 F. Supp. 906, 920 (S.D.N.Y. 1990) (noting defendants' contention that there will be a need to conduct discovery in Canada, and imposing a \$ 15,000 bond for costs); *Knight v. H.E. Yerkes & Assoc., Inc.*, 675 F. Supp. 139, 142 (S.D.N.Y. 1987) (concluding that "in light of the substantial number of depositions that will likely take place and the location of some of those depositions ... defendant will incur substantial costs," and ordering plaintiff to file a bond in the amount of \$ 15,000); *Haberman v. Tobin*, 466 F. Supp. 447, 451 (S.D.N.Y. 1979) (imposing a \$ 100,000 bond in light of "the magnitude of this case").

n70. See *Fisch v. Fidelcor Bus. Credit Corp.*, No. 91 Civ. 5047 (TPG), 1994 U.S. Dist. LEXIS 3419, at 5

(S.D.N.Y. Mar. 23, 1994) ("The multi-million dollar demand for damages, together with the nature of the issues, requires defendant to engage in extensive discovery in order to defend the case ... [Therefore], the court decides that plaintiffs should be required to post a bond or other security in the amount of \$ 10,000 ... "); *Oilex A.G. v. Mitsui & Co. (U.S.A.)*, 669 F. Supp. 85, 88 (S.D.N.Y. 1987) (explaining that costs would include extensive discovery in foreign countries, and the need to translate evidence into English; ordering plaintiff to post security in the amount of \$ 25,000); *Knight*, 675 F. Supp. at 142 (noting the substantial number of depositions that will likely take place); *Burke v. Central-Ill. Sec. Corp.*, 9 F.R.D. 426, 430 (D. Del. 1949) ("Increased costs involved in discovery procedure, depositions and other matters may increase the usual former amount of cost bonds if the original purpose of such bonds, viz., actual security for costs, is to be preserved.").

n71. *Jernryd v. Nilsson*, No. 84 Civ. 7551, 1988 U.S. Dist. LEXIS 11985, at 7 (N.D. Ill. Oct. 20, 1988) (citing *Soo Hardwoods, Inc. v. Universal Oil Prods. Co.*, 493 F. Supp. 76, 77-78 (W.D. Mich. 1980)); see also *Esquel Enters., Ltd. v. Misty Valley, Inc.*, No. 85 Civ. 9885 (CSH), 1987 U.S. Dist. LEXIS 10506, at 3 (S.D.N.Y. Nov. 6, 1987) ("'Costs,' in the usual use of the word in federal practice, means allowances to a party for certain expenses incurred in prosecuting or defending an action ... and as a rule will not include attorney's fees."). See generally 10 Wright & MILLER, supra note 17, 2666, at 203 ("Typically costs are allowed in favor of the winning party against the losing party to provide at least partial indemnification of the expenses incurred in establishing the claim or defense.").

n72. See *Beverly Hills Design Studio (N.Y.) Inc. v. Morris*, 126 F.R.D. 33, 37 (1989) ("When a defendant is statutorily entitled to attorneys' fees, it is consistent that security may be required to cover them."); *Amjon Publishers, Inc. v. Home Box Office, Inc.*, No. 82 Civ. 4968 (S.D.N.Y. Dec. 20, 1982) (granting HBO's motion for a bond "because of the likelihood that HBO will prevail ... which under 17 U.S.C. 505 may include reasonable attorneys' fees").

n73. See 17 U.S.C. 101 (1994).

n74. See 17 U.S.C. 505.

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

Id.

n75. See *Selletti v. Carey*, 173 F.R.D. 96, 102-03 (S.D.N.Y. 1997) (observing that, pursuant to the Copyright Act, plaintiff may be liable for attorney fees, and directing plaintiff to post a \$ 50,000 bond); *Beverly Hills Design Studio*, 126 F.R.D. at 36 (noting that defendant may be entitled to reasonable attorney fees, and requiring plaintiff to post a \$ 20,000 bond).

n76. See *Selletti*, 173 F.R.D. at 101 ("Defendant's report that their search of the public records maintained in the appropriate LEXIS computer database library reveal that [plaintiff's] only identifiable asset is a parcel of land valued at \$ 500.").

n77. See *id.* at 101 (noting the defendant's contention that the plaintiff offered nothing beyond speculation, and that plaintiff failed to allege any connection between his composition and the defendant).

n78. See *id.* (noting the defendants' reliance on the anticipated attorney fees as justification for requesting a security bond in the amount of \$ 250,000).

n79. See *Bressler v. Liebman*, No. 96 Civ. 9310 (LAP), 1997 U.S. Dist. LEXIS 11963, at 9 (S.D.N.Y. Aug. 14, 1997) (stating that "the extent and scope of discovery" is to be taken into consideration when considering a request for security for costs); *Lawford v. New York Life Ins. Co.*, 739 F. Supp. 906, 920 (S.D.N.Y. 1990) (concluding that more than a nominal bond was warranted because of the costs associated with taking depositions in Canada).

n80. U.S. Const. amend. XIV, 1.

n81. See *supra* notes 36-37 and accompanying text (observing that requiring security costs of foreign petitioners may violate the Equal Protection Clause).

n82. See, e.g., *Kreitzer v. Puerto Rico Cars, Inc.*, 417 F. Supp. 498, 502 n.2 (D.P.R. 1975) (listing several district courts that require, through a local rule, a non-residential plaintiff to post a bond); see also *supra* note 4 (citing federal district courts, which through a local rule, require a non-resident plaintiff to post security).

n83. See *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("Due process requires, at a minimum, that absent

a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.").

n84. See *id.* at 379 (stating that "except for extraordinary situations where some valid governmental interest is at stake," a person must be afforded a hearing before being deprived of a significant property interest).

n85. *401 U.S. 371 (1971)*.

n86. See *Boddie* at 380-81 (holding that the State's refusal to admit indigent parties into its courts, the only method in Connecticut of obtaining a divorce, is "the equivalent of denying them an opportunity to be heard ... [and] a denial of due process").

n87. See, e.g., *United States v. Kras*, 409 U.S. 434, 445 (1973) (distinguishing *Boddie*, and holding that a court may charge a filing fee that might prevent an indigent from making a voluntary bankruptcy petition on the ground that alternative means exist for the debtor to adjust his legal relations with his creditors); *Tri-Star Pictures, Inc. v. Unger*, 32 F. Supp. 2d 144, 148-49 (S.D.N.Y. 1999) (distinguishing *Boddie* on the ground that the defendant failed to substantiate its insolvency); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 1), 1973 *Duke L.J.* 1153, 1180 ("Judicial Monopoly ... was conceived as the common element mandating for divorce suitors ... protection against exclusionary court fees..."). But see *M.L.B. v. S.L.J.* 519 U.S. 102, 128 (1996) (holding that Mississippi may not condition a natural mother's right to appeal a parental status termination on the condition that she pay record preparation fees).

n88. See, e.g., *Roller v. Gunn*, 107 F.3d 227, 229 (4th Cir. 1997) (rejecting plaintiff's contention that a federal law requiring prisoners to pay a filing fee before filing a lawsuit or proceeding with an appeal creates an unconstitutional barrier to the courts); *Hampton v. Hobbs*, 106 F.3d 1281, 1284 (6th Cir. 1997) (holding that "the fee requirements placed on prisoners under the Prison Litigation Reform Act do not deprive [prisoners] of adequate, effective, and meaningful access to the courts"); *Lumbert v. Illinois Dep't of Corr.*, 827 F.2d 257, 259-60 (7th Cir. 1987) (distinguishing *Boddie*, and holding that requiring a prisoner to pay a \$ 7.20 partial filing fee is not unconstitutional).

n89. See, e.g., *Lysiak v. Comm'r*, 816 F.2d 311, 313 (7th Cir. 1987) (per curiam) (holding that a taxpayer's pattern of baseless litigation justified imposing restrictions on his access to the court); *Martin-Trigona v. Lavien*, 737 F.2d 1254, 1261-62 (2d Cir. 1984) (holding that, in light of the plaintiff's past history of time-consuming, frivolous litigation, the district court was justified in issuing an injunction prohibiting the plaintiff from bringing new actions without first obtaining leave of the court); *In re Green*, 669 F.2d 779, 787 (D.C. Cir. 1981)

(directing the district court to enter an order preventing a vexatious prisoner from continuing to file suits without seeking leave of the court, certifying that the claims he wishes to present have not been resolved before in any federal court).

n90. See *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 144 (1st Cir. 1976).

n91. See supra notes 36-37 (discussing equal protection problems); *Hawes*, 535 F.2d at 145 (holding that, while such a rule is not per se invalid, "to require all foreign plaintiffs, as such, to post substantial security as a condition to access to the courts may well be an unconstitutional denial of equal protection") (citation omitted).

n92. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968) (explaining the "Reward Model" using "economic analysis to develop optimal public and private policies to combat illegal behavior").

n93. This of course assumes, for the sake of simplicity, that there is no added short-term detriment to the plaintiff of paying its costs, C, even if believes that C will be recovered in the long term.

n94. See supra notes 26-28 and accompanying text (defining the boundaries of personal jurisdiction).

n95. See, e.g., Howard M. Erichson, *Nationwide Personal Jurisdiction in all Federal Question Cases: A New Rule 4*, 64 N.Y.U. L.Rev. 1117, 1117-19 (1989) (noting the profound impact of nationwide personal jurisdiction in disentangling the doctrines of personal jurisdiction, venue, and forum non conveniens); Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 Minn. L. Rev. 37 (1989) (discussing ways in which states can expand the reach of their subpoena power); Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 Geo. L.J. 81 (1990) (suggesting that the rule needs to be rewritten because of developments in technology, such as the ability to testify via satellite).

n96. See, e.g., 4 Wright & Miller, supra note 17, 1064 (providing a history of personal jurisdiction in the United States); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 Wash L. Rev. 479, 511 (1987) (stating that the Supreme Court's explanations of personal jurisdiction rules have been "brief and inadequate").

n97. See *Perdue*, supra note 96, at 511 ("Jurisdiction represents an assertion of state authority and state authority is inherently territorially limited."); *Wasserman*, supra note 95, at 91 (discussing why state legislatures have not authorized their courts to assert extraterritorial subpoena power despite that "one would have expected" them to do so).

n98. Indeed, the First Circuit has emphasized that instead of requiring all foreign plaintiffs to post security, a trial court should in each case determine whether the plaintiff is unable to post security for costs and exercise its discretion accordingly. See *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 145 (1st Cir. 1976).

APPENDIX 11



**ATLANTA SHIPPING CORPORATION, INC., Plaintiff, v. CHEMICAL BANK,
Defendant**

No. 84 Civ. 8862 (GLG)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

631 F. Supp. 335; 1986 U.S. Dist. LEXIS 27740

March 25, 1986

SUBSEQUENT HISTORY: [**1] As Amended,
March 27, 1986.

United States to Saudi Arabia in four voyages. The Liner Booking Note provided for freight charges of \$1.54 million per voyage.

COUNSEL: Michael P. Arra, Esq., Attorney for Plaintiff, New York, New York.

The first of the four contracted voyages was completed and paid for as provided for in the Liner Booking Note. Problems began with the second voyage. IMH paid the first three installments for this voyage, [**2] but did not pay the fourth. At about the same time that IMH missed this installment, it also failed to pay the first installment of the third voyage.

Zalkin, Rodin & Goodman, Attorneys for Defendant, New York, New York, by: Richard S. Toder, Esq., Andrew D. Gottfried, Esq., William H. Schrag, Esq., of counsel.

JUDGES: Goettel, D.J.

By the spring of 1977, IMH owed Atlanta \$2,222,393, in principal and interest. IMH gained a reprieve when, on February 22, 1977, it entered into a "Credit Agreement" with Atlanta, which restructured IMH's indebtedness to Atlanta and gave Atlanta title, possession, and a security interest in 141 homes then aboard an Atlanta ship. IMH also executed a promissory note reflecting its obligations to Atlanta. Atlanta then discharged the cargo and relinquished its possessory maritime lien.

OPINION BY: GOETTEL

OPINION

[*337] GOETTEL, D.J.:

In June 1976, plaintiff Atlanta Shipping Corporation ("Atlanta"), a Liberian corporation then engaged principally in the business of shipping, entered into a shipping contract with International Modular Housing, Inc. ("IMH"), a Delaware corporation that was then engaged in the business of purchasing modular homes in the United States, shipping them to Saudi Arabia, and selling them there. Under the terms of the shipping contract, referred to in the trade as a Liner Booking Note, Atlanta agreed to carry 560 mobile homes from the

The reprieve was short-lived, for, shortly thereafter, IMH brought an action in state court to enjoin enforcement of the credit agreement, claiming it had been entered into under economic duress. Atlanta removed that action to federal court, commenced an action against IMH in this Court to enforce collection of the promissory note, and served notice of arbitration upon IMH to

enforce collection of the amounts due to Atlanta pursuant to the Liner Booking Note. On September 30, 1982, and March 14, 1983, after years of arbitration and litigation, this Court [**3] confirmed arbitration awards against IMH and in favor of Atlanta in the respective amounts of \$2,012,500 and \$1,753,572. Nearly the entire amount of these judgments remains unsatisfied.¹

1 Atlanta has recovered only \$3,834.68 on these judgments. In one of the Atlanta actions, the Court awarded IMH \$25,000 against Atlanta as a discovery sanction. Thus, the amount due and owing by IMH to Atlanta is \$3,737,237.32, plus interest.

This is one of several actions commenced by Atlanta in an effort to recover on its unsatisfied judgments.² The defendant, Chemical Bank ("Chemical"), was IMH's primary lender and creditor almost from IMH's formation.

2 The other actions are *Atlanta v. Waldron*, 82-3081 (GLG) brought against the officers, directors, and stockholders of IMH, and *Atlanta v. Cross & Brown*, 84-2454 (GLG).

A variety of motions [**4] are before the Court. The defendant first challenges the Court's subject matter jurisdiction. It also moves to dismiss a number of the causes of [**338] action in the plaintiff's thirteen count, blunderbuss amended complaint, or, in the alternative, for summary judgment on many of Atlanta's claims. Finally, it seeks an order requiring Atlanta to post security for costs. For the reasons stated below, these motions are granted in part and denied in part.

I. Background

A. The Factual Background

The amended complaint relates the following pertinent facts, which we take as true, at least for purposes of evaluating the motions to dismiss. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

IMH was organized under the laws of the state of Delaware on March 15, 1976. At inception, it had four shareholders. Robert Waldron, its president and also a director, owned 35% of IMH's shares. Frank Visconti, its vice-president, owned 15% of IMH until 1978, when he

transferred his shares to Waldron. DIC Concrete Corporation ("DIC"), and Underhill Construction Corporation ("Underhill"), both New York corporations, each owned 25% of IMH. DIC and Underhill and certain [**5] of their associated corporations and individuals were allegedly coventurers in a joint venture ("the joint venture").

On March 15, 1976, IMH established a bank account with Chemical Bank in New York. On the same day, the joint venture paid \$125,000 into this account. In return, it received 50% of IMH's stock, 25% of which was issued to Underhill and 25% to DIC. Waldron was granted 50% of the stock without payment of any cash consideration. He then issued 15% to Visconti.

In October 1976, DIC and Underhill each borrowed \$1.5 million from Chemical Bank, pledging their assets as security. DIC and Underhill then lent the \$3 million to IMH. In exchange, each received notes and a chattel mortgage on 103 of IMH's modular homes. The amended complaint alleges that DIC and Underhill's loans, and its subsequent guarantees (discussed below) actually supplied IMH with equity.

By December 1976, IMH needed additional cash. To enable IMH to obtain the needed funds, DIC and Underhill guaranteed an additional \$3 million in Chemical loans to IMH. Thus, as of the end of December 1976, Chemical had loaned \$3 million and DIC and Underhill had each loaned \$1.5 million to IMH.

On January 10, 1977, DIC, [**6] Underhill, IMH, and Chemical agreed to realign their respective obligations. DIC and Underhill agreed to guarantee still another \$3 million loan by Chemical to IMH. Chemical, DIC, and Underhill understood that IMH would use this \$3 million to repay DIC and Underhill. DIC and Underhill would then repay Chemical. At the end of this realignment, IMH owed Chemical \$6 million. Including its obligations to Chemical, IMH's total debt as of January 1977 was \$14 million. Its equity was \$125,000.

The amended complaint alleges that, at the time of these transactions, Chemical was intimately familiar with the financial history, and business workings of IMH, DIC, Underhill, and their principals. Thus, Chemical allegedly knew that it was lending to a severely undercapitalized or insolvent corporation.

Between January 1977 and March 1980 (during the

ongoing dispute between IMH and Atlanta), IMH attempted, with some difficulty to sell its modular homes in Saudi Arabia. During that time, DIC and Underhill made loans to IMH to enable it to service its debt to Chemical. Chemical also accommodated IMH by continually renewing and extending the due dates of the promissory notes evidencing IMH's obligations [**7] to Chemical. Chemical monitored IMH's sales, assets, and general finances, conditioning its extensions on the receipt of the proceeds of IMH's sales. Whenever IMH's outstanding debt was reduced, Chemical would forward a renewal note to DIC or Underhill reflecting the reduction and further extending IMH's repayment schedule.

[*339] On February 7, 1980, Chemical forwarded a renewal note to IMH extending the loans for 60 days and requesting \$205,381 to cover interest to that date. IMH did not make the requested payment. A little more than a month later, IMH sold all of its remaining inventory in Saudi Arabia for \$2,450,000. IMH deposited the proceeds of that sale in its account at Chemical. On March 12, 1980, Chemical debited IMH's account \$2,150,000 out of the proceeds of the sale. The next day, Chemical advised DIC and Underhill of this set-off and demanded payment under their guarantees of the \$600,000 that IMH still owed it plus \$247,510.07 in interest that had accrued as of March 12, 1980. On or about April 3, 1980, DIC and Underhill made the requested payment. Chemical then assigned them its interest and rights as a creditor of IMH.

B. History of this Action

On October 11, [**8] 1984, several of Atlanta's creditors filed an involuntary petition pursuant to *11 U.S.C. § 303 (1982)* for relief against Atlanta under Chapter 7 of Title 11 of the Bankruptcy Code, *11 U.S.C. §§ 701-66 (1982)* ("the Code"). Atlanta filed its original, eleven count complaint in this action on December 11, 1984. On December 20, 1984, Atlanta answered the involuntary petition by filing a voluntary petition thereby converting the case to a proceeding under Chapter 11 of the Code. *See 11 U.S.C. § 706(a) (1982)*. After Chemical moved against the complaint in early-April 1985, Atlanta served and filed its thirteen count amended complaint. Chemical subsequently requested that the Court deem its motion to relate to the plaintiff's amended complaint.

C. The Amended Complaint

The amended complaint purports to state thirteen causes of action. Some of these causes of action contain

as many as five claims. Others are so confused as to defy comprehension. As best we can understand the amended complaint, it states the following claims.

The first, third, ninth, tenth, and eleventh causes of action allege, in whole or in part, that IMH fraudulently conveyed assets to Chemical in violation of *sections [**9] 273, 273-a, 274, 275, and 276* of the New York Debtor and Creditor Law *N.Y. Debt. & Cred. Law §§ 273, 273-a, 274, 275 & 276* (McKinney Supp. 1986) [hereinafter "D.C.L. § "], the common law of New York, and the law of admiralty. The first count cause of action asserts that Chemical, in exercising the \$2.15 million set-off, in loaning \$6 million to IMH, and in accepting each repayment of those loans, knowingly received a fraudulent conveyance. The third cause of action restates the claim that the set-off was a fraudulent conveyance. The ninth cause of action asserts that Chemical's loans to IMH were actually capital contributions. Thus, every repayment of those loans constituted a conveyance of IMH assets without fair consideration in violation of both the D.C.L. and sections of New York's Business Corporation Law referenced below. The tenth cause of action states that every renewal of the promissory notes and every payment pursuant to those renewals constituted fraudulent conveyances in violation of all of the aforementioned provisions. The eleventh cause of action states that should Chemical receive the proceeds from the sale of the 141 modular homes in which Atlanta had [**10] a security interest, that too will constitute a fraudulent conveyance. Moreover, according to the eleventh cause of action, the transfer of those proceeds violates Article 9 of the Uniform Commercial Code.

The fourth cause of action states three separate aiding and abetting claims. It charges Chemical with aiding and abetting (1) fraudulent conveyances by various IMH directors and/or stockholders, (2) improper transfers of assets by directors of IMH in violation of *section 720* of New York's business corporation law, *N.Y. Bus. Corp. Law § 720* (McKinney 1963) [hereinafter "B.C.L. § "], and (3) distributions to stockholders in violation of *sections 510 and 719* of the same law.

The second, third, and seventh causes of action all appear to allege claims against [*340] Chemical for receiving preferential transfers. The second reads, "each and every payment of principal and interest made by IMH on the aforementioned \$6 million in loan

obligations to Chemical Bank was in violation of the . . . common law of the State of New York, which prohibits [sic] preferential transfers by insolvent corporations." Amended Complaint para. 104. The third cause of action contains a [**11] similar allegation about the set-off. The seventh cause of action states that the set-off and IMH's other payments of principal and interest violated "the Admiralty Laws of the United States and the common law of the State of New York which prohibits preferential transfers by an insolvent corporation to or [sic] the benefit of insider beneficiaries." Amended Complaint para. 126.

The fifth, sixth, and eighth causes of action defy easy characterization. The fifth charges that Chemical breached a duty of fair dealing to IMH's other creditors by exercising the set-off. The sixth cause of action alleges that Chemical so controlled IMH, DIC, and Underhill that it had a fiduciary duty to IMH's creditors. By recovering payments of principal and interest, including the set-off, Chemical allegedly breached that duty. The eighth cause of action alleges that Chemical is liable as a coventurer of DIC and Underhill and/or IMH for the debts of the latter. The twelfth cause of action seeks punitive damages and attorney's fees, while the thirteenth requests a variety of equitable remedies. Chemical moves to dismiss or, in the alternative, for summary judgment on each of these claims.

II. Discussion [**12] - Part I: Motion to Dismiss for Lack of Subject Matter Jurisdiction

Atlanta asks this Court to entertain this action pursuant to its admiralty and diversity jurisdiction. Chemical argues that the Court has neither. Although we find that this matter is not within this Court's admiralty jurisdiction, the plaintiff has convinced us that we have diversity jurisdiction. The defendant's motion to dismiss for lack of subject matter jurisdiction is, therefore, denied.

A. Admiralty Jurisdiction

Section 1333 of Title 28 of the United States Code establishes the admiralty jurisdiction of the federal courts. That section provides, in pertinent part, that "the district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (1982).

Although the admiralty jurisdiction has been generally limited to cases involving "the primary operational and service concerns of the shipping industry," G. Gilmore & C. Black, *The Law of Admiralty* 22 (2d ed. 1975), a more expansive line of cases appears to invest the [**13] admiralty courts with jurisdiction over some actions that seek to enforce judgments obtained in admiralty. *Id.* at 41-43. The plaintiff relies on *Lee v. Thompson*, 15 F. Cas. 233 (C.C.D. La. 1878) (No. 8,202) ("*Lee*"), which it believes is the strongest of this expansive line, to support its argument that this action is within the Court's admiralty jurisdiction. Neither *Lee*, nor the other cited cases, justify the Court's invoking its admiralty jurisdiction in this case.

After the libelant (plaintiff) in *Lee* unsuccessfully attempted to execute against the defendant on a judgment in admiralty, he brought a supplementary action against two of the defendant's judgment debtors. They, in turn, claimed that the defendant had assigned their debts to another. The libelant challenged the purported transfer whereupon the district court found the transfer fraudulent and void and directed the plaintiff to recover from the two judgment debtors. The transferee appealed, contesting the district court's admiralty jurisdiction over the dispute. Affirming, the Court of Appeals stated that absent jurisdiction to hear the plaintiff's claim, "its jurisdiction would often be defeated." [**14] *Id.* at 235. The Court elaborated,

[*341] the power of the court to entertain such contestations upon all seizures made under its authority would seem to be indispensable. . . . It seems to me that the proposition can hardly be questioned. Without power to try the validity of conflicting claims, the court could not enforce its judgments for the payment of money. They could always be defeated by fraudulent and simulated transfers.

Id. The federal courts remain free to assert their admiralty jurisdiction in order to safeguard the integrity of their judgments in admiralty. *Olav Ringdals Tankrederi v. Ocean Carriers Corp.*, 1964 Am. Mar. Cas. 1581, 1582 (S.D.N.Y. 1964). Thus, for example, "the jurisdiction of a court of admiralty to determine [whether a defendant is the] *alter ego* [of a judgment debtor] is 'undoubted.'" *North East Shipping Corp. v. Government of Pakistan*,

1974 *Am. Mar. Cas.* 900, 904 (S.D.N.Y.) (Magistrate's report), *aff'd*, 1974 *Am. Mar. Cas.* 908 (S.D.N.Y. 1974). See also *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 94 L. Ed. 1206, 70 S. Ct. 861 (1950) (admiralty court could decide whether transferee [**15] of a ship that was attached in admiralty was the alter ego of the transferor). We expect that the power of an admiralty court extends to adjudicating whether a judgment debtor fraudulently conveyed assets to avoid an admiralty judgment.

Lee, Swift & Co., and their progeny expand the admiralty jurisdiction to include actions involving calculated attempts to avoid the judgments or jurisdiction of the admiralty courts. They do not invite the expansion of the admiralty jurisdiction into a blanket means to adjudicate every lawsuit that relates to an admiralty claim or judgment. See *Swift & Co.*, *supra*, 339 U.S. at 690 ("Unquestionably a court of admiralty will not enforce an independent equitable claim merely because it pertains to maritime property."). In determining whether this is an appropriate instance for exercising our admiralty jurisdiction, we must consider both the need to protect the jurisdiction of the admiralty courts and the obvious necessity of preventing its unwarranted expansion.

In this case, the balance falls convincingly on the side of limiting the unwarranted expansion of the admiralty jurisdiction. The amended complaint does not and can not allege that IMH's [**16] allegedly fraudulent transfers to Chemical were an attempt to avoid an admiralty judgment. Indeed, when Atlanta finally obtained a judgment against IMH, Chemical had long since ceased doing business with IMH. The plaintiffs have not alleged that IMH's transfers to Chemical were a calculated attempt to avoid our admiralty jurisdiction. Indeed, such an allegation would amount to little more than speculation, not the stuff upon which this Court may rest its admiralty jurisdiction. Nor does the plaintiff allege that Chemical is the alter ego of IMH. The cases involving claims against the alter ego of a defendant in admiralty do not control. In short, this Court need not exercise jurisdiction over this action in order to preserve its admiralty jurisdiction against fraud. By contrast, were we to entertain this action, an admittedly calculated effort to recover on unsatisfied judgments from a deep-pocket defendant, pursuant to our admiralty jurisdiction, we would set a dangerous precedent for hopelessly expanding the admiralty jurisdiction.

Even a court possessed with admiralty jurisdiction, may refrain from its exercise when no federal statutory tort claims are raised. *Swift & Co.*, *supra* [**17], 339 U.S. at 695. Had we admiralty jurisdiction, we would, nevertheless, decline its exercise.

B. Diversity Jurisdiction

The defendant, a New York corporation, also contends that the Court lacks diversity jurisdiction under 28 U.S.C. § 1332(a) (1982). It rests this contention on 28 U.S.C. § 1332(c) (1982), which states, that for purposes of section 1332, "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . ." Chemical asserts that section [**342] 1332(c) applies to alien corporations like Atlanta, a Liberian corporation. Atlanta is also alleged to have its principal place of business in New York. Atlanta vigorously contests the applicability of § 1332(c) to alien corporations, and the defendant's assertion that New York is Atlanta's principal place of business.

Whether section 1332(c) applies to alien corporations is a matter of considerable dispute within this circuit. See *Rubinfeld v. Bahama Cruise Line, Inc.*, 613 F. Supp. 300 (S.D.N.Y. 1985) (surveying the case law).³ In any event, the courts only apply section 1332(c) to alien corporations whose principal place [**18] of business world-wide is one of the United States. *Arab International Bank & Trust Co. v. National Westminster Bank Ltd.*, 463 F. Supp. 1145, 1147 (S.D.N.Y. 1979). Atlanta is not such a corporation. Section 1332(c) does not, therefore, apply.

3 "The trend of recent decisions, and the opinion of the commentators, is to deem" the section applicable. *Arab International Bank & Trust Co. v. National Westminster Bank, Ltd.*, 463 F. Supp. 1145 (S.D.N.Y. 1979). Were it necessary to reach this issue, we would follow this trend.

In its original complaint, Atlanta alleged that it was a Liberian corporation with a principal place of business in Monte Carlo, Monaco. The defendant asserts that by maintaining a document storage center in New York, and by actively litigating its claims against IMH here, Atlanta made New York its world-wide, principal place of business. In our view, a litigation warehouse does not a principal place of business make. If it did, Atlanta could have created diversity by moving its storage [**19]

facility across the river to New Jersey. Such obvious irrelevancies should not be conclusive as to the court's subject matter jurisdiction. Atlanta's litigation is also inconsequential. Although a law firm might litigate its way into citizenship, two or three lawsuits cannot do the trick. Moreover, since Atlanta has brought actions in courts throughout the United States, we would have to measure the size of each litigation before determining Atlanta's principal place of business. The absurdity of such a calculation negates the contention that a business enterprise may litigate its way into citizenship.

As of December 1984, ⁴ Atlanta had ceased its operations in the shipping business. Its primary activity was the litigation of its outstanding claims, including those against IMH. (It had yet to file for bankruptcy.) Atlanta's president, J.G. Wulfers, continued to work out of Atlanta's Monte Carlo office. From there, he supervised Atlanta's litigation, helping, among other things, to respond to discovery requests. Atlanta paid for this office space, as well as for telephones, and the part-time accounting services of Jan Van Langen, Atlanta's former controller. Although Atlanta was admittedly [**20] doing little if any business, Monaco was the focus of its activity.

4 Citizenship, for purposes of diversity, is measured from the date that suit is commenced. *Smith v. Sperling*, 354 U.S. 91, 1 L. Ed. 2d 1205, 77 S. Ct. 1112 (1957).

"Where a corporation is engaged in far-flung and varied activities . . . its principal place of business is the nerve center . . . from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective." *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (Weinfeld, J.). Although, Atlanta was by no means a far-flung enterprise at the commencement of this suit, its only activity, litigation, was directed and coordinated by Wulfers from Atlanta's office in Monaco. ⁵ Although novel, these facts indicate that Monaco was Atlanta's principal place of business world-wide. There is simply not enough authority in these circumstances for deeming Atlanta a citizen of New York under *section* [**21] 1332(c).

5 When Atlanta filed its bankruptcy petition, the bankruptcy trustee assumed primary responsibility for directing and coordinating Atlanta's litigation. Wulfers continues, however, to assist in that task.

[*343] Even if Atlanta did no business in Monaco, we would hesitate to deem New York its world-wide principal place of business. Instead, we might hold, as some have suggested, that no principal place of business existed. *See* J. Friedenthal, *New Limitations on Federal Jurisdiction*, 11 Stan. L. Rev. 213, 225 (1959) *quoted in*, 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3264 n.28 (2d Ed. 1984) ("It would be feasible and desirable for the courts to hold in appropriate cases that no principal place of business exists. What evidence we do have, however, would seem to command the courts to find a principal place of business in every situation.")

The defendant contends that testimony of Atlanta's representatives at a January 31, 1985 creditors meeting constitutes [**22] a judicial admission that, as of the commencement of this suit, New York was Atlanta's world-wide principal place of business. Alternatively, the defendant contends that the testimony judicially estops Atlanta from claiming that its principal place of business was elsewhere. Neither contention stands up to scrutiny.

The bankruptcy judge did not preside at the creditors meeting, which was held pursuant to 11 U.S.C. § 341(c) (1982). J.G. Wulfers; Cyndy Korman, Atlanta's bankruptcy counsel; and Michael Arra, Atlanta's special litigation counsel, testified as follows:

"THE PRESIDING OFFICER: . . . Can you tell me on what basis [Atlanta's petition] was filed in the Southern District of New York?

MS. KORMAN: For the reason that the debtor's assets, the principal assets, have been in New York for the 90 days preceding the petition.

THE PRESIDING OFFICER: And what principal assets are those?

MS. KORMAN: Litigations, several outstanding litigations.

THE PRESIDING OFFICER: So you are saying the only principal assets that were in this district were litigation files?

MR. WULFERS: Those are the principal assets, outstanding accounts

receivable, many of which exist in New York, are [**23] the assets of the corporation.

THE PRESIDING OFFICER: Does this debtor own any equipment?

MR. WULFERS: No, sir.

* * * *

THE PRESIDING OFFICER: What operations, if any, are going on at this point?

MR. WULFERS: No operations at all, sir, since the beginning of 1983.

THE PRESIDING OFFICER: No operations since the beginning of 1983?

MR. WULFERS: Right.

THE PRESIDING OFFICER: Then what was there that was being reorganized?

MR. WULFERS: Maybe you can help me.

MS. KORMAN: What's being organized is not so much an ongoing entity but the collection of the outstanding accounts receivable on the prosecution of the Waldron action and related actions, which are the principal assets of the corporation, which most effectively can be collected through a Chapter 11.

* * * *

THE PRESIDING OFFICER: Under Exhibit B [annexed to Atlanta's voluntary bankruptcy petition], it shows Mr. Wulfers' address as located in Monaco.

MR. WULFERS: Yes, sir.

THE PRESIDING OFFICER: Is there an address or location of the debtor in the United States?

MS. KORMAN: Yes, there is.

* * * *

MR. ARRA: . . . The landlord wanted Atlanta to move its records out by June 30th. Atlanta had maintained an office [**24] at 19 Rector Place.

I thereupon rented offices on their behalf at 15 Park Place down the street here so we could move those records out of storage because we needed them for [*344] litigation as well as a place for Atlanta to have its office.

Then this bankruptcy occurred and I simply continued until January 31st, which we had got a few more days than I thought.

So essentially Atlanta, meeting with Mr. Wulfers' consent, has an office down here at 15 Park Place.

MR. WULFERS: Park Row.

MR. ARRA: And the landlord of that building is Urban Management, and all their corporate records that we have in the United States are in the offices right now.

THE PRESIDING OFFICER: Are there any other employees?

MR. ARRA: No, sir.

THE PRESIDING OFFICER: Who is 'we'?

MR. WULFERS: At the moment, it is me alone, but the management office of Atlanta Shipping Corporation [in Monte Carlo] was closed down approximately eight months ago or seven months ago, in June or July of 1984, and until that time, we had been occupying an office with three persons and a secretary during the accountancy, and after July, in order to mitigate further expense, I was the only person who remained.

* * * * [**25]

MR. WULFERS: At that time, that is November 26, 1984, there was only one director and that was me, because I was the only person left in Atlanta Shipping Corporation.

Toder Affidavit, Exhibit 5, Transcript at 6-11, 14, 15.

This testimony must be viewed in context. The presiding officer was apparently concerned that Atlanta, an alien corporation, might be ineligible to file a petition for reorganization under the bankruptcy code in this district. Only a corporation that resides or has a domicile, place of business, or property in the United States . . . may be a debtor [and reorganize] under the bankruptcy code. *11 U.S.C. § 109(a) (1982)*.

"Once a court has found that a particular [entity], who may be an alien, is eligible to be a debtor under the Code, because that individual has a place of business or property in the United States, and therefore the bankruptcy courts can entertain the petition, [28 U.S.C. § 1408(1)] indicates the appropriate venue for that proceeding."

3 *Collier on Bankruptcy para. 3.02(c)(iv)* (15th ed. 1985). Under that section, venue lies

in the district court for the district -- in which the domicile, residence, principal [**26] place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district. . . .

28 U.S.C. § 1408(1) (1982). The above-referenced testimony addressed the presiding officer's apparent concern that Atlanta might not satisfy these requirements. In order to assuage his fears, Atlanta's representatives testified to the presence of substantial assets or property

in New York. The testimony, *in toto*, emphasized the presence of Atlanta's litigation assets in New York, not the presence of any business assets or principals there. The testimony confirmed Atlanta's representation in its voluntary petition for bankruptcy that it had its principal assets within the United States during the preceding 180 days. Toder Affidavit, Exhibit 3 at 1. Atlanta had not there indicated, as it could have, [**27] that its residence or domicile was in the United States. *Id.*

At the creditors' meeting, Atlanta did not admit that New York was its principal place of business. Since its position at that meeting was not inconsistent with its position herein, the doctrine of judicial estoppel, which prevents a party who succeeds in maintaining a position from thereafter [*345] asserting a contrary position in the same or related litigation, *Environmental Concern, Inc. v. Larchwood Construction Corp.*, 101 A.D.2d 591, 476 N.Y.S.2d 175, 177 (2d Dep't 1984), is inapplicable. ⁶

6 The doctrine applies only when an assertion has prejudiced a party in a prior judicial proceeding. *Mann Theatres Corp. v. Mid-Island Shopping Plaza Co.*, 94 A.D.2d 466, 464 N.Y.S.2d 793, 800 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 930, 468 N.E.2d 51, 479 N.Y.S.2d 213 (1984). Arguably, the creditors meeting, which the bankruptcy judge did not attend, was not a judicial proceeding. In addition, it is unclear how the plaintiff's assertions prejudiced the defendant, who did not even attend the creditors' meeting.

[**28] Although the plaintiff's claims are non-maritime, the Court has subject matter jurisdiction by virtue of the parties' diverse citizenship. The defendant's motion to dismiss for lack of subject matter jurisdiction is denied. ⁷

7 Consequently, the plaintiff can only state claims under New York law. Any claims that it purports to state under federal maritime law or any claims arising under Federal law are dismissed.

III. Discussion - Part II: Motions on the Substantive Claims

A. The Fraudulent Conveyance Claims

The defendant moves against the various fraudulent conveyance claims on a variety of grounds. It first seeks

to dismiss all of the claims for failure to state a claim on which relief can be granted. Alternatively, it moves, pursuant to *Fed. R. Civ. P. 9(b)*, to dismiss these claims for failure to plead fraud with particularity. Finally, it seeks partial summary judgment on some claims for failure to comply with the statute of limitations.

1. Motions to Dismiss for Failure to State a Claim on Which [**29] Relief Can be Granted

Atlanta has alleged that every payment from IMH to Chemical constituted a fraudulent conveyance in violation of New York's Debtor and Creditor Law. IMH allegedly violated each of the D.C.L.'s five substantive provisions. Chemical asserts that Atlanta can not state a claim for a fraudulent conveyance under any of these provisions.

a) The Presumed Intent Claims

Sections 273, 273-a, 274 & 275 of the D.C.L. prohibit conveyances made without fair consideration by a person or entity "who is or will be thereby rendered insolvent," D.C.L. § 273,⁸ who is a "defendant in an action for money damages," *id.* § 273-a,⁹ who is "engaged or about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital. . . ." *id.* § 274,¹⁰ or "who intends or believes that he will incur debts beyond his ability to pay as they mature." *Id.* § 275.¹¹ Under these sections,

[*346] fair consideration is given for property, or obligation,

(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt [**30] is satisfied, or

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

D.C.L. § 272. A fraudulent intent will not be presumed, unless fair consideration is lacking. Absent a presumed intent, a plaintiff can not state a claim under any of the

above-noted sections of the D.C.L. Both parties concede that IMH's payments to Chemical fairly satisfied an antecedent debt, but Atlanta contends that the absence of good faith on Chemical's behalf gives rise to a presumption of fraudulent intent.

8 *Section 273* reads in full,

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

N.Y. Debt. & Cred. Law § 273 (McKinney Supp. 1986) ([hereinafter "D.C.L. § "])

9 *Section 273-a* reads in full,

Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

D.C.L. § 273-a.

[**31]

10 *Section 274* reads in full,

Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonable small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

D.C.L. § 274.

11 Section 275 reads in full,

Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

D.C.L. § 275.

Generally, a transfer for antecedent debt is deemed a good faith transfer. Bad faith will only vitiate such a transfer when the transferee is an officer, director, or major stockholder of the transferor. *In re Checkmate Stereo and Electronics, Ltd.*, 9 B.R. 585, 617 (Bankr. E.D.N.Y. 1981), [**32] *aff'd*, 21 B.R. 402 (E.D.N.Y. 1982); *Southern Industries v. Jeremias*, 66 A.D.2d 178, 411 N.Y.S.2d 945 (2d Dept. 1978). This is the only exception to the rule that a transfer for antecedent debt is a transfer for fair consideration within the meaning of the D.C.L. McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv. L. Rev. 404, 412-13 (1933) (Under the Uniform Fraudulent Conveyance Act, "satisfaction of an antecedent debt has been duly recognized as fair consideration. It necessarily follows that preferences are not bad unless invalidated by some law other than the Uniform Act. The preferred party may be the grantor's wife, or a close relative, or one with whom the grantor has intimate business relations. But preferences by corporations of their officers have long been held objectionable."). Due consideration of the transferee's fiduciary duty to other creditors of the transferor underlies this exception.

In this case, the transferee, Chemical, is neither an officer, director, nor major stockholder of the transferor. Nor have sufficient facts been alleged to support an inference that Chemical controls IMH or has otherwise assumed a duty to its creditors. [**33] *See infra* pp. 34-37. No court will presume a fraudulent intent in these circumstances.

At most, IMH preferred Chemical to Atlanta and its other creditors. Atlanta could have forced Chemical to

treat it fairly by putting IMH into bankruptcy and attacking its transfers as preferential. Many years later, Atlanta seeks to exercise this foregone option. IMH's right to prefer one creditor over another is not assailable under the presumed intent provisions of the D.C.L.

The transfer is not rendered illegal by the fact that the transferor was insolvent or that the transferee has knowledge of such insolvency. Nor is the transfer subject to attack by reason of knowledge on the part of the transferee that the transferor is preferring him to other creditors, even by virtue of a secret agreement to that effect. Moreover, the fact that a confidential relation exists between the grantor and the grantee does not affect the validity of the transfer.

24 N.Y. Jur. *Fraudulent Conveyances* § 75 at 494-95 (1962) (footnotes omitted). Unless the transfer is made with actual intent to hinder, delay, or defraud creditors, it is subject to avoidance only to the extent prohibited by [**34] the Bankruptcy Code or statutes prohibiting preferences in general assignments for the benefit of creditors. *Id.* at 495. Consequently, the motions to dismiss Atlanta's claims under sections 273, 273-a, 274, and 275 of the D.C.L. are granted.¹²

12 The Court need not consider the defendant's motion for summary judgment on these claims.

[*347] b) The Actual Intent Claims

The plaintiff also attempts to state a claim under D.C.L. § 276, which states, "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." The defendant contends that the complaint can not allege an actual intent to defraud Atlanta, but at most alleges an intent to prefer, which is insufficient.

In order to state a claim under section 276, a creditor need only establish an "actual intent to hinder and delay." An actual intent to defraud is unnecessary. [**35] *Flushing Savings Bank v. Parr*, 81 A.D.2d 655, 438 N.Y.S.2d 374, 376 (2d Dep't), *appeal dismissed*, 54

N.Y.2d 770, 426 N.E.2d 752, 443 N.Y.S.2d 61 (1981); Farino v. Farino, 113 Misc. 2d 374, 449 N.Y.S.2d 379, 386 (Sup. Ct. Nassau Co. 1982).

The requisite intent under . . . section [276] need not be proven by direct evidence but may be inferred (a) where the transferor has knowledge of the creditor's claim and knows that he is unable to pay it; (b) where the conveyance is made without fair consideration; or (c) where the transfer is made to a related party (i.e., husband to wife, corporation to stockholder).

De West Realty Corp. v. Internal Revenue Service, 418 F. Supp. 1274, 1279 (S.D.N.Y. 1976).

The plaintiff has alleged that IMH knew and indeed intended to deprive Atlanta of payment on its claim, and that Chemical was a knowing and willing transferee. *See, e.g.,* Amended Complaint paras. 89, 97. It has pleaded more than a mere intent to prefer, it has alleged an improper intent to defraud, or, at a minimum, delay or hinder Atlanta.

The defendant nevertheless maintains that "a transfer by a debtor to pay or secure an antecedent debt will not be deemed [**36] a transfer to hinder, delay, or defraud creditors." Memorandum in Support at 24. The leading case cited for this proposition is *Irving Trust Co. v. Kaminsky, 19 F. Supp. 816, 818 (S.D.N.Y. 1937)*, wherein the court stated that "a transfer by an insolvent debtor to pay or to secure an antecedent debt has never been treated as a transfer to hinder delay or defraud creditors. . . ." *Id. at 818*. The rigidity of *Kaminsky* and the other cases the defendant cites no longer characterizes the law of fraudulent conveyances. The mere existence of an antecedent debt is not alone sufficient to validate an otherwise fraudulent transfer. 24 N.Y. Jur., Fraudulent Conveyances § 76 (1962). Should Atlanta properly plead and prove its allegation that IMH intended to hinder, delay, or defraud Atlanta when it made the various transfers to Chemical, it may void those transfers under D.C.L. § 276.¹³

13 The scope of the appropriate relief, if any, has neither been briefed by the parties nor determined by the Court.

2. [**37] Motion to Dismiss for Failure to Plead

Fraud with Particularity

The pleading requirements of *Fed. R. Civ. P. 9(b)* guard against the undue expansion of the fraudulent conveyance concept that transferees for antecedent debt, like the defendant, necessarily fear. The defendant moves to dismiss the fraudulent conveyance claims for failure to satisfy those requirements. That motion is granted.

Rule 9(b) provides that "in all averments of fraud . . . the circumstances constituting the fraud . . . shall be stated with particularity." *Fed. R. Civ. P. 9(b)*. Mere conclusory allegations that the defendants' conduct was fraudulent are not enough. *Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 114 (2d Cir. 1982)*. Instead, the complaint must allege with some specificity the acts or statements constituting the fraud. *Ross v. A. H. Robins Co., 607 F.2d 545, 557 (2d Cir. 1979), cert. denied, 446 U.S. 946, 64 L. Ed. 2d 802, 100 S. Ct. 2175 (1980)*.

[*348] In recognition of these policies, courts generally dismiss allegations of fraud based on information and belief. *Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972)*. However, a fraud pleading that concerns matters peculiarly within [**38] the adverse party's knowledge, will satisfy the 9(b) requirements if accompanied by a statement of facts upon which the belief is founded. *Id. at 608; Posner v. Coopers & Lybrand, 92 F.R.D. 765, 769 n.4 (S.D.N.Y. 1981); Gross v. Diversified Mortgage Investors, 431 F. Supp. 1080, 1087 (S.D.N.Y. 1977); 2A J. Moore & J. Lucas, Moore's Federal Practice para. 9.03, at 9-26 through 9-27 (1984)*.

The plaintiff has wholly disregarded these settled rules of pleading. It has pleaded the entire amended complaint "upon information and belief," without stating the facts upon which its belief is founded. The remaining fraudulent conveyance claims are dismissed with leave to plead within 30 days.¹⁴ Since the plaintiff has had substantial discovery against IMH and its principals, and some additional discovery against Chemical, the Court can envision few if any allegations that would have to be pleaded on information and belief. If there are facts peculiarly within the defendant's knowledge, the plaintiff may plead them on information and belief and include a statement of facts upon which the belief is founded. Further scrutiny of the pleadings must await a new submission.

14 Wherever possible, the plaintiff should endeavor to simplify and clarify the remainder of

its pleading. In particular, separate claims should be pleaded separately. However, no claim should be pleaded twice. The fraudulent conveyance claim should be clearly stated once, not five or six times. No new claims may be pleaded, nor may the plaintiff replead any claim that the Court has dismissed. Any new or previously dismissed claims will be dismissed *sua sponte*. The repleaded complaint should facilitate the defendants' answer, the Court's understanding, and the parties' discovery, and should comply with all other directives in this opinion.

[**39] B. The Aiding and Abetting Claim

The fourth cause of action contains a claim against Chemical for aiding and abetting a fraudulent conveyance. We do not believe it possible to state such a claim. In a fraudulent conveyance action, the plaintiff attacks the conveyance seeking to reclaim the property conveyed. 24 N.Y. Jur., Fraudulent Conveyances § 86 (1962). The appropriate relief is to void the conveyance. An aiding and abetting claim against someone other than a transferee is meaningless in these circumstances. That aspect of the fourth cause of action alleging that Chemical aided and abetted a fraudulent conveyance is dismissed.

C. The Preference Claims

The defendant moves to dismiss those portions of the amended complaint, particularly the second, seventh, and the part of the third cause of action that refer to "preference." The plaintiff's response to this motion is almost indecipherable.¹⁵

¹⁵ It ill behooves the plaintiff to fashion arguments that defy comprehension. By forcing the Court to endlessly labor to understand its position, the plaintiff defeats its stated purpose of moving this litigation to a speedy conclusion.

[**40] In its initial memorandum in opposition, Atlanta came right out and stated, "The complaint charges Chemical Bank with a fraudulent transfer not preference." Memorandum in Opposition at 75. In a sur-reply memorandum, the plaintiff apparently changed its tune, stating, "It is clear from the allegations of the complaint that Atlanta is relying upon several theories of preference as follows." Sur-reply Memorandum at 5. The plaintiff continued, "The good faith requirement of

D.C.L. 272 makes payments to transferees with certain knowledge preferential even if paid for or in repayment of an antecedent indebtedness." *Id.* Thus, the plaintiff is admittedly not relying on a theory of preference but on several sections of the D.C.L. that it believes sound in preference.

The second and seventh causes of action, sounding only in preference, and that portion of the third cause of action that purports to state a claim for preference are [*349] dismissed. To the extent that those causes of action state claims under the D.C.L. or under the Business Corporation Law, the same claims are stated elsewhere in the amended complaint.

D. The Business Corporation Law Claims

After the defendant moved [**41] to dismiss those aspects of the fourth claim arising under *sections 510, 719(a)(1), and 720* of New York's Business Corporation Law, *N.Y. Bus. Corp. Law §§ 510, 719(a)(1) & 720* (McKinney 1963) [hereinafter "B.C.L. § "], the plaintiff appeared to reverse course, stating that it had not attempted to state claims under those sections. Rather the B.C.L. purportedly set up a measure by which the conduct of the defendants was to be judged, *i.e.*, a *per se* standard. Memorandum in Opposition at 95. In its sur-reply, Atlanta backed away from its new position, arguing that it had timely stated claims under the relevant sections of the B.C.L. In the interest of completeness, we accept the plaintiff's last-stated position, as best we can construe it.

1. Section 719(a)(1)

B.C.L. § 719(a)(1)¹⁶ creates a cause of action against members of the board of directors of a corporation who authorize a dividend in contravention of B.C.L. § 510¹⁷ which in turn prohibits a corporation from declaring or paying a dividend to shareholders if the corporation is insolvent or would thereby be rendered insolvent. Atlanta alleges that Chemical is liable for aiding and abetting IMH's alleged [**42] violation of *section 719*.

¹⁶ *Section 719(a)(1)* provides,

- (a) Directors of a corporation who vote for or concur in any of the following corporate actions shall be jointly and severally liable

to the corporation for the benefit of its creditors or shareholders, to the extent of any injury suffered by such persons, respectively, as a result of such action:

(1) The declaration of any dividend or other distribution to the extent that it is contrary to the provisions of paragraphs (a) and (b) of section 510 (Dividends or other distributions in cash or property).

N.Y. Bus. Corp. Law § 719(a)(1) (McKinney 1963) (hereinafter "B.C.L. § ").

17 That sections provides, in pertinent part,

(a) A corporation may declare and pay dividends or make other distributions in cash or its bonds or its property, including the shares or bonds of other corporations, on its outstanding shares, except when currently the corporation is insolvent or would thereby be made insolvent. . . .

B.C.L. § 510(a).

[**43] Chemical correctly asserts that Atlanta is not the proper party to state a claim under section 719. By its own terms, that section applies only "to directors of a corporation who vote for or concur in" the prohibited transaction. *Id.* § 719(a). Accordingly, the various exculpatory provisions relating to § 719(a) also apply only to directors. *See, e.g.*, B.C.L. § 717 (limiting the liability of directors who perform their duties in good faith). Although section 58 of New York's Stock Corporation Law, section 719's predecessor provision, was construed to impose liability on transferees with knowledge, *Field v. Bankers Trust Co.*, 296 F.2d 109, 110 (2d Cir. 1961) (Lumbard, C.J.), cert. denied, 369 U.S. 859, 8 L. Ed. 2d 17, 82 S. Ct. 948 (1962), the courts have never gone so far as to impose aiding and abetting liability under either section.

Chemical is neither a director of IMH, nor a recipient (transferee) of a dividend or distribution. Rather, DIC and Underhill allegedly received the improper dividend that

underlies the section 719 claim. Other transferees are referenced but not identified. Chemical can not be liable under section 719 merely as an aider and abettor.

[**44] 2. Section 720

B.C.L. § 720 authorizes an action against officers and directors of a corporation "to set aside an illegal conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness." *Id.* § 720(a)(2) (McKinney Supp. 1986).¹⁸ Section 720 simply restates, with [*350] slight modification, General Corporation Law § 60. B.C.L. § 720: Legislative Studies and Reports (McKinney 1963). Although, by its terms, section 60 only authorized actions against directors and officers, a knowing transferee was liable thereunder to the corporation and its creditors. *Trionics Research Sales Corp. v. Nautech Corp.*, 28 A.D.2d 664, 280 N.Y.S.2d 630 (1st Dep't 1967), rev'd on other grounds, 21 N.Y.2d 574, 237 N.E.2d 68, 289 N.Y.S.2d 745 (1968); *Henry v. First National Bank*, 110 N.Y.S.2d 115, 123 (Sup. Ct. Westchester County 1951).

18 Section 720 provides, in pertinent part,

(a) An action may be brought against one or more directors or officers of a corporation to procure a judgment for the following relief:

* * * *

(2) To set aside an illegal conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.

* * * *

(b) An action may be brought for the relief provided in this section . . . by a corporation, or a receiver, trustee in bankruptcy, officer, director or judgment creditor thereof. . . .

B.C.L. § 720 (McKinney 1963 & Supp. 1986).

[**45] Read literally, the amended complaint alleges that Chemical violated section 720 by aiding and

abetting IMH's directors in transferring corporate assets in breach of their fiduciary duties to IMH. We construe it liberally to allege a claim against Chemical as a transferee of those assets. *Section 720* authorizes such a claim.

Assuming, for purposes of this motion, that the three year statute of limitations in *section 214(2a)* of *New York's Civil Practice Law* [hereinafter C.P.L.R. § " "]¹⁹ applies, the *section 720* claim is not time-barred, as Chemical contends. The statute of limitations does not begin running against a creditor plaintiff under *section 720* until the entry of judgment and return of execution unsatisfied. *Buttles v. Smith*, 281 N.Y. 226 at 236, 22 N.E. 2d 350 (1939) (construing General Corporation Law § 60); *Storer v. Ripley*, 12 Misc. 2d 466, 171 N.Y.S.2d 14, 16-17 (Sup. Ct. Westchester Co. 1958) (same). The plaintiff obtained a judgment against Atlanta on October 8, 1982 and commenced this action on December 11, 1984, less than three years later. The motion to dismiss the plaintiff's claim under B.C.L. § 720 is denied. The claim under *sections* [**46] 510 and 719 is dismissed.

¹⁹ C.P.L.R. § 214(2) reads, "an action to recover upon a liability, penalty or forfeiture created or imposed by statute must be commenced within three years." *N.Y. Civ. Prac. Law § 214(2)* (McKinney 1981).

E. The Fifth, Sixth, and Eighth Causes of Action

The fifth, sixth, and eighth causes of action seek to hold Chemical liable for IMH's obligations to Atlanta by virtue of Chemical's alleged status as a fiduciary (fifth cause of action), a control person (sixth cause of action), or a joint venturer (eighth cause of action). Chemical moves to dismiss these claims for failure to state a claim on which relief can be granted²⁰ or, alternatively, seeks a more definite statement of these claims.

²⁰ Atlanta's response to this aspect of the motion is typically murky and of little assistance to the Court.

1. The Fiduciary [**47] Duty Claim

The plaintiff alleges that Chemical breached a fiduciary duty to IMH's other creditors. The duty allegedly arose by virtue of Chemical's status as a creditor with special inside knowledge of the management and financial affairs of IMH. Atlanta cites

no authority for the existence of such a duty, nor has our research revealed any. Absent an allegation that Chemical assumed a status more substantial than that of a creditor, we refuse to impose upon it any special fiduciary duty. *Cf. Farm Stores, Inc. v. School Feeding Corp.*, 102 A.D.2d 249, 477 N.Y.S.2d 374, 378 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 1065, 479 N.E.2d 222, 489 N.Y.S.2d 877 (1985) (Creditor who exercised his influence as a shareholder in decisions that directly affected his investments, consented to challenged fraudulent distributions had a fiduciary duty to the rights of general creditors). Atlanta already has ample recourse, of which it is taking full advantage, against IMH's other creditors.

2. The Control Person Claim

One who controls a corporation cannot recover on its loans to the corporation to the [*351] detriment of other creditors. *See Pepper v. Litton*, 308 U.S. 295, 308-10, 84 L. Ed. [**48] 281, 60 S. Ct. 238 (1939) (Loans of dominant or controlling stockholder subordinated to claims of other creditors). But Atlanta's conclusory allegations that Chemical controlled IMH will not suffice to state a claim under this theory.

In order to assume the mantle of control and its associated benefits and perils, one must manage and conduct the business of the corporation. *Levy v. American Beverage Co.*, 265 A.D. 208, 38 N.Y.S.2d 517 (1st Dep't 1942). Atlanta has not alleged facts sufficient to place Chemical in that role. Rather the amended complaint alleges that DIC, Underhill, the joint venture and their principals controlled the affairs of IMH. Their self-interested actions were allegedly primarily responsible for IMH's conduct. Although the amended complaint alleges that Chemical's bargaining position vis-a-vis IMH was strong, conduct amounting to management or control is not alleged. The sixth cause of action is, therefore, dismissed.

3. The Joint Venture Claim

Finally, Atlanta alleges that Chemical and IMH were joint venturers. A joint venture is

an association of two or more persons, in the nature of a partnership, to carry out a single enterprise for profit, [**49] for which purpose the members combine their property, money, effects, skill, and knowledge, and agree that a community of

interest shall exist among them as to the undertaking's purpose, and that each coventurer shall stand in the relation of principal as well as agent to, as to each of the other coventurers, with an equal right of control of the means used to carry out the purpose of the venture.

16 N.Y. Jur 2d § 1576 (1981). "A transaction involving a loan of money and creating a debtor-creditor relationship will not of itself make the lender and the borrower joint venturers." *Id.* at § 1577.

IMH and Chemical are not alleged to have shared their skill, knowledge, property or effects. Chemical was a lender, not a coventurer. Chemical did not stand to share in the profits of IMH, and stood to share in the losses only to the extent that it was not repaid. The amended complaint does not contain any allegations that would support its conclusory assertion that Chemical and IMH were co-venturers.

The fifth, sixth and eighth causes of action are dismissed for failure to state a claim on which relief can be granted. The defendant's motion for a more definite statement of these [**50] claims is, thereby, rendered moot.

F. The Article 9 Claim

In its eleventh cause of action, Atlanta purported to state a claim under Article 9 of the Uniform Commercial Code against Chemical for receiving the proceeds of the sale of 141 homes in which Atlanta held a superior security interest.²¹ Chemical moved for partial summary judgment on this claim because actions for conversion of secured property are governed by a three year statute of limitations. *C.P.L.R. § 214(4)*. In typical fashion, Atlanta responded by denying that it intended to state a claim under Article 9. Chemical has accepted Atlanta's withdrawal of its claim. Even if Atlanta had not withdrawn this claim, we would grant summary judgment for failure to bring this claim within the applicable three-year limitations period.

21 The pertinent portions of the amended complaint state,

137. In the event IMH's request for a permanent injunction in 82 Civ. 3081 is denied, Chemical

Bank will be guilty of receiving the proceeds of the sale of approximately 141 modular homes which had been assigned to Atlanta pursuant to the Credit Agreement.

* * * *

140. As a result of the foregoing, Chemical Bank is liable to Atlanta under the Admiralty Laws of the United States; the Uniform Commercial Code of New York, specifically but not limited to Article 9 thereof; and Article 10 Sections 273, 273-a, 274, 275 and 276 of the New York Debtor and Creditor Law.

Amended Complaint paras. 137, 140.

[**51] [*352] G. The Claims for Punitive Damages and Attorney's Fees

The defendant next moves to strike the plaintiff's demand in the twelfth cause of action for punitive damages and attorney's fees. The motion to strike the demand for punitive damages is granted. Punitive damages are not recoverable in an action to recover a fraudulent conveyance, the sole basis upon which the plaintiff rests its demand for such damages. *James v. Powell*, 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967).

The motion to strike the demand for attorney's fees is denied. Under D.C.L. § 276-a, a plaintiff who can establish that a fraudulent conveyance was "made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud . . . creditors" can recover attorney's fees. Since an issue of fact remains as to Chemical's actual intent, *see supra pp. 26-27*, we can not now dismiss the plaintiff's claim for attorney's fees.

III. Discussion - Part III: Procedural Motions

A. Security for Costs

The defendant asks the Court to require the plaintiff to post a bond as security for costs pursuant to *CPLR § 8501*.²² That section [**52] mandates the provision of

security when none of the plaintiffs is a "domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made." *CPLR § 8501(a)*. An award of security in an action by a debtor in possession is optional. *Id.* at § 8501(b). The plaintiff contends that Rule 39 of the Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York ²³ governs the posting of security for costs in this action. Under Local Rule 39, "the Court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate." *Id.* We need not decide which provision to apply in this diversity action. 24 In our view, application of either the state or local rule compels the plaintiff to post a \$10,000 bond as security for costs.

22 *CPLR § 8501* provides, in pertinent part,

(a) . . . upon motion by the defendant without notice, the court or a judge thereof shall order security for costs to be given by the plaintiffs where none of them is a domestic corporation, a foreign corporation licensed to do business in the state or a resident of the state when the motion is made.

(b) In court's discretion. Upon motion by the defendant with notice, or upon its own initiative, the court may order the plaintiff to give security for costs in an action by or against an assignee or trustee for the benefit of creditors, a trustee, a receiver or debtor in possession in bankruptcy.

C.P.L.R. § 8501 (McKinney 1981).

[**53]

23 That rule states,

The court, on motion or in its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to

comply with the order the court may make such orders in regard to noncompliance as are just, and among others the following: an order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

24 There is substantial disagreement in this district as to whether Local Rule 39 or *C.P.L.R. § 8501* applies in diversity actions. *Compare Ilro Productions, Ltd. v. Music Fair Enterprises, Inc.*, 94 F.R.D. 76 (S.D.N.Y. 1982) (Lowe, J.) (applying state rule) with *Rapol v. Henry R. Jahn & Son, Inc.*, 84 F.R.D. 42 (S.D.N.Y. 1979) (Cooper, J.) (applying federal rule but looking to state statute for guidance).

The federal courts look to the state statute for guidance in determining whether to require a plaintiff to post security for costs. *Rapol* [**54] *v. Henry R. Jahn & Son*, 84 F.R.D. 42, 45 (S.D.N.Y. 1979). Under either statute, the bond assures that a defendant who is sued will, if successful, at least be able to recoup its costs. J. McLaughlin, *Practice Commentaries CPLR § 8501*, C8501:1 (McKinney 1981). In deciding whether to require security, courts also consider whether a lawsuit is instituted solely to harass. *Rapol*, *supra*, 84 F.R.D. at 45; see also *River Plate Reinsurance* [*353] *Co. v. Jay-Mar Group, Ltd.*, 588 F. Supp. 23, 27 (S.D.N.Y. 1984).

In this case, we perceive a high risk that the plaintiff, a debtor in bankruptcy, will be unable to pay the defendant's costs should the defendant prevail. The plaintiff itself admits that it "has no liquid assets except claims before this Court and claims in other districts. . . ." Plaintiff's Memorandum in Opposition at 99. Although we do not believe the plaintiff brought this action only to harass the defendant, Atlanta's lack of assets and status as a debtor in bankruptcy counsels us to require it to post a bond as security for costs. ²⁵

25 The plaintiff asks us to make a preliminary determination on the merits in order to decide whether to require costs. At this stage, that determination is neither possible nor necessary.

[**55] The requirement should not, however, impede Atlanta's ability to prosecute this action. We, therefore, require the plaintiff to post a \$10,000 bond. Although Atlanta's resources are not unlimited, it has testified that one of its creditors has agreed to finance up to \$300,000 in fees for this and related litigations. Toder Affidavit, Exhibit 4, at 36. Requiring it to post a \$5,000 bond should not seriously impede the prosecution of this action.

B. Certification for Appeal

The plaintiff asks this Court to certify for interlocutory appeal the question of whether this Court has admiralty jurisdiction. It argues that our decision on that issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *28 U.S.C. § 1292(b) (1982)*.²⁶ We do not agree with any of the plaintiff's contentions. First, there is not substantial ground for difference of opinion on this question. Second, the question is not controlling, since the Court has held that it has another basis of subject matter jurisdiction. Finally, an immediate appeal will [**56] not advance this litigation. Indeed, the time spent on appeal will hinder its progress. Moreover, a finding that this Court has admiralty jurisdiction will necessitate reconsideration of nearly all of the motions now before us. This litigation must proceed apace. The plaintiff's request, pursuant to *28 U.S.C. § 1292(b)*, for an order permitting immediate appeal on the question of admiralty jurisdiction is denied.

²⁶ *Section 1292(b)* states,

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit

an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (1982).

[**57] IV. Conclusion

1. The defendant's motion to dismiss this action for lack of subject matter jurisdiction is denied. Any claims that the plaintiff purports to state under federal maritime law or some other form of federal law are dismissed.

2. The defendant's motion to dismiss the second, third,²⁷ and seventh causes of action is granted.

²⁷ Any claims in the third cause of action that arise under the D.C.L. are stated elsewhere in the amended complaint.

3. The defendant's motion to dismiss the fifth, sixth, and eighth causes of action is granted.

4. That portion of the eleventh cause of action arising under the Uniform Commercial Code is dismissed.

5. The defendant's motion to dismiss those parts of the fourth cause of action purporting to state claims under *sections 510 and 719* of the Business Corporation Law and for aiding and abetting violations [*354] of the Debtor and Creditor Law is granted. The motion to dismiss that aspect of the fourth cause of action purporting to state a claim [**58] under *section 720* of the Business Corporation Law is denied.

6. The motion to strike the demand for punitive damages in the twelfth cause of action is granted.

7. The motion to strike the demand for attorney's fees is denied.

8. The motions to dismiss the claims arising under *sections 273, 273-a, 274, and 275* of New York's Debtor and Creditor Law is granted. The motion, pursuant to *Fed. R. Civ. P. 12(b)(6)*, to dismiss the claims arising under *section 276* of that law is denied. The defendant's

motion to dismiss that claim for failure to plead fraud with particularity is granted with leave to replead, in accordance with the instructions herein, *see supra* note 14, within 30 days.

9. The motion to dismiss the thirteenth cause of action, which seeks equitable relief for the fraudulent conveyance claims, is granted with leave to replead when the fraudulent conveyance claims are themselves repleaded.

10. The plaintiff is hereby ordered to post a \$10,000 bond as security for costs. The plaintiff may not file its second amended complaint until the bond is posted.

11. The plaintiff's request for certification of this action for immediate appeal is denied.

SO ORDERED.

APPENDIX 12



**DEEP AGGARWAL, Plaintiff, Appellant, v. PONCE SCHOOL OF MEDICINE,
Defendant, Appellee**

No. 84-1163

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

745 F.2d 723; 1984 U.S. App. LEXIS 17939; 40 Fed. R. Serv. 2d (Callaghan) 262

October 4, 1984

PRIOR HISTORY: [**1] Appeal From The United States District Court For The District Of Puerto Rico [Hon. Jaime Pieras, Jr., U.S. District Judge].

COUNSEL: Luis A. Gonzalez Perez, Woods, Woods & Mayo, for Appellant.

Charles R. Cuprill, Hector R. Cuprill, Jose E. Otero, Oscar Davila Suliveres, Victor M. Caparros Cabrera and Luis G. Estates, hijo, for Appellee.

JUDGES: Campbell, Chief Judge, Breyer, Circuit Judge, and Selva, * District Judge.

* Of the District of Rhode Island, sitting by designation.

OPINION BY: SELYA

OPINION

[*724] SELYA, District Judge

The appellant, Deep Aggarwal, formerly toiled in the academic vineyards of the appellee, Ponce School of Medicine (PSM), as an associate professor of physiology. Somewhere along the way, the seeds of discontent were sown; and, in early May of 1981, PSM notified Dr. Aggarwal that his services would no longer be required after July 31, 1981. That separation from service took

place as scheduled.

Dr. Aggarwal fled to Wisconsin, mulled over his plight at some length, and eventually decided that he would not permit PSM to plow him under without a struggle. This decision fructified in August of 1983, when Dr. Aggarwal filed suit in the United [**2] States District Court for the District of Puerto Rico. His complaint invoked that court's diversity jurisdiction, 28 U.S.C. § 1332, and sought money damages aggregating \$500,000 for breach of contract. Simultaneous with the filing of its answer, PSM moved pursuant to Rule 5 of the Local Rules of the District of Puerto Rico to require the appellant to post bond. Since this rule is central to the matters here at issue, its full text follows:

When the plaintiff is domiciled outside of Puerto Rico or is a foreign corporation, a bond shall be required to secure the costs, expenses and attorneys' fees which may be awarded. All proceedings in the action shall be stayed until bond is given, which shall not be less than five [*725] hundred dollars (500.00). The Court may require an additional bond upon a showing that the original bond is not sufficient security, and stay the proceeding in the action until such additional bond is given.

After the lapse of ninety (90) days from the service of the order requiring

bond or additional bond, without the bond having been given, the Court may dismiss the action.

This rule shall be liberally interpreted in [**3] favor of the plaintiff so as not to preclude his right to sue through excessive bond requirement. Consistent with this, the Court, for good cause shown, may dispense with this requirement.

It is beyond cavil that the appellant, who claimed in his complaint to be "domiciled and residing in the state of Wisconsin," was -- and remains -- within the reach of D.P.R.L.R. 5.

On October 5, 1983, before Dr. Aggarwal had responded to the Rule 5 motion and prior to the expiration of the time for so doing, *see* D.P.R.L.R. 8(f), the court granted PSM's request. While the motion was silent as to any proposed principal amount for the bond, the district judge took note of the ad damnum contained in the complaint, and wrote in pertinent part:

... Using the amount claimed and the nature of the claim as a yardstick, the court must determine the bond to be posted in order to reasonably protect the interest of defendants [sic]. The bond is placed at \$5,000.00 which is to be posted within 30 days from date hereof, or otherwise the complaint is to be dismissed.

Dismayed by the bitter fruit of this unwanted harvest, the appellant seasonably pressed for relief from [**4] the order. Dr. Aggarwal contended that the practical effect of the bond requirement was to deprive him of any judicial remedy, and implored the court to exempt him from posting the mandated security by reason of his impecunty. Dr. Aggarwal attached to his motion an affidavit which recited in substance that he had been out of work since July of 1981; that his only income was a monthly gratuity (\$200) from his relatives in India; that his valiant (albeit unspecified) efforts to find gainful employment had been uniformly unavailing; and that his present checking account balance was roughly \$350. The record before us reflects no stated opposition to this motion. Yet, the parties agree that it was orally denied at a *Fed. R. Civ. P. 16* status/scheduling conference held

before the district court on November 22.

In early December, Dr. Aggarwal again moved for relief vis-a-vis the bond. He reiterated his plea of poverty; expressed his "particular[] interest" in continuing the prosecution of the case; and averred that he had "made every effort possible to obtain the sum required as bond, but due to his extremely limited financial resources" had come up empty. PSM filed a formal opposition [**5] to this motion, in which it stalwartly defended the propriety of the bond. But, PSM did not in any way controvert or cast doubt upon the appellant's description of his straitened circumstances. The district court responded in January of 1984 by a written order in which it both denied Dr. Aggarwal's latest imprecation and dismissed the action for noncompliance with the October 5 surety decree. In so doing, the district judge concluded:

The Court finds that plaintiff has no attachable property in Puerto Rico and his likelihood of success on the merits is tenuous. The bond was set at 1% of the amount claimed in the complaint and, considering the length, complexity, and cost of this suit, plaintiff's failure in posting a non-resident bond renders this case as DISMISSED.

No finding was made upon, nor any comment addressed to, Dr. Aggarwal's allegations of impoverishment.

Judgment was entered in favor of PSM on January 31, 1984. The appellant promptly moved pursuant to *Fed. R. Civ. P. 60(b)(6)* for relief from the judgment. Dr. Aggarwal challenged the district court's assessment of his chances of success on the merits, and again displayed the tatterdemalion banner [**6] of impecunty. He characterized the bond amount as "excessive" [*726] in relation to his meagre resources and questioned the constitutionality of so draconian an application of D.P.R.L.R. 5. PSM's objection, filed on February 17, 1984, did not contest (or even touch upon) Dr. Aggarwal's financial condition. The record before us is devoid of any indication of judicial action below on this motion, presumably because an appeal was taken from the judgment of dismissal, also on February 17, 1984.

This court has, in the not too distant past, had occasion to consider the constitutionality of D.P.R.L.R. 5

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on its face, and has held it harmless against such a challenge. *Hawes v. Club Ecuestre El Comandante*, 535 F.2d 140, 144-45 (1st Cir. 1976). And, we have likewise determined that the promulgation and perpetuation of Local Rule 5 was a proper exercise of the power ceded to the district courts by Congress, see *Fed. R. Civ. P.* 83, to design and implement idiocratic procedural rules. *Hawes*, 535 F.2d at 143-44. There is nothing in the case before us which in any way signals the need for a retreat from the twin holdings of *Hawes*. Indeed, as we [**7] observed at that time:

Even in the absence of a standing local rule, a federal district court has the inherent power to require security for costs when warranted by the circumstances of the case.

Id. at 143. See also *McClure v. Borne Chemical Co.*, 292 F.2d 824, 835 (3d Cir. 1961).

But, *Hawes* was careful to note that the nondomiciliary plaintiffs in that case did not attack D.P.R.L.R. 5 as applied. *Hawes*, 535 F.2d at 145. *Hawes*, therefore, left open the possibility of ferment arising out of particular applications of the rule, warning that

The district court is under an obligation to evaluate each case individually, and to exercise its inherent discretion to apply the requirements of Rule 5 so as to facilitate a just and speedy disposition on the merits, as required by *Fed. R. Civ. P.* 1.

Id.

The instant case takes up, in a very real sense, where *Hawes* left off. The appellant's sortie is two-pronged: he claims that the imposition of substantial surety for costs upon one in his beggarly circumstances is an unconstitutional denial of equal protection and of access to the courts; [**8] and that, given the appellant's indigency, the judge abused the "inherent discretion"

which *Hawes*, *id.*, directed the district court to exercise.

It has long been a basic tenet of the federal courts to eschew the decision of cases on constitutional grounds unless and until all other available avenues of resolution were exhausted. *Mills v. Rogers*, 457 U.S. 291, 305, 73 L. Ed. 2d 16, 102 S. Ct. 2442, (1982); *Hagans v. Lavine*, 415 U.S. 528, 546-47, 39 L. Ed. 2d 577, 94 S. Ct. 1372, (1974); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 347-48, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring). We have routinely followed such an approach. *E.g.*, *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 22 (1st Cir. 1982). Indeed, to look the other way would be "gratuitously to hold a farthing candle to the sun." *Lopez v. Bulova Watch Co.*, 582 F. Supp. 755, 762 (D.R.I. 1984). Mindful, then, of this prudential precept, we turn first to a consideration of the argument that the district judge, by imposing a \$5,000 bond requirement in this case, overstepped [**9] the encincture of his discretion.

We are aware that the question of security for costs is procedural in nature, *Hawes*, 535 F.2d at 143 & n.3, and that a trial court's discretion in administering procedural matters -- even those which may arguably affect substantive rights -- is wide. *Id.* at 143-44. See *Smith v. Ford Motor Co.*, 626 F.2d 784, 796 (10th Cir. 1980), *cert. denied*, 450 U.S. 918, 101 S. Ct. 1363, 67 L. Ed. 2d 344, (1981); *United States v. Simmons*, 476 F.2d 33, 35 (9th Cir. 1973); *Lance, Inc. v. Dewco Services*, 422 F.2d 778, 783-84 (9th Cir. 1970). But discretion, as the term implies, necessarily speaks to degrees, not to absolutes. And, it has regularly been recognized that limits upon the [*727] exercise of such judicial discretion do obtain. *E.g.*, *Wirtz v. Hooper-Holmes Bureau, Inc.*, 327 F.2d 939, 943 (5th Cir. 1964) ("It is also true that a district court may abuse its authority and discretion in the application and enforcement of local rules, which are otherwise valid."). See also *Farmer v. Arabian American Oil Co.*, 285 F.2d 720 (2d Cir. 1960). [**10] As Chief Judge Magruder remarked some three decades ago:

"Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court

unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. One is reminded of the "clearly erroneous" standard in *Rule 52(a) of the Federal Rules of Civil Procedure*, 28 U.S.C.

In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954).

The cask which encases a judge's discretion, though commodious, can be shattered when a reviewing tribunal is persuaded that the trial court misconceived or misapplied the law, or misconstrued its own rules. *Smith*, 626 F.2d at 796; *Farmer*, 285 F.2d at 722-23. It is this strain which nourishes the appellant's argument. He contends, at bottom, that the district court, in ignoring the uncontradicted evidence as to Dr. Aggarwal's broken fortunes, misconceived the applicable legal standard in setting the surety sum.

[**11] In the matter at bar, the district court's determinations (i) that the claim asserted was of dubious worth, and (ii) that, because of Aggarwal's itinerant status and dearth of assets in Puerto Rico, PSM had a cogent need for meaningful security,¹ cannot readily be contested. This is peculiarly so in this case, given the lower court's broad discretion and the skimpiness of the record before us. Yet, these findings comprise, at best, two-thirds of the equation. They omit entirely any reference to the appellant's means.

¹ Since the bond was set above the stated minimum, it would have been preferable for the court to have made somewhat more detailed findings as to the type and kind of "costs, expenses and attorneys' fees," D.P.R.L.R. 5, which foreseeably could have been awarded to PSM in the aftermath of this litigation, so as to buttress the selection of the \$5,000 figure. The district judge's preliminary assessment of the merit (or better put, the lack thereof) of the suit, in juxtaposition with the availability under Puerto Rican law of counsel fees in favor of a prevailing defendant "where a party has been obstinate," Rule 44.1(d), Puerto Rico Rules of Civil Procedure, 32 L.P.R.A. Appendix III (1979),

combine in this case, however, adequately to explain the indemnity amount.

[**12] In finding D.P.R.L.R. 5 valid per se, we noted that Rule 5 must be read as being subject to the strictures of 28 U.S.C. § 1915(a), the text of which is excerpted in the margin.² *Hawes*, 535 F.2d at 143. Later in that opinion, in virtually the same breath in which we emphasized the district court's obligation "to evaluate each case individually," *id.* at 145, we reaffirmed the notion that "to require all foreign plaintiffs, as such, to post substantial security as a condition to access to the courts may well be an unconstitutional denial of equal protection." *Id.*, quoting *Coady v. Aguadilla Terminal Inc.*, 456 F.2d 677, 679 (1st Cir. 1972). And, there is in this instance no necessity to engraft consideration of the nondomiciliary's financial status upon the rule by appellate fiat, as D.P.R.L.R. 5 itself directs the court to take this into account in the plainest of terms ("This rule shall be liberally interpreted in favor of the plaintiff so as not to preclude his right to sue through excessive bond requirement.").

² 28 U.S.C. 1915(a) provides in pertinent part:

Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor.

[**13] In fine, D.P.R.L.R. 5 demands that the court construct an equation composed of at least three integers: (i) the degree of [*728] probability/improbability of success on the merits, and the background and purpose of the suit; (ii) the reasonable extent of the security to be posted, if any, viewed from the defendant's perspective; and (iii) the reasonable extent of the security to be posted, if any, viewed from the nondomiciliary plaintiff's perspective. And just as factors such as the absence of attachable property within the district or the conduct of the parties may bear on a defendant's legitimate need for the prophylaxis of a bond, so too, a plaintiff's ability to post surety for costs must weigh in the balance when the

third figure of the equation is tabulated.³ While it is neither unjust nor unreasonable to expect a suitor "to put his money where his mouth is," *cf. In re Stump*, 449 F.2d 1297, 1298 (1st Cir. 1971) (per curiam), toll-booths cannot be placed across the courthouse doors in a haphazard fashion. The district court, in the exercise of its sound discretion, must settle upon an assurance which is fair in the light not only of the case itself [**14] and of the exigencies faced by the defendant, but also fair when illuminated by the actual financial situation of the plaintiff. The rule is a scalpel, to be used with surgical precision as an aid to the even-handed administration of justice, not a bludgeon to be employed as an instrument of oppression.

3 In deference to the court below, it should be observed that *Hawes*, 535 F.2d at 144 (dicta), did set forth a partial listing of "pertinent factors for the district court to consider" in respect to the dollar amount of a Local Rule 5 bond; and failed to include among them specific reference to the state of the nondomiciliary plaintiff's exchequer. Yet, we believe that the requirement which we today impose is fairly implied in *Hawes*, *e.g., id. at 145*; and we note that in *Hawes*, unlike this case, the appellants "made no attempt to show that they are financially unable to post the amounts required by the district court." *Id. at 144*.

This formulation, [**15] we believe, captures the spirit of *Farmer v. Arabian American Oil Co.*, *supra*, where the Second Circuit, on admittedly different facts and in an era when the value of the dollar had been subjected to considerably less erosion, set aside an order of the district court fixing a \$6,000 nondomiciliary bond under a local varietal of D.P.R.L.R. 5. Noting, as do we, that competing concerns are at play, the Second Circuit reversed for abuse of discretion. Judge Clark, for a unanimous panel, wrote in part:

It is clear that possible loss of reimbursement for costs, should defendant eventually become so entitled, may annoy it, but cannot really prejudice it in its defense. On the other hand, plaintiff showed conclusively that he could not put up the 100% collateral required by surety companies before furnishing the bond. Truly were this order to stand it would go far in making the federal court a court only

for rich litigants. . . .

Farmer, 285 F.2d at 722.

In the case at hand, there is no history of the persistent pursuit of fruitless litigation by the appellant, nor any demonstrated track record of harassment or the like. Dr. [**16] Aggarwal repeatedly alleged that he was desirous of pressing what he visualized as a bona fide claim, but that he was financially helpless in the face of the sizable bonding requirement imposed by the district court. While the facts which he served up to support his conclusion of fiscal impuissance were somewhat sketchy, the point was plainly made. And, having been raised in a timely fashion, Dr. Aggarwal's protestations of impecunity (never denied by PSM) were not addressed by the district court.⁴ This, we believe, was an abuse of discretion. The lower court should either have held an evidentiary hearing or demanded that more concrete proof of the appellant's economic health -- say, a detailed financial statement or copies [*729] of his federal income tax returns -- be produced. Given the tenor of D.P.R.L.R. 5, express findings should have been set forth to reflect that the court had weighed the plaintiff's finances and had interpreted the rule with the required liberality "so as not to preclude [plaintiff's] right to sue through excessive bond requirement." *Id.*

4 The appellee suggested, both in its brief and at oral argument, that the district court may well have chosen to disbelieve Dr. Aggarwal's claim of impoverishment, based on his retention of a distinguished law firm and on some indications in the papers of the case that the appellant commuted once or twice between Wisconsin and Puerto Rico. But, the district court made no findings of this sort. While we agree that these topics may be relevant to an overall inquiry into Dr. Aggarwal's mendicancy *vel non*, we decline PSM's invitation to indulge in the tea-leaf reading which its suggestion implicitly entails.

[**17] We are troubled, too, by the district court's reliance on an arbitrary percentage of the ad damnum as a suggested basis for establishing the principal amount of the bond. Modern litigation practices being what they are, the monetary demand which caps a plaintiff's complaint is likely to be sanguine at best -- and more

often than not, the merest of velleities. After all, the only requirement is that a pleader set forth "a demand for judgment for the relief to which he deems himself entitled." *Fed. R. Civ. P. 8(a)(3)* (Emphasis supplied). In any event, the amount claimed by the plaintiff bears no necessary relationship to the "costs, expenses, and attorneys' fees," D.P.R.L.R. 5, which the defendant can expect either to incur or to recover: a suit upon a \$1,000,000 promissory note is not likely to be ten times more expensive to defend than would be the case if the note were in the face amount of \$100,000. Moreover, if the prayer for judgment was to dictate the amount of security to be posted, a nondomiciliary plaintiff could undercut the entire purpose of the local rule by the simple expedient of inserting in his complaint a modest demand; he would have nothing to lose, for it [**18] is firmly settled that the ad damnum does not constitute a ceiling of any sort on the plaintiff's recovery. See, e.g., *Morton Buildings of Nebraska Inc. v. Morton Buildings, Inc.*, 531 F.2d 910, 919 (8th Cir. 1976) ("The law clearly provides that a plaintiff is not strictly bound by the prayers for relief in the complaint . . ."); *Farmer*, 285 F.2d at 722 n.2; *Matarese v. Moore-McCormack Lines*, 158 F.2d 631,

633 (2d Cir. 1946) ("The demand for judgment does not limit the . . . amount of the relief except in case of a judgment by default."). See also *Fed. R. Civ. P. 54(c)*. From our vantage point, using such a conjectural figure as a basis for meaningful judicial action is fraught with peril, and ought to be avoided except where compelling reasons exist.

The payment assurance required of the appellant was, therefore, twice debauched: no evaluation was made of Dr. Aggarwal's ability to post bond, and undue reliance was placed upon the amount claimed in his suit. Since the district court in this case plucked the \$5000 grape from the vine before it had ripened, we are constrained to remand so that the entire question of security [**19] can be reviewed in the proper context. The district court should vacate the bond previously set and reconsider the matter afresh.

The judgment of the district court is vacated and the case is remanded to the district court for further proceedings consonant herewith.

APPENDIX 13



**Ajitabh Bachchan, Plaintiff, v. India Abroad Publications Incorporated, Trading as
India Abroad News Service, Defendant.**

Index No. 28692/91

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

**154 Misc. 2d 228; 585 N.Y.S.2d 661; 1992 N.Y. Misc. LEXIS 231; 20 Media L. Rep.
1051**

April 13, 1992, Decided

SUBSEQUENT HISTORY: [***1] As Amended
September 30, 1992

DISPOSITION: For the above-stated reasons, the
motion for summary judgment in lieu of complaint is
denied.

HEADNOTES

Judgments - Foreign Judgment - Enforcement of
English Libel Judgment

An English libel judgment obtained by plaintiff, an
Indian national, based upon a wire service story
transmitted by defendant regarding plaintiff's
involvement in an international scandal which touched
major players in Indian politics, is not entitled to
enforcement in New York pursuant to *CPLR 5304* on
constitutional grounds because English libel law, contrary
to constitutional requirements in this country, places the
burden of proving truth upon media defendants which
publish speech of public concern. Plaintiff's failure to
prove falsity in the English libel action renders the
judgment unenforceable in this State. In addition,
enforcement of the English judgment would also violate
the First Amendment since plaintiff was not required to
and did not meet the "less forbidding" constitutional
requirement that a private figure show that a media
defendant, which published a matter arguably within the

sphere of legitimate public concern, acted in a grossly
irresponsible manner without due consideration for the
standards of information gathering and dissemination
ordinarily followed by responsible parties.

COUNSEL: *Chalos English & Brown* for plaintiff.
Lankenau Kovner & Bickford for defendant.

JUDGES: Fingerhood

OPINION BY: Shirley Fingerhood, J.

OPINION

[*229] [**661] Although the cases interpreting
constitutional limitations on libel actions are legion, this
is apparently the first time that a New York court has
been asked to apply those limitations to bar the
enforcement of a foreign judgment.

The judgment was granted in an action brought in the
High Court of Justice in London, England, by an Indian
national against the New York operator of a news service
which transmits reports only to a news service in India.
The story held to be defamatory was written by a reporter
in London, wired by defendant to the news service in
India which sent it to newspapers there. It was reported
in two Indian newspapers, copies of which were
distributed in the United Kingdom.

154 Misc. 2d 228, *229; 585 N.Y.S.2d 661, **661;
1992 N.Y. Misc. LEXIS 231, ***1; 20 Media L. Rep. 1051

The story was also reported in an issue of India Abroad, defendant's New York newspaper. An edition of India Abroad was printed and distributed in the United Kingdom by defendant's English [***2] subsidiary, India Abroad (U.K.) and a claim based on that distribution was asserted in the lawsuit approximately a year after its commencement.

The wire service story transmitted by defendant on January 31, 1990 stated that Dagens Nyheter, a Swedish daily newspaper, (hereinafter DN) had reported that Swiss authorities had frozen an account belonging to plaintiff to which money was transferred from a coded account into which commissions paid by Bofars were deposited. Bofars is a Swedish arms company, which some time before had been charged with paying kickbacks to obtain a large munitions contract with the Indian government. Plaintiff's name had previously been mentioned in connection with the scandal in a variety of Indian and other publications. On February 3, 1990, defendant's wire service transmitted plaintiff's denial that he was the holder of such a bank account or that he or any member of his family had any connection with the Bofars contract.

Plaintiff brought an action against DN in London at the same time as it sued India Abroad Publications Incorporated. DN settled the claim against it by paying a sum of money and issuing an apology saying that it had been misled [***3] by [**662] Indian government sources. India Abroad did not apologize but did report DN's settlement and apology.

The jury assessed 40,000 pounds in damages for the wire service story together with attorney's fees against India Abroad Publications Incorporated and its reporter, Rahul [*230] Bedi. As authorized by *CPLR 5303* plaintiff seeks to enforce that judgment by motion for summary judgment in lieu of complaint. (A 40,000 pound judgment granted against India Abroad, U.K. for its distribution of the English edition of India Abroad is not directly at issue here.)

Entry of the judgment is opposed on the ground that it was imposed without the safeguards for freedom of speech and the press required by the *First Amendment of the US Constitution* and *NY Constitution, article I, § 8*. Defendant asks this court to reject the judgment as repugnant to public policy, a ground for nonrecognition of foreign judgments under *CPLR 5304 (b) (4)*.

CPLR 5304 is comprised of two parts: subdivision (a) which is explicitly mandatory and precludes recognition of foreign judgments on certain constitutional grounds, i.e., if the procedures pursuant to which a foreign judgment was rendered [***4] are not compatible with the requirements of due process of law or when the foreign court did not have personal jurisdiction over the defendant; and subdivision (b) which provides that a foreign judgment "need not be recognized if," *inter alia*, "the cause of action on which the judgment is based is repugnant to the public policy of this state" (*CPLR 5304 [b] [4]*).

It is plaintiff's position that the public policy exception to the rule that foreign judgments are afforded comity is narrow and inapplicable here. He asserts that this court should not reexamine the claim for which the judgment was awarded to determine whether it would be culpable under United States precedents. Pointing to *CPLR 5304 (b) (4)*'s reference to "cause[s] of action" rather than judgments, he argues that libel causes of action are cognizable in New York. If that paragraph is deemed to refer to judgments as well as causes of action, plaintiff asks this court to exercise its discretion to recognize the judgment in view of the common antecedents of the law of Great Britain and that of the United States.

It is doubtful whether this court has discretion to enforce the judgment if the action in which it [***5] was rendered failed to comport with the constitutional standards for adjudicating libel claims. In his commentary on *CPLR 5304*, David D. Siegel notes that one of the grounds for nonrecognition of a foreign judgment in subdivision (b), a lack of fair notice in sufficient time to enable a defendant to defend, "goes to the roots of due process." (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, *CPLR C5304:1*, at 493.) For [*231] that reason, he suggests that a refusal to recognize a foreign country judgment for lack of fair notice may be constitutionally mandatory, rather than, as subdivision (b) would have it, discretionary. (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, *CPLR C5304:1*, at 492.) Similarly, if, as claimed by defendant, the public policy to which the foreign judgment is repugnant is embodied in the *First Amendment of the US Constitution* or the free speech guarantee of the NY Constitution, the refusal to recognize the judgment should be, and it is deemed to be, "constitutionally

154 Misc. 2d 228, *231; 585 N.Y.S.2d 661, **662;
1992 N.Y. Misc. LEXIS 231, ***5; 20 Media L. Rep. 1051

mandatory." Accordingly, the libel law applied by the High Court of Justice in London in granting judgment to plaintiff will be reviewed to ascertain [***6] whether its provisions meet the safeguards for the press which have been enunciated by the courts of this country.

Both parties submitted descriptions of the defamation laws of England in affidavits and affirmations by English solicitors and barristers with copies of relevant statutes, rules and case law. Pursuant to *CPLR 4511* the court will take judicial notice of the law as set forth in the affirmations of Sarosh Zaiwalla and Charles Anthony St. John Gray, plaintiff's solicitor and barrister, and Geoffrey Robertson, Q.C., for the defendant. The instructions given to the jury by the presiding Judge at [**663] the trial of plaintiff's claim, Mr. Justice Otten, have also been considered.

Under English law, any published statement which adversely affects a person's reputation, or the respect in which that person is held, is prima facie defamatory. Plaintiffs' only burden is to establish that the words complained of refer to them, were published by the defendant, and bear a defamatory meaning. If, as in the present case, statements of fact are concerned, they are presumed to be false and the defendant must plead justification for the issue of truth to be brought before the [***7] jury. An unsuccessful defense of justification may result in the award of aggravated damages. For, in the language of Lord Hailsham of the House of Lords in *Broome v Cassell & Co.* (1 All ER 801, 824 [1972]): "Quite obviously, the award must include factors for injury ... the absence of apology, or the reaffirmation of the truth of the matter complained of".

English law does not distinguish between private persons and those who are public figures or are involved in matters of public concern. None are required to prove falsity of the libel or fault on the part of the defendant. No plaintiff is required [*232] to prove that a media defendant intentionally or negligently disregarded proper journalistic standards in order to prevail.

The defendant has the burden of proving not only truth but also of establishing entitlement to the qualified privilege for newspaper publications and broadcasters provided by section 7 (3) of the 1952 Defamation Act where the "matter [published] is ... of public concern and ... [its] publication ... is ... for the public benefit" (emphasis added). *

* That defense is unavailable if the plaintiff requests that explanation or contradiction be published and defendant refuses to do so. Even reports of proceedings of a public nature--of Parliament and of the courts are protected by privilege only "provided they are neither inaccurate nor unfair to the plaintiff." (Duncan & Neill, Defamation § 14.29, at 103 [1978].)

[***8] As stated by Mr. Gray, plaintiff's barrister, "[t]he difference between the American and English jurisdictions essentially comes down to where the burden of proof lies".

Defendant argues that the defamation law of England fails to meet the constitutional standards required in the United States because plaintiff, a friend of the late Prime Minister of India Rajiv Ghandi and the brother and manager of a movie star and former member of Parliament, is a public figure. In *New York Times Co. v Sullivan* (376 US 254, 279-280 [1964]), the Supreme Court of the United States ruled that in order to recover damages for defamation a public official must prove by clear and convincing evidence that the defendant published the allegedly defamatory statement with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." That burden of proof was placed on public figures who sued media defendants in *Curtis Publ. Co. v Butts* (388 US 130 [1967]).

However, it seems neither necessary nor appropriate to decide whether plaintiff, an Indian national residing in England or Switzerland, is a public figure. Instead, the procedures [***9] of the English court will be compared to those which according to decisions of the United States Supreme Court are constitutionally mandated for suits by private persons complaining of press publications of public concern.

In *Gertz v Robert Welch, Inc.* (418 US 323, 347 [1974]) the court held that a private figure could not recover damages for defamation without showing that a media defendant was at fault, leaving the individual States to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." [*233]

Reviewing the Supreme Court's decisions enunciating constitutional limitations on suits for defamation, Justice O'Connor stated [**664] in

154 Misc. 2d 228, *233; 585 N.Y.S.2d 661, **664;
1992 N.Y. Misc. LEXIS 231, ***9; 20 Media L. Rep. 1051

Philadelphia Newspapers v Hepps (475 US 767, 775): "One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the [***10] Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern."

The issue in *Hepps* (*supra*) was the validity under the First Amendment of the common-law presumption that a defamatory statement is false, pursuant to which the burden of proving truth is on the defendant. Finding plaintiff to be a private figure and the subject of the newspaper articles in issue to be of public concern, the court held that, "the common-law's rule on falsity--that the defendant must bear the burden of proving truth--must ... fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages" (475 US, at 776).

It is obvious that defendant's publication relates to a matter of public concern. The affidavits [***11] and documents submitted by both parties reveal that the wire service report was related to an international scandal which touched major players in Indian politics and was reported in India, Sweden, the United States, England and elsewhere in the world. Consider the revelation of Mr. Zaiwalla, who had the conduct of the action resulting in the English judgment, that it was given priority over other defamation actions waiting to be tried because "the Indian General Election was imminent and the Bofars affairs and the plaintiff's long-time family friendship with Mr. Rajiv Ghandi, the former prime minister of India ... and leader of the main opposition party ... were being used as electoral weapons in India." Mr. Justice Otten, in his instructions, referred to the political context of the story by suggesting to [*234] the jury that it "ignore the complexities" of the Indian politics and political parties which were the background of the news stories.

Placing the burden of proving truth upon media defendants who publish speech of public concern has been held unconstitutional because fear of liability may deter such speech. "Because such a 'chilling' effect would be antithetical [***12] to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could 'only result in a deterrence of speech which the Constitution makes free.' " (*Philadelphia Newspapers v Hepps, supra*, at 777.)

The "chilling" effect is no different where liability results from enforcement in the United States of a foreign judgment obtained where the burden of proving truth is upon media defendants. Accordingly, the failure of Bachchan to prove falsity in the High Court of Justice in England makes his judgment unenforceable here.

There is, of course, another reason why enforcement of the English judgment would violate the First Amendment: in England, plaintiff was not required to and did not meet the "less forbidding" constitutional requirement that a private figure show that a media defendant was at fault.

New York's standard for liability in actions brought by private persons against the press is set forth in *Chapadeau v Utica Observer-Dispatch* (38 NY2d 196, 199 [1975]): [***13] "[W]here the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

As stated above, the English courts do not require plaintiff to prove that a press defendant was at fault in any degree. Bachchan certainly did not establish, as required by *Chapadeau* (*supra*), that defendant was grossly irresponsible, a difficult task, where defendant disseminates another's news report. (*See, Rust Communication Group v 70 State St. Travel Serv.*, 122 AD2d 584 [4th Dept 1986].)

[*235] It is true that England and the United States

154 Misc. 2d 228, *235; 585 N.Y.S.2d 661, **664;
1992 N.Y. Misc. LEXIS 231, ***13; 20 Media L. Rep. 1051

share many common-law principles of law. Nevertheless, a significant difference between the two jurisdictions lies in England's lack of an equivalent to the *First Amendment to the US Constitution*. The protection to free speech and the press embodied [***14] in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards

deemed appropriate in England but considered antithetical to the protections afforded the press by the US Constitution.

For the above-stated reasons, the motion for summary judgment in lieu of complaint is denied.

APPENDIX 14



BODDIE ET AL. v. CONNECTICUT ET AL.

No. 27

SUPREME COURT OF THE UNITED STATES

401 U.S. 371; 91 S. Ct. 780; 28 L. Ed. 2d 113; 1971 U.S. LEXIS 73

**December 8, 1969, Argued
March 2, 1971, Decided**

SUBSEQUENT HISTORY: Reargued November 17, 1970.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

DISPOSITION: *286 F.Supp. 968*, reversed.

SUMMARY:

In a class action brought on behalf of all female welfare recipients residing in Connecticut and wishing divorces, but prevented from bringing divorce suits by Connecticut statutes requiring payment of court fees and costs for service of process as a condition precedent to access to the courts, the plaintiffs sought in the United States District Court for the District of Connecticut a judgment declaring the statutes invalid as applied to the class, and an injunction requiring defendants to permit members of the class to sue for divorce without payment of any fees and costs. A three-judge court dismissed the complaint for failure to state a claim (*286 F Supp 968*).

On appeal, the Supreme Court of the United States reversed. In an opinion by Harlan, J., expressing the views of six members of the court, it was held that a state denies due process of law to indigent persons by refusing to permit them to bring divorce actions except on payment of court fees and service-of-process costs which they are unable to pay.

Douglas, J., concurred in the result on the ground that the *equal protection clause* rather than the due process clause was the proper basis of decision.

Brennan, J., concurred on the ground that while denying indigents access to the courts for nonpayment of a fee is a denial of due process, it is also a denial of equal protection of the laws, and no distinction can be drawn between divorce suits and other actions.

Black, J., dissented on the ground that charging practically nominal initial court costs in civil actions does not violate either the due process or *equal protection clause*.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

APPEAL AND ERROR §1293

dismissal for failure to state claim -- review --

Headnote:[1]

On appeal from a judgment of a three-judge Federal District Court dismissing a complaint for failure to state a claim, the Supreme Court must assume the truth of the undisputed allegations of the complaint.

[***LEdHN2]

CONSTITUTIONAL LAW §779

401 U.S. 371, *, 91 S. Ct. 780, **;
28 L. Ed. 2d 113, ***LEdHN2; 1971 U.S. LEXIS 73

divorce suits -- indigent plaintiffs --

Headnote:[2]

Due process prohibits a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

[***LEdHN3]

CONSTITUTIONAL LAW §786

due process -- hearing --

Headnote:[3]

Due process requires, at a minimum, that, absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process be given a meaningful opportunity to be heard.

[***LEdHN4]

CONSTITUTIONAL LAW §786

due process -- notice and hearing --

Headnote:[4]

The due process clause requires at a minimum that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

[***LEdHN5]

CONSTITUTIONAL LAW §786

due process -- hearing --

Headnote:[5]

Due process does not require that the defendant in every civil case actually have a hearing on the merits.

[***LEdHN6]

CONSTITUTIONAL LAW §761

due process -- default judgment --

Headnote:[6]

A state does not violate due process by entering a default judgment against a defendant who, after adequate notice, fails to make a timely appearance.

[***LEdHN7]

CONSTITUTIONAL LAW §761

due process -- default judgment --

Headnote:[7]

A state does not violate due process by entering a default judgment against a defendant who without justifiable excuse violates a procedural rule requiring the production of evidence necessary for orderly adjudication.

[***LEdHN8]

CONSTITUTIONAL LAW §787

hearing -- sufficiency --

Headnote:[8]

Within the limits of practicality, due process requires an opportunity, granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case.

[***LEdHN9]

CONSTITUTIONAL LAW §787

due process -- hearing --

Headnote:[9]

The formality and procedural due process requisites for a hearing can vary, depending on the importance of the interests involved and the nature of the subsequent proceedings.

[***LEdHN10]

CONSTITUTIONAL LAW §786

due process -- time of hearing --

Headnote:[10]

Due process requires that an individual be given an opportunity for a hearing before he is deprived of any

significant property interest, except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event.

[***LEdHN11]

RULES OF COURT §2

STATUTES §21

validity -- application --

Headnote:[11]

A statute or a rule may be constitutionally invalid as applied, when it operates to deprive an individual of a protected right, even though its general validity as a measure enacted in the legitimate exercise of state power is beyond question.

[***LEdHN12]

CONSTITUTIONAL LAW §786

due process -- hearing --

Headnote:[12]

The right to a meaningful opportunity to be heard, within the limits of practicality, must be protected against denial by particular laws which operate to jeopardize it for particular individuals.

[***LEdHN13]

CONSTITUTIONAL LAW §786

due process -- cost requirement --

Headnote:[13]

A requirement as to payment of costs, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard.

[***LEdHN14]

CONSTITUTIONAL LAW §514

due process -- meaning --

Headnote:[14]

A state's obligations under the *Fourteenth Amendment* are not simply generalized ones; rather, the state owes to each individual that process which, in light of the values of a free society, can be characterized as due.

[***LEdHN15]

CONSTITUTIONAL LAW §779

court fees -- indigent litigants --

Headnote:[15]

A state denies due process of law to indigent persons by refusing to permit them to bring divorce actions except on payment of court fees and service-of-process costs which they are unable to pay.

[***LEdHN16]

CONSTITUTIONAL LAW §779

due process -- divorce --

Headnote:[16]

A state may not, consistent with the *due process clause of the Fourteenth Amendment*, pre-empt the right to dissolve marriages without affording all citizens access to the means it has prescribed for doing so.

SYLLABUS

In view of the basic position of the marriage relationship in our society and the state monopolization of the means for dissolving that relationship, due process of law prohibits a State from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriage. Pp. 374-383.

COUNSEL: Arthur B. LaFrance reargued the cause and filed briefs for appellants.

Raymond J. Cannon, Assistant Attorney General of Connecticut, reargued the cause for appellees. With him on the brief were Robert K. Killian, Attorney General, and William S. Kaplan.

Allan Ashman filed a brief for the National Legal Aid and Defender Association as amicus curiae urging reversal.

401 U.S. 371, *; 91 S. Ct. 780, **;
28 L. Ed. 2d 113, ***; 1971 U.S. LEXIS 73

Briefs of amici curiae urging affirmance were filed by Francis B. Burch, Attorney General of Maryland, and J. Michael McWilliams, Assistant Attorney General, joined by George F. Kugler, Jr., Attorney General of New Jersey, and Stephen Skillman, Assistant Attorney General, and by the following Attorneys General: David P. Buckson of Delaware, Jack P. F. Gremillion of Louisiana, Clarence A. H. Meyer of Nebraska, Harvey Dickerson of Nevada, Helgi Johanneson of North Dakota, and Lee Johnson of Oregon.

JUDGES: Harlan, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Marshall, and Blackmun, JJ., joined. Douglas, J., filed an opinion concurring in the result, post, p. 383. Brennan, J., filed an opinion concurring in part, post, p. 386. Black, J., filed a dissenting opinion, post, p. 389.

OPINION BY: HARLAN

OPINION

[*372] [***115] [**783] MR. JUSTICE HARLAN delivered the opinion of the Court.

Appellants, welfare recipients residing in the State of Connecticut, brought this action in the Federal District Court for the District of Connecticut on behalf of themselves and others similarly situated, challenging, as applied to them, certain state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process, that restrict their access to the courts in their effort to bring an action for divorce.

It appears from the briefs and oral argument that the average cost to a litigant for bringing an action for divorce is \$ 60. *Section 52-259 of the Connecticut General Statutes* provides: "There shall be paid to the [***116] clerks of the supreme court or the superior court, for entering each civil cause, forty-five dollars" An additional \$ 15 is usually required for the service of process by the sheriff, although as much as \$ 40 or \$ 50 may be necessary where notice must be accomplished by publication.¹

¹ App. 9. The dollar figures are averages taken from the undisputed allegations of the complaint. The particular fee the sheriff receives from the plaintiff for service of process in any one case depends on the distance he must travel to

effectuate service of process. Conn. Gen. Stat. Rev. § 52-261 (1968).

There is no dispute as to the inability of the named appellants in the present case to pay either the court fees required by statute or the cost incurred for the service of process. The affidavits in the record establish that appellants' welfare income in each instance barely suffices [*373] to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the courts in order to obtain a divorce. Also undisputed is appellants' "good faith" in seeking a divorce.

[***LEdHR1] [1]Assuming, as we must on this motion to dismiss the complaint, the truth of the *undisputed* allegations made by the appellants, it appears that they were unsuccessful in their attempt to bring their divorce actions in the Connecticut courts, simply by reason of their indigency. The clerk of the Superior Court returned their papers "on the ground that he could not accept them until an entry fee had been paid." App. 8-9. Subsequent efforts to obtain a judicial waiver of the fee requirement and to have the court effect service of process were to no avail. *Id.*, at 9.

Appellants thereafter commenced this action in the Federal District Court seeking a judgment declaring that Connecticut's statute and service of process provisions, "requiring payment of court fees and expenses as a condition precedent to obtaining court relief [are] unconstitutional [as] applied to these indigent [appellants] and all other members of the class which they represent." As further relief, appellants requested the entry of an injunction ordering the appropriate [**784] officials to permit them "to proceed with their divorce actions without payment of fees and costs." A three-judge court was convened pursuant to 28 U. S. C. § 2281, and on July 16, 1968, that court concluded that "a state [may] limit access to its civil courts and particularly in this instance, to its divorce courts, by the requirement of a filing fee or other fees which effectively bar persons on relief from commencing actions therein." 286 *F.Supp.* 968, 972.

[***LEdHR2] [2]We noted probable jurisdiction, 395 U.S. 974 (1969). The case was heard at the 1969 Term and thereafter was [*374] set for reargument at the present Term. 399 U.S. 922 (1970). We now reverse.² Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values

401 U.S. 371, *374; 91 S. Ct. 780, **784;
28 L. Ed. 2d 113, ***LEdHR2; 1971 U.S. LEXIS 73

and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely [***117] because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

2 Following colloquy at the oral reargument as to the possible availability of public or private funds to enable plaintiffs-appellants to defray the expense requirements at issue in this case, the parties submitted further papers on this score. Nothing in these materials would justify our declining to adjudicate the constitutional question squarely presented by this record.

I

At its core, the right to due process reflects a fundamental value in our American constitutional system. Our understanding of that value is the basis upon which we have resolved this case.

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

[*375] American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original *Constitution*, in the *Fifth Amendment*, and later those who drafted the *Fourteenth Amendment*, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor

property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Such litigation has, however, typically involved rights of defendants -- not, as here, persons seeking access to the judicial process in the first instance. This is because our society has been so structured that resort to the courts is not usually the only available, legitimate means of resolving private disputes. Indeed, [**785] private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount. Thus, this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where [*376] some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only [***118] effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy.

Recognition of this theoretical framework illuminates the precise issue presented in this case. As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society. See, e. g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923). It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and

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more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.

Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to [*377] defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.

II

These due process decisions, representing over a hundred years of effort by this Court to give concrete embodiment to this concept, provide, we think, complete vindication for appellants' contentions. In particular, precedent has firmly embedded in our due process jurisprudence two important principles upon whose application we rest our decision in the case before us.

A

[**LEdHR3] [3] [**LEdHR4] [4] Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "wherever one is assailed in his person or his property, there he may defend," *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). See *Baldwin v. Hale*, 1 Wall. 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897). The theme that [**786] "due process of law signifies a right to be heard in one's defence," *Hovey v. Elliott*, *supra*, at 417, has continually recurred in the [***119] years since *Baldwin*, *Windsor*, and *Hovey*.³ Although "many controversies [*378] have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of

life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313.

3 See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Schroeder v. New York*, 371 U.S. 208, 212 (1962); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 (1963); *Covey v. Town of Somers*, 351 U.S. 141 (1956); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950); *Anderson Nat. Bank v. Lockett*, 321 U.S. 233, 246 (1944); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153 (1941); *Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Illinois Central R. Co.*, 291 U.S. 457, 463 (1934); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423 (1915); *Londoner v. Denver*, 210 U.S. 373, 385-386 (1908); *Louisville & Nashville R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900).

[**LEdHR5] [5] [**LEdHR6] [6] [**LEdHR7] [7] [**LEdHR8] [8] [**LEdHR9] [9] [**LEdHR10] [10] Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see *Windsor*, *supra*, at 278, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909). What the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.*, *supra*, at 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.⁴ That the hearing required by due process [*379] is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,⁵ except for extraordinary situations where some valid governmental interest is at

stake that justifies postponing the hearing until after the event. ⁶ In short, "within [***120] the limits of practicability," *id.*, at 318, [**787] a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.

⁴ Compare *Goldberg v. Kelly*, *supra*, with *In re Winship*, 397 U.S. 358 (1970). See also *Bowles v. Willingham*, 321 U.S. 503, 520-521 (1944).

⁵ *Goldberg v. Kelly*, *supra*; *Sniadach v. Family Finance Corp.*, *supra*; *Opp Cotton Mills v. Administrator*, *supra*, at 152-153; *United States v. Illinois Central R. Co.*, *supra*, at 463; *Coe v. Armour Fertilizer Works*, *supra*.

⁶ *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Bowles v. Willingham*, *supra*; *Yakus v. United States*, 321 U.S. 414 (1944).

B

[***LEdHR11] [11]Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights. ⁷

⁷ *E. g.*, *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Bates v. Little Rock*, 361 U.S. 516, 527 (1960); *Sherbert v. Verner*, 374 U.S. 398 (1963).

[***LEdHR12] [12]No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws [*380] that operate to jeopardize it for particular individuals. See *Mullane v. Central Hanover Tr. Co.*, *supra*; *Covey v. Town of Somers*, 351 U.S. 141 (1956).

In *Mullane* this Court held that the statutory provision for notice by publication in a local newspaper,

although sufficient as to beneficiaries of a trust whose interests or addresses were unknown to the trustee, was not sufficient notice under the Due Process Clause for known beneficiaries. Similarly, *Covey* held that notice by publication in a foreclosure action, even though sufficient to provide a normal person with an opportunity for a hearing, was not sufficient where the defendant was a known incompetent. The Court expressly rejected an argument that "the *Fourteenth Amendment* does not require the State to take measures in giving notice to an incompetent beyond those deemed sufficient in the case of the ordinary taxpayer." *Id.*, at 146.

[***LEdHR13] [13] [***LEdHR14] [14]Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the *Fourteenth Amendment* are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

III

[***LEdHR15] [15]Drawing upon the principles established by the cases just canvassed, we conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, [***121] and, in the absence of a sufficient countervailing [*381] justification for the State's action, a denial of due process.

⁸

⁸ At least one court has already recognized the special nature of the divorce action. Justice Sobel in a case like that before us took note of the State's involvement in the marital relationship:

"Marriage is clearly marked with the public interest. In this State, a marriage cannot be dissolved except by 'due judicial proceedings. . . .' We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication This hurdle is an effective barrier to [plaintiff's] access to the courts. The loss of access to the courts in an action for divorce

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is a right of substantial magnitude when only through the courts may redress or relief be obtained." *Jeffreys v. Jeffreys*, 58 Misc. 2d 1045, 1056, 296 N. Y. S. 2d 74, 87 (1968).

See also *Brown v. Chastain*, 416 F.2d 1012, 1014 (CA5 1969) (Rives, J., dissenting).

[**788] The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational, and its balance between the defendant's right to notice and the plaintiff's right to access is reasonable.

In our opinion, none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages. Not only is there no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit,⁹ but it is here beyond present dispute that appellants bring these actions in good faith. Moreover, other alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous litigation, [*382] such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few. In the same vein we think that reliable alternatives exist to service of process by a state-paid sheriff if the State is unwilling to assume the cost of official service. This is perforce true of service by publication which is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings. See *Mullane v. Central Hanover Tr. Co.*, *supra*. We think in this case service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper.

⁹ We think *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), has no bearing on this case. Differences between divorce actions and derivative actions aside, unlike *Cohen*, where we considered merely a statute on its face, the application of this statute here operates to cut off entirely access to the courts.

We are thus left to evaluate the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin v. Illinois*

, 351 U.S. 12 (1956). In *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process. While in *Griffin* the transcript could be waived as a convenient but not necessary predicate to court access, here the State invariably imposes the costs as a measure of allocating its judicial resources. Surely, then, the rationale of *Griffin* covers this case.

[***122] IV

[***LEdHR16] [16]In concluding that the *Due Process Clause of the Fourteenth Amendment* requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the *Due Process Clause of the Fourteenth Amendment* so that its exercise may not be placed beyond the reach of any individual, [*383] for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement [**789] that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the *Due Process Clause of the Fourteenth Amendment*, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Reversed.

CONCUR BY: DOUGLAS; BRENNAN (In Part)

CONCUR

MR. JUSTICE DOUGLAS, concurring in the result.

I believe this case should be decided upon the principles developed in the line of cases marked by *Griffin v. Illinois*, 351 U.S. 12. There we considered a state law which denied persons convicted of a crime full appellate review if they were unable to pay for a transcript of the trial. MR. JUSTICE BLACK's opinion announcing the judgment of the Court stated:

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28 L. Ed. 2d 113, ***LEdHR16; 1971 U.S. LEXIS 73

"Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.*, at 19.

Griffin has had a sturdy growth. "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *Roberts v. LaVallee*, 389 U.S. 40, 42. See also *Williams v. Oklahoma City*, 395 U.S. 458; *Long v. District Court of Iowa*, 385 U.S. 192; *Draper v. Washington*, 372 U.S. 487. But [*384] *Griffin* has not been limited to securing a record for indigents who appeal their convictions. If the more affluent have counsel on appeal, then counsel for indigents must be provided on appeal of a criminal conviction. *Douglas v. California*, 372 U.S. 353. The tie to *Griffin* was explicit. "In either case [*Griffin* or *Douglas*] the evil is the same: discrimination against the indigent." *Id.*, at 355.

In *Burns v. Ohio*, 360 U.S. 252, we invalidated [***123] a procedure whereby cases within the jurisdiction of the state supreme court would not be considered if a person could not pay the filing fee. In *Smith v. Bennett*, 365 U.S. 708, we held that requiring indigents to pay filing fees before a writ of habeas corpus could be considered in state court was invalid under the *Equal Protection Clause*. Here Connecticut has provided requirements for married couples to obtain divorces and because of filing fees and service of process one of the requirements is having the necessary money. The more affluent can obtain a divorce; the indigent cannot. This situation is comparable to *Burns v. Ohio*, and *Smith v. Bennett*.

The Due Process Clause on which the Court relies has proven very elastic in the hands of judges. "The doctrine that prevailed in *Lochner* [*v. New York*, 198 U.S. 45], *Coppage* [*v. Kansas*, 236 U.S. 1], *Adkins* [*v. Children's Hospital*, 261 U.S. 525], [*Jay*] *Burns* [*Baking Co. v. Bryan*, 264 U.S. 504], and like cases -- that due process authorizes courts to hold laws unconstitutional

when they believe the legislature has acted unwisely -- has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730. I would not invite its revival.

Whatever residual element of substantive law the Due Process Clause may still have (*Thompson v. Louisville*, 362 U.S. 199), it essentially regulates procedure. *Sniadach* [**790] *v. Family Finance Corp.*, 395 U.S. 337; *Wisconsin v. Constantineau*, 400 U.S. 433. The Court today puts [*385] "flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. Fishing may be equally important to some communities. May an indigent be excused if he does not obtain a license which requires payment of money that he does not have? How about a requirement of an onerous bond to prevent summary eviction from rented property? The affluent can put up the bond, though the indigent may not be able to do so. See *Williams v. Shaffer*, 385 U.S. 1037. Is housing less important to the mulch holding society together than marriage? The examples could be multiplied. I do not see the length of the road we must follow if we accept my Brother HARLAN's invitation. The question historically has been whether the right claimed is "of the very essence of a scheme of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325. That makes the test highly subjective and dependent on the idiosyncrasies of individual judges as *Lochner*, *Coppage*, and *Adkins* illustrate.

The reach of the *Equal Protection Clause* is not definable with mathematical precision. But in spite of doubts by some, * as it has been construed, rather definite guidelines have been developed: *race* is one (*Strauder v. West Virginia*, 100 U.S. 303; *McLaughlin v. Florida*, 379 U.S. 184); *alienage* is another (*Takahashi v. Fish & Game Comm'n*, 334 U.S. 410); *religion* is another [***124] (*Sherbert v. Verner*, 374 U.S. 398); *poverty* is still another (*Griffin v. Illinois*, *supra*); and *class* or *caste* yet another (*Skinner v. Oklahoma*, 316 U.S. 535).

* See Karst, *Invidious Discrimination*, 16 U. C. L. A. L. Rev. 716 (1969).

The power of the States over marriage and divorce is, of course, complete except as limited by specific constitutional provisions. But could a State deny divorces to domiciliaries who were Negroes and grant them to whites? [*386] Deny them to resident aliens and grant them to citizens? Deny them to Catholics and grant

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them to Protestants? Deny them to those convicted of larceny and grant them to those convicted of embezzlement?

Here the invidious discrimination is based on one of the guidelines: *poverty*.

An invidious discrimination based on poverty is adequate for this case. While Connecticut has provided a procedure for severing the bonds of marriage, a person can meet every requirement save court fees or the cost of service of process and be denied a divorce. Connecticut says in its brief that this is justified because "the State does not favor divorces; and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the named parties, which seem to the legislature to make it probable that the interests of society will be better served and that parties will be happier, and so the better citizens, separate, than if compelled to remain together."

Thus, under Connecticut law divorces may be denied or granted solely on the basis of wealth. Just as denying further judicial review in *Burns* and *Smith*, appellate counsel in *Douglas*, and a transcript in *Griffin* created an invidious distinction based on wealth, so, too, does making the grant or denial of a divorce to turn on the wealth of the parties. Affluence does not pass muster under the *Equal Protection Clause* for determining who must remain married and who shall be allowed to separate.

MR. JUSTICE BRENNAN, concurring in part.

I join the Court's opinion to the extent that it holds that Connecticut denies [**791] procedural due process in denying the indigent appellants access to its courts for the sole reason that they cannot pay a required fee. "Consideration of what procedures due process may require under any given set of circumstances must begin with [*387] a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). When a State's interest in imposing a fee requirement on an indigent is compared to the indigent's interest in being heard, it is clear that the latter is the weightier. It is an unjustifiable denial of a hearing, and therefore a denial of due process, to close the courts to an indigent on the ground of nonpayment of a fee.

But I cannot join the Court's opinion insofar as today's holding is made to depend upon the factor that only the State can grant a divorce and that an indigent would be locked into a marriage if unable to pay the fees required to obtain a divorce. A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical [***125] matter, if disputes cannot be successfully settled between the parties, the court system is usually "the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Ante*, at 376-377. In this case, the Court holds that Connecticut's unyielding fee requirement violates the Due Process Clause by denying appellants "an opportunity to be heard upon their claimed right to a dissolution of their marriages" without a sufficient countervailing justification. *Ante*, at 380. I see no constitutional distinction between appellants' attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law. If fee requirements close the courts to an indigent he can no more invoke the aid of the courts for other forms of relief than he can escape the legal incidents of a marriage. The right to be heard in some way at some time extends [*388] to all proceedings entertained by courts. The possible distinctions suggested by the Court today will not withstand analysis.

In addition, this case presents a classic problem of equal protection of the laws. The question that the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection. Certainly, there is at issue the denial of a hearing, a matter for analysis under the Due Process Clause. But Connecticut does not deny a hearing to everyone in these circumstances; it denies it only to people who fail to pay certain fees. The validity of this partial denial, or differentiation in treatment, can be tested as well under the *Equal Protection Clause*.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), we held under the *Equal Protection Clause* as well as the Due Process Clause that a State may not deny a free transcript to an indigent, where the transcript is necessary for a direct appeal from his conviction. Subsequently, we have applied and extended that principle in numerous criminal cases. See, e. g., *Eskridge v. Washington State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958); *Burns v.*

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Ohio, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961); *Coppedge v. United States*, 369 U.S. 438 (1962); *Lane v. Brown*, 372 U.S. 477 (1963); *Draper v. Washington*, 372 U.S. 487 (1963); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Long v. District Court of Iowa*, 385 U.S. 192 (1966); *Roberts v. LaVallee*, 389 U.S. 40 [**792] (1967); *Gardner v. California*, 393 U.S. 367 (1969). The rationale of *Griffin* covers the present case. Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the *Equal Protection Clause* if they shut their doors to indigent [*389] plaintiffs altogether. Where money determines not merely "the kind of trial a man gets," *Griffin v. Illinois*, *supra*, at 19, but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State [***126] may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee. Cf. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). In my view, Connecticut's fee requirement, as applied to an indigent, is a denial of equal protection.

DISSENT BY: BLACK

DISSENT

MR. JUSTICE BLACK, dissenting.

This is a strange case and a strange holding. Absent some specific federal constitutional or statutory provision, marriage in this country is completely under state control, and so is divorce. When the first settlers arrived here the power to grant divorces in Great Britain was not vested in that country's courts but in its Parliament. And as recently as 1888 this Court in *Maynard v. Hill*, 125 U.S. 190, upheld a divorce granted by the Legislature of the Territory of Oregon. Since that time the power of state legislatures to grant divorces or vest that power in their courts seems not to have been questioned. It is not by accident that marriage and divorce have always been considered to be under state control. The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children under laws passed by their elected representatives. The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their

citizens when they enter into, maintain, and dissolve marriages. The power of the States over marriage and [*390] divorce is complete except as limited by specific constitutional provisions. *Loving v. Virginia*, 388 U.S. 1, 7-12 (1967).

The Court here holds, however, that the State of Connecticut has so little control over marriages and divorces of its own citizens that it is without power to charge them practically nominal initial court costs when they are without ready money to put up those costs. The Court holds that the state law requiring payment of costs is barred by the *Due Process Clause of the Fourteenth Amendment of the Federal Constitution*. Two members of the majority believe that the *Equal Protection Clause* also applies. I think the Connecticut court costs law is barred by neither of those clauses.

It is true, as the majority points out, that the Court did hold in *Griffin v. Illinois*, 351 U.S. 12 (1956), that indigent defendants in criminal cases must be afforded the same right to appeal their convictions as is afforded to a defendant who has ample funds to pay his own costs. But in *Griffin* the Court studiously and carefully refrained from saying one word or one sentence suggesting that the rule there announced to control rights of criminal defendants would control in the quite different field of civil cases. And there are strong reasons for distinguishing between the two types of cases.

Criminal defendants are brought into court by the State or Federal Government to defend themselves against charges of crime. They go into court knowing that they may be convicted, and condemned to lose their lives, their liberty, or their property, as a penalty for their crimes. Because of this great governmental power the United States [***127] Constitution [**793] has provided special protections for people charged with crime. They cannot be convicted under bills of attainder or ex post facto laws. And numerous provisions of the *Bill of Rights* -- the right to counsel, the right to be free from coerced [*391] confessions, and other rights -- shield defendants in state courts as well as federal courts. See, e. g., *Benton v. Maryland*, 395 U.S. 784 (1969); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963). With all of these protections safeguarding defendants charged by government with crime, we quite naturally and quite properly held in *Griffin* that the *Due Process* and *Equal Protection*

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28 L. Ed. 2d 113, ***127; 1971 U.S. LEXIS 73

Clauses both barred any discrimination in criminal trials against poor defendants who are unable to defend themselves against the State. Had we not so held we would have been unfaithful to the explicit commands of the *Bill of Rights*, designed to wrap the protections of the Constitution around all defendants upon whom the mighty powers of government are hurled to punish for crime.

Civil lawsuits, however, are not like government prosecutions for crime. Civil courts are set up by government to give people who have quarrels with their neighbors the chance to use a neutral governmental agency to adjust their differences. In such cases the government is not usually involved as a party, and there is no deprivation of life, liberty, or property as punishment for crime. Our Federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict and rigid due process rules the Constitution has provided to protect people charged with crime.

This distinction between civil and criminal proceedings is implicit in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), where we held that a statute requiring some, but not all, plaintiffs in stockholder derivative actions to post a bond did not violate the Due Process or the *Equal Protection Clause*. The *Cohen* case is indistinguishable [*392] from the one before us. In *Cohen*, as here, the statute applied to plaintiffs. In both situations the legal relationships involved are creatures of the State, extensively governed by state law. The effect of both statutes may be to deter frivolous or ill-considered suits, and in both instances the State has a considerable interest in the prevention of such suits, which might harm the very relationship the State created and fostered. Finally, the effect of both statutes may be to close the state courts entirely to certain plaintiffs, a result the Court explicitly accepted in *Cohen*. See *id.*, at 552. I believe the present case should be controlled by the Court's thorough opinion in *Cohen*.

The Court's suggested distinction of *Cohen* on the ground that the Court there dealt only with the validity of the statute on its face ignores the following pertinent language:

"It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their [***128] rights. Of course, to require security for the payment of any kind of costs, or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, *it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met.*" *Id.*, at 552. (Emphasis added.)

Rather, *Cohen* can only be distinguished on the ground that it involved a stockholders' suit, while this case involves marriage, an interest "of basic importance in our society." Thus the Court's [**794] opinion appears to rest solely on a philosophy that any law violates due process if it is unreasonable, arbitrary, indecent, deviates from the fundamental, is shocking to the conscience, or fails to meet [*393] other tests composed of similar words or phrases equally lacking in any possible constitutional precision. These concepts, of course, mark no constitutional boundaries and cannot possibly depend upon anything but the belief of particular judges, at particular times, concerning particular interests which those judges have divined to be of "basic importance."

I do not believe the wise men who sought to draw a written constitution to protect the people from governmental harassment and oppression, who feared alike the king and the king's judges, would have used any such words or phrases. Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a "shock the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics. I believe the only way to steer this country towards its great destiny is to follow what our Constitution says, not what judges think it should have said.

For these reasons I am constrained to repeat what I said in dissent in *Williams v. North Carolina*, 325 U.S. 226, 271-274 (1945):

401 U.S. 371, *393; 91 S. Ct. 780, **794;
28 L. Ed. 2d 113, ***128; 1971 U.S. LEXIS 73

"I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution which the Court derives from adding a new content to the Due Process Clause. The elasticity of that clause necessary to justify this holding is found, I suppose, in the notion that it was intended to give this Court unlimited authority to supervise all assertions of [*394] state and federal power to see that they comport with our ideas of what are 'civilized standards of law.' . . .

. . . .

". . . This perhaps is in keeping with the idea that the Due Process Clause is a blank sheet of paper provided for courts to make changes in the Constitution and the *Bill of Rights* in accordance with their ideas of civilization's demands. I should leave the power over divorces in the states."

See also *In re Winship*, 397 U.S. 358, 377 (1970) (BLACK, J., dissenting).

[***129] One more thought about the Due Process and *Equal Protection Clauses*: neither, in my judgment, justifies judges in trying to make our Constitution fit the times, or hold laws constitutional or not on the basis of a judge's sense of fairness. The *Equal Protection Clause* is no more appropriate a vehicle for the "shock the

conscience" test than is the Due Process Clause. See, e. g., my dissent in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 675-680 (1966). The rules set out in the Constitution itself provide what is governmentally fair and what is not. Neither due process nor equal protection permits state laws to be invalidated on any such nonconstitutional standard as a judge's personal view of fairness. The people and their elected representatives, not judges, are constitutionally vested with the power to amend the Constitution. Judges should not usurp that power in order to put over their own views. Accordingly, I would affirm this case.

REFERENCES

16 Am Jur 2d, Constitutional Law 570

US L Ed Digest, Constitutional Law 779, 786, 787

ALR Digests, Constitutional Law 627, 641, 641.5

L Ed Index to Anno, Constitutional Law; Divorce and Separation

ALR Quick Index, Divorce and Separation; Due Process of Law

Federal Quick Index, Divorce and Separation; Due Process of Law

APPENDIX 15



BOUNDS, CORRECTION COMMISSIONER, ET AL. v. SMITH ET AL.

No. 75-915

SUPREME COURT OF THE UNITED STATES

430 U.S. 817; 97 S. Ct. 1491; 52 L. Ed. 2d 72; 1977 U.S. LEXIS 79

Argued November 1, 1976

April 27, 1977

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner State sought review of a decision of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the district court that respondent prisoners' rights to access to the courts and equal protection of the laws had been violated because the prison library was inadequate and there was no other legal assistance available to the prisoners.

OVERVIEW: Prisoners brought suit under *42 U.S.C.S. § 1983* alleging that they were denied access to the courts in violation of their *Fourteenth Amendment* rights by the State's failure to provide legal research facilities. The court of appeals affirmed the district court's finding that the State of North Carolina failed to provide adequate law libraries and approved the State's plan to remedy the situation. On petition for certiorari, the Court affirmed, holding that the prisoners had a constitutional right of

access to the courts. States had affirmative obligations to assure all prisoners meaningful access to the courts, including paper and pen, notarial services, stamps, the foregoing of docket fees, and lawyers. Law libraries or other forms of legal assistance were needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts. The fundamental constitutional right of access to the courts required prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

OUTCOME: The judgment requiring the State to provide prison law libraries and other forms of legal assistance was affirmed. States were required to assure the prisoners an adequate opportunity to present their claims fairly in order to guarantee their constitutional right of access to the courts.

LexisNexis(R) Headnotes

430 U.S. 817, *, 97 S. Ct. 1491, **;
52 L. Ed. 2d 72, ***; 1977 U.S. LEXIS 79

*Civil Rights Law > Prisoner Rights > Access to Courts
Constitutional Law > Bill of Rights > Fundamental
Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Postconviction
Proceedings > Imprisonment*

[HN1] Prisoners have a constitutional right of access to the courts.

*Civil Rights Law > Prisoner Rights > Access to Courts
Criminal Law & Procedure > Postconviction
Proceedings > Imprisonment*

*Criminal Law & Procedure > Habeas Corpus >
Procedure > Filing of Petition > General Overview*

[HN2] The State and its officers may not abridge or impair a prisoner's right to apply to a federal court for a writ of habeas corpus.

*Criminal Law & Procedure > Postconviction
Proceedings > Imprisonment*

*Criminal Law & Procedure > Habeas Corpus >
Procedure > Filing of Petition > General Overview*

[HN3] In order to prevent effectively foreclosed access, indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees.

*Criminal Law & Procedure > Postconviction
Proceedings > Imprisonment*

[HN4] Because adequate and effective appellate review is impossible without a trial transcript or adequate substitute, states must provide trial records to inmates unable to buy them.

*Constitutional Law > Bill of Rights > Fundamental
Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Appeals > Right to Appeal
> Defendants*

*Public Health & Welfare Law > Social Services > Legal
Aid*

[HN5] Counsel must be appointed to give indigent inmates a meaningful appeal from their convictions.

*Constitutional Law > Substantive Due Process > Scope
of Protection*

*Criminal Law & Procedure > Counsel > Right to
Counsel > General Overview*

*Public Health & Welfare Law > Social Services > Legal
Aid*

[HN6] States must assure the indigent defendant an adequate opportunity to present his claims fairly. Meaningful access to the courts is the touchstone.

*Civil Rights Law > Prisoner Rights > Access to Courts
Criminal Law & Procedure > Postconviction
Proceedings > Imprisonment*

Evidence > Authentication > General Overview

[HN7] Indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial.

*Civil Rights Law > Prisoner Rights > Access to Courts
Criminal Law & Procedure > Postconviction
Proceedings > Imprisonment*

[HN8] The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

*Criminal Law & Procedure > Postconviction
Proceedings > Imprisonment*

[HN9] Judicial restraint is often appropriate in prisoners' rights cases. This policy cannot encompass any failure to take cognizance of valid constitutional claims.

SUMMARY:

Inmates incarcerated in North Carolina's correctional facilities filed suits under *42 USCS 1983*, alleging that they were denied access to the courts, in violation of their *Fourteenth Amendment* rights, by the state's failure to provide legal research facilities. After consolidating the actions and finding in favor of the inmates, the United States District Court for the Eastern District of North Carolina approved a plan proposed by the state for the establishment of several libraries across the state, and held that legal assistance in addition to libraries need not be provided. The United States Court of Appeals for the Fourth Circuit affirmed the District Court judgment as to the basic provisions of the plan (except insofar as it denied equal access to the facilities for women prisoners) (*538 F2d 541*).

430 U.S. 817, *; 97 S. Ct. 1491, **;
52 L. Ed. 2d 72, ***; 1977 U.S. LEXIS 79

On certiorari, the United States Supreme Court affirmed. In an opinion by Marshall, J., joined by Brennan, White, Blackmun, Powell, and Stevens, JJ., it was held that the fundamental constitutional right of access to the courts required state prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Powell, J., concurring, expressed the view that the holding implied nothing as to the constitutionally required scope of review of prisoners' claims in state or federal court.

Burger, Ch. J., dissented, expressing the view that (1) there was no broad constitutional right for state prisoners to collaterally attack in federal court convictions entered by a state court of competent jurisdiction, and (2) a state should not be ordered to expend resources in support of a federally created right which was not constitutional in nature, for the state's duty was merely the negative duty of not interfering where the federal right in question was of a statutory rather than a constitutional nature.

Stewart, J., joined by Burger, Ch. J., dissented, expressing the alternative views that (1) if a state had a constitutional duty to provide prisoners with "meaningful access" to the federal courts, such access could seldom be realistically advanced by the device of making law libraries available to prison inmates untutored in their use, and (2) if a prisoner had no constitutional right of "meaningful access" to federal courts to attack his sentence, then a state could be under no constitutional duty to make that access "meaningful" by providing law libraries.

Rehnquist, J., joined by Burger, Ch. J., dissented, expressing the view that nothing in the Constitution granted a convict serving a term of imprisonment in a state prison pursuant to a final judgment of a court of competent jurisdiction a "fundamental" right of access to the federal courts, where the prisoner had pursued all available avenues of direct appeal from the judgment of conviction and the state had imposed no invidious regulations denying physical access to the federal courts.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONVICTS §1

inmates -- access to courts -- requirements --

Headnote:[1A][1B][1C]

The fundamental constitutional right of access to the courts requires state prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in law; it is irrelevant that the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts may be authorized by the state, and the creation of an advisory inmate grievance commission does not answer the constitutional requirement for legal assistance to prisoners. (Burger, Ch. J., Stewart, J., and Rehnquist, J., dissented from this holding.)

[***LEdHN2]

CONVICTS §1

access to courts --

Headnote:[2]

Prisoners have a constitutional right of access to the courts.

[***LEdHN3]

ERROR §980

CORPUS §109

indigent prisoners -- docket fees --

Headnote:[3]

Indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees in order to prevent effectively foreclosed access to the courts.

[***LEdHN4]

LAW §46.5

appointment of counsel -- indigent prisoners -- appeal --

430 U.S. 817, *, 97 S. Ct. 1491, **;
52 L. Ed. 2d 72, ***LEdHN4; 1977 U.S. LEXIS 79

Headnote:[4]

Counsel must be appointed to give indigent inmates a meaningful appeal from their convictions.

[***LEdHN5]

CONVICTS §1

access to courts -- states -- "writ writers" --

Headnote:[5]

The constitutional duty to provide prison inmates with access to the courts requires more of the states than that they merely allow inmate "writ writers" to function.

[***LEdHN6]

CONVICTS §1

indigents -- required state expenditures --

Headnote:[6]

Indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them.

[***LEdHN7]

LAW §46.5

CONVICTS §1

indigents -- state expenditures --

Headnote:[7]

States must forego collection from indigent inmates of docket fees otherwise payable to the treasury and expend funds for transcripts; additionally, state expenditures are necessary to pay lawyers for indigent defendants at trial and in appeals as of right.

[***LEdHN8]

CONVICTS §1

access to courts -- economic factors --

Headnote:[8]

While economic factors may be considered in choosing the methods used to provide meaningful access to the courts for prisoners, the cost of protecting a constitutional right cannot justify its total denial.

[***LEdHN9]

CORPUS §111

PLEADING §191

habeas corpus petition -- civil rights complaint -- contents --

Headnote:[9]

In general, a prisoner's habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action.

[***LEdHN10]

ERROR §905

applications for discretionary review -- contents --

Headnote:[10]

Applications for discretionary review need only apprise an appellate court of a case's possible relevance to the law.

[***LEdHN11]

CONVICTS §1

right to counsel -- habeas corpus or civil rights actions --

Headnote:[11A][11B]

A prison inmate's constitutional right of access to the courts encompasses the appointment of counsel in federal habeas corpus or state or federal civil rights actions.

[***LEdHN12]

COURTS §774

per curiam opinion -- precedential weight --

Headnote:[12]

A brief per curiam opinion of the United States

430 U.S. 817, *, 97 S. Ct. 1491, **;
52 L. Ed. 2d 72, ***LEdHN12; 1977 U.S. LEXIS 79

Supreme Court, which merely states that it affirms the judgment of a Federal District Court and cites another Supreme Court case as authority, has precedential weight as deciding in the affirmative (consistent with the District Court's judgment) the question presented in the jurisdictional statement as to whether a state has an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to provide inmates with professional or quasi-professional legal assistance.

[***LEdHN13]

CONVICTS §1

access to courts -- law libraries -- alternative means

--

Headnote:[13]

While adequate law libraries provided by a state are one constitutionally acceptable method to assure meaningful access to the courts for prisoners, alternative means may also be used to achieve such access.

[***LEdHN14]

CONVICTS §1

access to courts -- program -- constitutionality --

Headnote:[14]

A state's program to insure access to the courts for prisoners need not include any particular element, but must be evaluated as a whole to ascertain its compliance with constitutional standards.

[***LEdHN15]

CONVICTS §1

federal court decision -- state prisons --

Headnote:[15]

A federal court decision holding that the fundamental constitutional right of access to the courts requires state prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law is not improper on the ground that federal courts should not sit as co-administrators of

state prisons.

SYLLABUS

The fundamental constitutional right of access to the courts *held* to require prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. *Younger v. Gilmore*, 404 U.S. 15. Pp. 821-833.

538 F. 2d 541, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 833. BURGER, C.J., filed a dissenting opinion, *post*, p. 833. STEWART, J., *post*, p. 836, and REHNQUIST, J., *post*, p. 837, filed dissenting opinions, in which BURGER, C.J., joined.

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

Barry Nakell, by appointment of the Court, 425 U.S. 968, argued the cause and filed a brief for respondents. *

* *Andrew P. Miller*, Attorney General, and *Alan Katz*, Assistant Attorney General, filed a brief for the Commonwealth of Virginia as *amicus curiae* urging reversal.

JUDGES: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens

OPINION BY: MARSHALL

OPINION

[*817] [***76] [**1492] MR. JUSTICE MARSHALL delivered the opinion of the Court.

[***LEdHR1A] [1A]The issue in this case is whether States must protect the right of prisoners to access [**1493] to the courts by providing them with law libraries or alternative sources of legal knowledge. In *Younger v. Gilmore*, 404 U.S. 15 (1971), we held *per curiam* that such services are constitutionally mandated.

430 U.S. 817, *817; 97 S. Ct. 1491, **1493;
52 L. Ed. 2d 72, ***LEdHR1A; 1977 U.S. LEXIS 79

Petitioners, officials of the State of North Carolina, ask us [*818] to overrule that recent case, but for reasons explained below, we decline the invitation and reaffirm our previous decision.

I

Respondents are inmates incarcerated in correctional facilities of the Division of Prisons of the North Carolina Department of Correction. They filed three separate actions under 42 U.S.C. § 1983, all eventually consolidated in the District Court for the Eastern District of North Carolina. Respondents alleged, in pertinent part, that they were denied access to the courts in violation of their *Fourteenth Amendment* rights by the State's failure to provide legal research facilities.¹

1 The complaints also alleged a number of other constitutional violations not relevant to the issue now before us.

The District Court granted respondents' motion for summary judgment [***77] on this claim,² finding that the sole prison library in the State was "severely inadequate" and that there was no other legal assistance available to inmates. It held on the basis of *Younger v. Gilmore* that respondents' rights to access to the courts and equal protection of the laws had been violated because there was "no indication of any assistance at the initial stage of preparation of writs and petitions." The court recognized, however, that determining the "appropriate relief to be ordered... presents a difficult problem," in view of North Carolina's decentralized prison system.³ Rather than attempting "to dictate precisely what course the State should follow," the court "charge[d] the Department [*819] of Correction with the task of devising a Constitutionally sound program" to assure inmate access to the courts. It left to the State the choice of what alternative would "most easily and economically" fulfill this duty, suggesting that a program to make available lawyers, law students, or public defenders might serve the purpose at least as well as the provision of law libraries. Supp. App. 12-13.

2 The District Court had originally granted summary judgment for the state officials in one of the three consolidated actions. On appeal, the Court of Appeals for the Fourth Circuit appointed counsel and remanded that case with the suggestion that it be consolidated with the other two cases, then still pending in the District Court.

3 North Carolina's 13,000 inmates are housed in 77 prison units located in 67 counties. Sixty-five of these units hold fewer than 200 inmates. Brief for Petitioners 7 n. 3.

The State responded by proposing the establishment of seven libraries in institutions located across the State chosen so as to serve best all prison units. In addition, the State planned to set up smaller libraries in the Central Prison segregation unit and the Women's Prison. Under the plan, inmates desiring to use a library would request appointments. They would be given transportation and housing, if necessary, for a full day's library work. In addition to its collection of lawbooks,⁴ each library [**1494] would stock legal forms and writing paper and have typewriters and use of copying machines. The State proposed to train inmates as research assistants and typists to aid fellow prisoners. It was estimated that ultimately [***78] some 350 inmates per week could use the libraries, although inmates not facing court deadlines might have to wait three or four weeks for their turn at a library. Respondents [*820] protested that the plan was totally inadequate and sought establishment of a library at every prison.⁵

4 The State proposed inclusion of the following law books:

North Carolina General Statutes
North Carolina Reports (1960-present)
North Carolina Court of Appeals Reports
Strong's North Carolina Index
North Carolina Rules of Court
United States Code Annotated:
Title 18
Title 28 §§ 2241-2254
Title 28 Rules of Appellate Procedure
Title 28 Rules of Civil Procedure
Title 42 §§ 1891-2010
Supreme Court Reporter (1960-present)
Federal 2d Reporter (1960-present)

430 U.S. 817, *820; 97 S. Ct. 1491, **1494;
52 L. Ed. 2d 72, ***78; 1977 U.S. LEXIS 79

Federal Supplement (1960-present)

books proposed by respondents would surpass their usefulness.

Black's Law Dictionary

Sokol: Federal Habeas Corpus

LaFave and Scott: Criminal Law Hornbook
(2 copies)

Cohen: Legal Research

Criminal Law Reporter

Palmer: Constitutional Rights of Prisoners

In its final decision, the District Court held that petitioners were not constitutionally required to provide legal assistance as well as libraries. It found that the library plan was sufficient [*821] to give inmates reasonable access to the courts and that our decision in *Ross v. Moffitt*, 417 U.S. 600 (1974), while not directly in point, supported the State's claim that it need not furnish attorneys to bring habeas corpus and civil rights actions for prisoners.

This proposal adheres to a list approved as the minimum collection for prison law libraries by the American Correctional Association (ACA), American Bar Association (ABA), and the American Association of Law Libraries, except for the questionable omission of several treatises, Shepard's Citations, and local rules of court. See ACA, Guidelines for Legal Reference Service in Correctional Institutions: A Tool for Correctional Administrators 5-9 (2d ed. 1975) (hereafter ACA Guidelines); ABA Commission on Correctional Facilities and Services, Bar Association Support to Improve Correctional Services (BASICS), Offender Legal Services 29-30, 70-78 (rev. ed. 1976).

After the District Court approved the library plan, the State submitted an application to the Federal Law Enforcement Assistance Administration (LEAA) for a grant to cover 90% of the cost of setting up the libraries and training a librarian and inmate clerks. The State represented to LEAA that the library project would benefit all inmates in the State by giving them "meaningful and effective access to the court[s].... [T]he ultimate result... should be a diminution in the number of groundless petitions and complaints filed.... The inmate himself will be able to determine to a greater extent whether or not his rights have been violated" and judicial evaluation of the petitions will be facilitated. Brief for Respondents 3a.

5 Respondents also contended that the libraries should contain additional legal materials, and they urged creation of a large central circulating library.

Both sides appealed from those portions of the District Court orders adverse to them. The Court of Appeals for the Fourth Circuit affirmed in all respects save one. It found that the library plan denied women prisoners the same access rights as men to research facilities. Since there was no justification for this discrimination, the Court of Appeals ordered it eliminated. The State petitioned for review and we granted certiorari. 425 U.S. 910 (1976).⁷ We affirm.

The District Court rejected respondents' objections, finding the State's plan "both economically feasible and practicable," and one that, fairly and efficiently run would "insure each inmate the time to prepare his petitions." ⁶ *Id.*, at 19. Further briefing was ordered on whether the State was required to provide independent legal advisors for inmates in addition to the library facilities.

7 Respondents filed no cross-appeal and do not now question the library plan, nor do petitioners challenge the sex discrimination ruling.

II

6 The District Court did order two changes in the plan: that extra copies of the U.S.C.A. Habeas Corpus and Civil Rights Act volumes be provided, and that no reporter advance sheets be discarded, so that the libraries would slowly build up duplicate sets. But the court found that most of the prison units were too small to require their own libraries, and that the cost of the additional

[**LEdHR2] [2]A. It is now established beyond doubt that [HN1] prisoners have a constitutional right of access to the courts. [***79] This Court recognized that right more than 35 years [**1495] ago when it struck down a regulation prohibiting state prisoners from filing petitions for habeas corpus unless they were found "properly [*822] drawn" by the "legal investigator" for the parole

430 U.S. 817, *822; 97 S. Ct. 1491, **1495;
52 L. Ed. 2d 72, ***79; 1977 U.S. LEXIS 79

board. *Ex parte Hull*, 312 U.S. 546 (1941). We held this violated the principle that [HN2] "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Id.*, at 549. See also *Cochran v. Kansas*, 316 U.S. 255 (1942).

[**LEdHR3] [3] [**LEdHR4] [4] More recent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful. Thus, [HN3] in order to prevent "effectively foreclosed access," indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees. *Burns v. Ohio*, 360 U.S. 252, 257 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961). [HN4] Because we recognized that "adequate and effective appellate review" is impossible without a trial transcript or adequate substitute, we held that States must provide trial records to inmates unable to buy them. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956).⁸ Similarly, [HN5] counsel must be appointed [*823] to give indigent inmates "a meaningful appeal" from their convictions. *Douglas v. California*, 372 U.S. 353, 358 (1963).

8 See also *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958) (provision of trial transcript may not be conditioned on approval of judge); *Draper v. Washington*, 372 U.S. 487 (1963) (same); *Lane v. Brown*, 372 U.S. 477 (1963) (public defender's approval may not be required to obtain *coram nobis* transcript); *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (unconstitutional to require reimbursement for cost of trial transcript only from unsuccessful imprisoned defendants); *Long v. District Court of Iowa*, 385 U.S. 192 (1966) (State must provide transcript of post-conviction proceeding); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (State must provide preliminary hearing transcript); *Gardner v. California*, 393 U.S. 367 (1969) (State must provide habeas corpus transcript); *Williams v. Oklahoma City*, 395 U.S. 458 (1969) (State must provide transcript of petty-offense trial); *Mayer v. Chicago*, 404 U.S. 189 (1971) (State must provide transcript of nonfelony trial).

The only cases that have rejected indigent defendants' claims to transcripts have done so either because an adequate alternative was available but not used, *Britt v. North Carolina*,

404 U.S. 226 (1971), or because the request was plainly frivolous and a prior opportunity to obtain a transcript was waived, *United States v. MacCollom*, 426 U.S. 317 (1976).

Essentially the same standards of access were applied in *Johnson v. Avery*, 393 U.S. 483 (1969), which struck down a regulation prohibiting prisoners from assisting each other with habeas corpus applications and other legal matters. Since inmates had no alternative form of legal assistance available to them, we reasoned that this ban on jailhouse lawyers effectively prevented prisoners who were "unable themselves, with reasonable adequacy, to prepare their petitions," from challenging the legality of their confinements. *Id.*, at 489. *Johnson* [**80] was unanimously extended to cover assistance in civil rights actions in *Wolff v. McDonnell*, 418 U.S. 539, 577-580 (1974). And even as it rejected a claim that indigent defendants have a constitutional right to appointed counsel for discretionary appeals, the Court reaffirmed that [HN6] States must "assure the indigent defendant an adequate opportunity to present his claims fairly." *Ross v. Moffitt*, 417 U.S., at 616. "[M]eaningful access" to the courts is the touchstone. See *id.*, at 611, 612, 615.⁹

9 The same standards were applied in *United States v. MacCollom*, *supra*.

[**LEdHR5] [5] Petitioners contend, however, that this constitutional duty merely obliges States to allow inmate "writ writers" to function. [**1496] They argue that under *Johnson v. Avery*, *supra*, as long as inmate communications on legal problems are not restricted, there is no further obligation to expend state funds to implement affirmatively the right of access. This argument misreads the cases.

In *Johnson and Wolff v. McDonnell*, *supra*, the issue was whether the access rights of ignorant and illiterate inmates were violated without adequate justification. Since these inmates were unable to present their own claims in writing to the courts, we held that their "constitutional right to help," [*824] *Johnson v. Avery*, *supra*, at 502 (WHITE, J., dissenting), required at least allowing assistance from their literate fellows. But in so holding, we did not attempt to set forth the full breadth of the right of access. In *McDonnell*, for example, there was already an adequate law library in the prison.¹⁰ The case

430 U.S. 817, *824; 97 S. Ct. 1491, **1496;
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was thus decided against a backdrop of availability of legal information to those inmates capable of using it. And in *Johnson*,¹⁰ although the petitioner originally requested lawbooks, see 393 U.S., at 484, the Court did not reach the question, as it invalidated the regulation because of its effect on illiterate inmates. Neither case considered the question we face today and neither is inconsistent with requiring additional measures to assure meaningful access to inmates able to present their own cases.¹¹

10 The plaintiffs stipulated in the District Court to the general adequacy of the library, see *McDonnell v. Wolff*, 342 F. Supp. 616, 618, 629-630 (Neb. 1972), although they contested certain limitations on its use. Those claims were resolved by the lower courts. See *id.*, at 619-622; 483 F. 2d 1059, 1066 (CA8 1973); 418 U.S., at 543 n.2.

11 Indeed, our decision is supported by the holding in *Procurier v. Martinez*, 416 U.S. 396 (1974), in a related right-of-access context. There the Court invalidated a California regulation barring law students and paraprofessionals employed by lawyers representing prisoners from seeing inmate clients. *Id.*, at 419-422. We did so even though California has prison law libraries and permits inmate legal assistance, *Gilmore v. Lynch*, 319 F. Supp. 105, 107 n. 1 (ND Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971). Even more significantly, the prisoners in question were actually represented by lawyers. Thus, despite the challenged regulation, the inmates were receiving more legal assistance than prisoners aided only by writ writers. Nevertheless, we found that the regulation "impermissibly burdened the right of access." 416 U.S., at 421.

[***LEdHR6] [6] [***LEdHR7] [7] [***LEdHR8] [8] Moreover, our decisions have consistently required States to shoulder [***81] affirmative obligations to assure all prisoners meaningful access to the courts. It is indisputable that [HN7] indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to [*825] authenticate them, and with stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial, *Gideon v. Wainwright*, 372 U.S. 335

(1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and in appeals as of right, *Douglas v. California*, *supra*.¹² This is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial. Thus, neither the availability of jailhouse lawyers nor the necessity for affirmative state action is dispositive of respondents' claims. The inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.

12 Cf. *Estelle v. Gamble*, 429 U.S. 97 (1976), holding that States must treat prisoners' serious medical needs, a constitutional duty obviously requiring outlays for personnel and facilities.

[***LEdHR9] [9]B. Although it is essentially true, as petitioners argue,¹³ that a habeas corpus [**1497] petition or civil rights complaint need only set forth facts giving rise to the cause of action, but see, *Fed. Rules Civ. Proc.* 8(a)(1), (3), it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.

13 Brief for Petitioners 16-17; Tr. of Oral Arg. 3-9, 11-12.

If a lawyer must perform such preliminary research, it is [*826] no less vital for a *pro se* prisoner.¹⁴ Indeed, despite the "less stringent standards" by which a *pro se* pleading is judged, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing *in forma pauperis* and may dismiss the case if it is deemed frivolous. See 28 U.S.C. § 1915.¹⁵ Moreover, if the State files a response to a *pro se* pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate [***82] will be unable to rebut the State's argument. It is not enough to answer

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that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation. Cf. *Gardner v. California*, 393 U.S. 367, 369-370 (1969). In fact, one of the consolidated cases here was initially dismissed by the same judge who later ruled for respondents, possibly because *Younger v. Gilmore* was not cited.

14 A source of current legal information would be particularly important so that prisoners could learn whether they have claims at all, as where new court decisions might apply retroactively to invalidate convictions.

15 The propriety of these practices is not before us. Courts may also impose additional burdens before appointing counsel for indigents in civil suits. See *Johnson v. Avery*, 393 U.S. 483, 487-488 (1969).

We reject the State's claim that inmates are "ill-equipped to use" "the tools of the trade of the legal profession," making libraries useless in assuring meaningful access. Brief for Petitioners 17. In the first place, the claim is inconsistent with the State's representations on its LEAA grant application, *supra*, at 821, and with its argument that access is adequately protected by allowing inmates to help each other with legal problems. More importantly, this Court's experience indicates that *pro se* petitioners are capable of using lawbooks to file cases raising claims that are serious and legitimate even [*827] if ultimately unsuccessful. Finally, we note that if petitioners had any doubts about the efficacy of libraries, the District Court's initial decision left them free to choose another means of assuring access.

It is also argued that libraries or other forms of legal assistance are unnecessary to assure meaningful access in light of the Court's decision in *Ross v. Moffitt*. That case held that the right of prisoners to "an adequate opportunity to present [their] claims fairly," 417 U.S., at 616, did not require appointment of counsel to file petitions for discretionary review in state courts or in this Court. *Moffitt's* rationale, however, supports the result we reach here. The decision in *Moffitt* noted that a court addressing a discretionary review petition is not primarily concerned with the correctness of the judgment below. Rather, review is generally granted only if a case raises an issue of significant public interest or jurisprudential importance or conflicts with controlling precedent. *Id.*, at

615-617. *Moffitt* held that *pro se* applicants can present their claims adequately for appellate courts to decide whether these criteria are met because [**1498] they have already had counsel for their initial appeals as of right. They are thus likely to have appellate briefs previously written on their behalf, trial transcripts, and often intermediate appellate court opinions to use in preparing petitions for further review. *Id.*, at 615.

[**LEdHR10] [10]By contrast in this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this Court has "constantly emphasized," habeas corpus and civil rights actions are of "fundamental importance... in our constitutional scheme" because they directly protect our most valued rights. *Johnson v. Avery*, 393 U.S., at 485; *Wolff v. McDonnell*, 418 U.S., at 579. While [***83] applications for [*828] discretionary review need only apprise an appellate court of a case's possible relevance to the development of the law, the prisoner petitions here are the first line of defense against constitutional violations. The need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review.¹⁶

1 Nor is *United States v. MacCollom*, 426 U.S. 317 (1976), inconsistent with our decision. That case held that in a post-conviction proceeding under 28 U.S.C. § 2255, an applicant was not unconstitutionally deprived of access to the courts by denial of a transcript of his original trial pursuant to 28 U.S.C. § 753 (f), where he had failed to take a direct appeal and thereby secure the transcript, where his newly asserted claim of error was frivolous, and where he demonstrated no need for the transcript. Without a library or legal assistance, however, inmates will not have "a current opportunity to present [their] claims fairly," 426 U.S., at 329 (BLACKMUN, J., concurring in judgment), and valid claims will undoubtedly be lost.

[**LEdHR1B] [1B] [**LEdHR11A] [11A]We hold, therefore, that [HN8] the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful

legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. ¹⁷

17 [***LEdHR1C] [1C] [***LEdHR11B]
[11B]

Since our main concern here is "protecting the ability of an inmate to prepare a petition or complaint," *Wolff v. McDonnell*, 418 U.S., at 576, it is irrelevant that North Carolina authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts. See *N.C. Gen. Stat. § 7A-451* (Supp. 1975); Brief for Petitioners 3 n. 1, 12 n. 8, 14 n. 9, and accompanying text; but cf. *Ross v. Moffitt*, 417 U.S. 600, 614 (1974). Moreover, this statute does not cover appointment of counsel in federal habeas corpus or state or federal civil rights actions, all of which are encompassed by the right of access.

Similarly, the State's creation of an advisory Inmate Grievance Commission, see *N.C. Gen. Stat. § 148-101 et seq.* (Supp. 1975); Brief for Petitioners 14, while certainly a noteworthy innovation, does not answer the constitutional requirement for legal assistance to prisoners.

[***LEdHR12] [12]C. Our holding today is, of course, a reaffirmation of the result reached in *Younger v. Gilmore*. While *Gilmore* is not [*829] a necessary element in the preceding analysis, its precedential weight strongly reinforces our decision. The substantive question presented in *Gilmore* was: "Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to provide inmates with professional or quasi-professional legal assistance?" Jurisdictional Statement 5, Brief for Appellants 4, in No. 70-9, O.T. 1971. This Court explicitly decided that question when it affirmed the judgment of the District Court in reliance on *Johnson v. Avery*. Cf. this Court's Rule 15(c). The affirmative answer was given unanimously after full briefing and oral argument. *Gilmore* has been relied upon without question in our subsequent decisions. *Cruz v. Hauck*, 404 U.S. 59 (1971) (vacating and remanding for reconsideration in light of *Gilmore* a decision that legal materials [*1499] need not be furnished to county jail inmates); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (

Gilmore cited approvingly in support of inmates' right of access to the courts); *Chaffin v. Stynchcombe*, 412 U.S. 17, 34 n. 22 (1973) (*Gilmore* cited approvingly as a decision "removing roadblocks and disincentives to appeal"). [***84] Most recently, in *Wolff v. McDonnell*, despite differences over other issues in the case, the Court unanimously reaffirmed that *Gilmore* requires prison officials "to provide indigent inmates with access to a reasonably adequate law library for preparation of legal actions." 418 U.S., at 578-579.

Experience under the *Gilmore* decision suggests no reason to depart from it. Most States and the Federal Government have made impressive efforts to fulfill *Gilmore*'s mandate by establishing law libraries, prison legal-assistance programs, or combinations of both. See Brief for Respondents, Ex. B. Correctional administrators have supported the programs and acknowledged their value. ¹⁸ Resources and support including [*830] substantial funding from LEAA have come from many national organizations. ¹⁹

18 Nearly 95% of the state corrections commissioners, prison wardens, and treatment directors responding to a national survey supported creation and expansion of prison legal services. Cardarelli & Finkelstein, Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States, 65 J. Crim. L., C. & P.S. 91, 99 (1974). Almost 85% believed that the programs would not adversely affect discipline or security or increase hostility toward the institution. Rather, over 80% felt legal services provide a safety valve for inmate grievances, reduce inmate power structures and tensions from unresolved legal problems, and contribute to rehabilitation by providing a positive experience with the legal system. *Id.*, at 95-98. See also ACA Guidelines, *supra*, n. 4; National Sheriffs' Assn., Inmates' Legal Rights, Standard 14, pp. 33-34 (1974); Bluth, Legal Services for Inmates: Coopting the Jailhouse Lawyer, 1 Capital U.L. Rev. 59, 61, 67 (1972); Sigler, A New Partnership in Corrections, 52 Neb. L. Rev. 35, 38 (1972).

19 See, e.g., U.S. Dept. of Justice, LEAA, A Compendium of Selected Criminal Justice Projects, III-201, IV-361-366 (1975); U.S. Dept. of Justice, LEAA, Grant 75 DF-99-0013, Consortium of States to Furnish Legal Counsel to

430 U.S. 817, *830; 97 S. Ct. 1491, **1499;
52 L. Ed. 2d 72, ***84; 1977 U.S. LEXIS 79

Prisoners, Final Report, and Program Narrative (1975). The ABA BASICS program, see n. 4, *supra*, makes grants to state and local bar associations for prison legal services and libraries and publishes a complete technical assistance manual, *Offender Legal Services* (rev. ed. 1976). See also ABA Resource Center on Correctional Law and Legal Services, *Providing Legal Services to Prisoners*, 8 Ga. L. Rev. 363 (1974). The American Correctional Association publishes *Guidelines for Legal Reference Service in Correctional Institutions* (2d ed. 1975). The American Association of Law Libraries publishes O. Werner, *Manual for Prison Law Libraries* (1976), and its members offer assistance to prison law library personnel.

See also ABA Joint Committee on the Legal Status of Prisoners, *Standards Relating to the Legal Status of Prisoners*, Standards 2.1, 2.2, 2.3 and Commentary, 14 Am. Crim. L. Rev. 377, 420-443 (tent. draft 1977); National Conference of Commissioners on Uniform State Laws, *Uniform Corrections Code*, § 2-601 (tent. draft 1976); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 26-30, Standards 2.2, 2.3 (1973).

[**LEdHR13] [13] [**LEdHR14] [14] It should be noted that while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here, as in *Gilmore*, does not foreclose alternative means to achieve that goal. Nearly [*831] half the States and the District of Columbia provide some degree of professional or quasi-professional legal assistance to prisoners. Brief for Respondents, Ex. B. Such programs take many imaginative forms and may have a number of advantages over libraries alone. Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal [**85] clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a parttime consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part [**1500] of public defender or legal services offices.²⁰ Legal services plans not only result in more efficient and skillful handling of prisoner cases, but also avoid the

disciplinary problems associated with writ writers, see *Johnson v. Avery*, 393 U.S., at 488; *Procurier v. Martinez*, 416 U.S. 396, 421-422 (1974). Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that other grievances against the prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly.²¹ It has [*832] been estimated that as few as 500 full-time lawyers would be needed to serve the legal needs of the entire national prison population.²² Nevertheless, a legal access program need not include any particular element we have discussed, and we encourage local experimentation. Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards.²³

20 For example, full-time staff attorneys assisted by law students and a national back-up center were used by the Consortium of States to Furnish Legal Counsel to Prisoners, see n. 19, *supra*. State and local bar associations have established a number of legal services and library programs with support from the ABA BASICS program, see nn. 4 and 19, *supra*. Prisoners' Legal Services of New York plans to use 45 lawyers and legal assistants in seven offices to give comprehensive legal services to all state inmates. *Offender Legal Services*, *supra*, n. 19, at iv. Other programs are described in *Providing Legal Services to Prisoners*, *supra*, n. 19, at 399-416.

21 See Cardarelli & Finkelstein, *supra*, n. 18, at 96-99; LEAA Consortium Reports, *supra*, n. 19; Champagne & Haas, *The Impact of Johnson v. Avery on Prison Administration*, 43 *Tenn. L. Rev.* 275, 295-299 (1976). Cf. 42 U.S.C. § 2996(4) (1970 ed., *Supp. V*), in which Congress, establishing the Legal Services Corp., declared that "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws."

22 ABA Joint Committee, *supra*, n. 19, at 428-429.

23 See, e.g., *Stevenson v. Reed*, 530 F. 2d 1207 (CA5 1976), *aff'g* 391 F. *Supp.* 1375 (ND Miss. 1975); *Bryan v. Werner*, 516 F. 2d 233 (CA3 1975); *Gaglie v. Ulibarri*, 507 F. 2d 721 (CA9 1974); *Corpus v. Estelle*, 409 F. *Supp.* 1090 (SD Tex. 1975).

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52 L. Ed. 2d 72, ***85; 1977 U.S. LEXIS 79

III

[**LEdHR15] [15]Finally, petitioners urge us to reverse the decision below because federal courts should not "sit as co-administrators of state prisons," Brief for Petitioners 13, and because the District Court "exceeded its powers when it puts [*sic*] itself in the place of the [prison] administrators," *id.*, at 14. While we have recognized that [HN9] judicial restraint is often appropriate in prisoners' rights cases, we have also repeatedly held that this policy "cannot encompass any failure to take cognizance of valid constitutional claims." *Procunier v. Martinez*, *supra*, at 405.

Petitioners' hyperbolic claim is particularly inappropriate in this case, for the courts below scrupulously respected the limits on their [**86] role. The District Court initially held only that petitioners had violated the "fundamental constitutional guarantee," *ibid.*, of access to the courts. It did not thereupon thrust itself into prison administration. Rather, it ordered petitioners themselves to devise a remedy for the violation, strongly suggesting that it would prefer a plan [*833] providing trained legal advisors. Petitioners chose to establish law libraries, however, and their plan was approved with only minimal changes over the strong objections of respondents. Prison administrators thus exercised wide discretion within the bounds of constitutional requirements in this case.

The judgment is

Affirmed.

CONCUR BY: POWELL

CONCUR

MR. JUSTICE POWELL, concurring.

The decision today recognizes that a prison inmate has a constitutional right of access to the courts to assert such procedural and substantive rights as may be available to him under state and federal law. It does not purport to pass on the kinds of claims [**1501] that the Constitution requires state or federal courts to hear. In *Wolff v. McDonnell*, 418 U.S. 539, 577-580 (1974), where we extended the right of access recognized in *Johnson v. Avery*, 393 U.S. 483 (1969), to civil rights actions arising under the Civil Rights Act of 1871, we did

not suggest that the Constitution required such actions to be heard in federal court. And in *Griffin v. Illinois*, 351 U.S. 12 (1956), where the Court required the States to provide trial records for indigents on appeal, the plurality and concurring opinions explicitly recognized that the Constitution does not require any appellate review of state convictions. Similarly, the holding here implies nothing as to the constitutionally required scope of review of prisoners' claims in state or federal court.

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

DISSENT BY: BURGER; STEWART; REHNQUIST

DISSENT

MR. CHIEF JUSTICE BURGER, dissenting.

I am in general agreement with MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, and join in their opinions. I write only to emphasize the theoretical and practical difficulties raised by the Court's holding. The Court leaves us unenlightened as to the source of the "right of access to the courts" [*834] which it perceives or of the requirement that States "foot the bill" for assuring such access for prisoners who want to act as legal researchers and brief writers. The holding, in my view, has far-reaching implications which I doubt have been fully analyzed or their consequences adequately assessed.

It should be noted, first, that the access to the courts which these respondents are seeking is not for the purpose of direct appellate review of their criminal convictions. Abundant access for such purposes has been guaranteed by our prior decisions, *e.g.*, *Douglas v. California*, 372 U.S. 353 (1963), and *Griffin v. Illinois*, 351 U.S. 12 (1956), and by the States independently. Rather, the underlying [**87] substantive right here is that of prisoners to mount collateral attacks on their state convictions. The Court is ordering the State to expend resources in support of the federally created right of collateral review.

This would be understandable if the federal right in question were constitutional in nature. For example, the State may be required by the *Eighth Amendment* to provide its inmates with food, shelter, and medical care, see *Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976);

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similarly, an indigent defendant's right under the *Sixth Amendment* places upon the State the affirmative duty to provide him with counsel for trials which may result in deprivation of his liberty, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); finally, constitutional principles of due process and equal protection form the basis for the requirement that States expend resources in support of a convicted defendant's right to appeal. See *Douglas v. California*, *supra*; *Griffin v. Illinois*, *supra*.

However, where the federal right in question is of a statutory rather than a constitutional nature, the duty of the State is merely negative; it may not act in such a manner as to interfere with the individual exercise of such federal rights. *E.g.*, *Ex parte Hull*, 312 U.S. 546 (1941) (State may not interfere with prisoner's access to the federal court by screening [*835] petitions directed to the court); *Johnson v. Avery*, 393 U.S. 483 (1969) (State may not prohibit prisoners from providing to each other assistance in preparing petitions directed to the federal courts). Prohibiting the State from interfering with federal statutory rights is, however, materially different from requiring it to provide affirmative assistance for their exercise.

It is a novel and doubtful proposition, in my view, that the Federal Government can, by statute, give individuals certain rights and then require the State, as a constitutional matter, to fund the means for exercise [**1502] of those rights. Cf. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

As to the substantive right of state prisoners to collaterally attack in federal court their convictions entered by a state court of competent jurisdiction, it is now clear that there is no broad federal constitutional right to such collateral attack, see *Stone v. Powell*, 428 U.S. 465 (1976); whatever right exists is solely a creation of federal statute, see *Swain v. Pressley*, *ante*, p. 384 (opinion of BURGER, C.J.); *Schneekloth v. Bustamonte*, 412 U.S. 218, 250, 252-256 (1973) (POWELL, J., concurring). But absent a federal constitutional right to attack convictions collaterally - and I discern no such right - I can find no basis on which a federal court may require States to fund costly law libraries for prison inmates. * Proper federal-state relations [***88] preclude such intervention in the "complex and intractable" problems of prison administration. *Procunier v. Martinez*, 416 U.S. 396 (1974).

* The record reflects that prison officials in no

way interfered with inmates' use of their own resources in filing collateral attacks. Prison regulations permit access to inmate "writ writers" and each prisoner is entitled to store reasonable numbers of lawbooks in his cell.

I can draw only one of two conclusions from the Court's holding: it may be read as implying that the right of prisoners to collaterally attack their convictions is constitutional, rather than statutory, in nature; alternatively, it may be read as [*836] holding that States can be compelled by federal courts to subsidize the exercise of federally created statutory rights. Neither of these novel propositions is sustainable and for the reasons stated I cannot adhere to either view and therefore dissent.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, dissenting.

In view of the importance of the writ of habeas corpus in our constitutional scheme, "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Wolff v. McDonnell*, 418 U.S. 539, 578, quoting *Johnson v. Avery*, 393 U.S. 483, 485. From this basic principle the Court over five years ago made a quantum jump to the conclusion that a State has a constitutional obligation to provide law libraries for prisoners in its custody. *Younger v. Gilmore*, 404 U.S. 15.

Today the Court seeks to bridge the gap in analysis that made *Gilmore's* authority questionable. Despite the Court's valiant efforts, I find its reasoning unpersuasive.

If, as the Court says, there is a constitutional duty upon a State to provide its prisoners with "meaningful access" to the federal courts, that duty is not effectuated by adhering to the unexplained judgment in the *Gilmore* case. More than 20 years of experience with *pro se* habeas corpus petitions as a Member of this Court and as a Circuit Judge have convinced me that "meaningful access" to the federal courts can seldom be realistically advanced by the device of making law libraries available to prison inmates untutored in their use. In the vast majority of cases, access to a law library will, I am convinced, simply result in the filing of pleadings heavily larded with irrelevant legalisms - possessing the veneer but lacking the substance of professional competence.

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52 L. Ed. 2d 72, ***88; 1977 U.S. LEXIS 79

If, on the other hand, MR. JUSTICE REHNQUIST is correct in his belief that a convict in a state prison pursuant to a [*837] final judgment of a court of competent jurisdiction has no constitutional right of "meaningful access" to the federal courts in order to attack his sentence, then a State can be under no constitutional duty to make that access "meaningful." If the extent of the constitutional duty of a State is simply not to deny or obstruct a prisoner's access to the courts, *Johnson v. Avery, supra*, then it cannot have, even arguably, any affirmative [**1503] constitutional obligation to provide law libraries for its prison inmates.

I respectfully dissent.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's opinion in this case serves the unusual purpose of supplying [***89] as good a line of reasoning as is available to support a two-paragraph per curiam opinion almost six years ago in *Younger v. Gilmore*, 404 U.S. 15 (1971), which made no pretense of containing any reasoning at all. The Court's reasoning today appears to be that we have long held that prisoners have a "right of access" to the courts in order to file petitions for habeas corpus, and that subsequent decision have expanded this concept into what the Court today describes as a "meaningful right of access." So, we are told, the right of a convicted prisoner to "meaningful access" extends to requiring the State to furnish such prisoners law libraries to aid them in piecing together complaints to be filed in the courts. This analysis places questions of prisoner access on a "slippery slope," and I would reject it because I believe that the early cases upon which the Court relies have a totally different rationale from that which underlies the present holding.

There is nothing in the United States Constitution which requires that a convict serving a term of imprisonment in a State penal institution pursuant to a final judgment of a court of competent jurisdiction "right of access" to the federal courts in order to attack his sentence. In the first [*838] case upon which the Court's opinion relies, *Ex parte Hull*, 312 U.S. 546 (1941), the Court held invalid a regulation of the Michigan State prison which provided that "[a]ll legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals" which prisoners wish to file in court had to be first submitted to the legal investigator of the state parole board. If the documents were, in the

opinion of this official, "properly drawn," they would be directed to the court designated. Hull was advised that his petition addressed to this Court had been "intercepted" and referred to the legal investigator for the reason that it was "deemed to be inadequate." This Court held that such a regulation was invalid, and said very clearly why: S

"Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." *Id.*, at 549.I

A number of succeeding cases have expanded on this barebones holding that an incarcerated prisoner has a right of physical access to a federal court in order to petition that court for relief which Congress has authorized it to grant. These cases, most of which are mentioned in the Court's opinion, begin with *Griffin v. Illinois*, 351 U.S. 12 (1956), and culminate in *United States v. MacCollom*, 426 U.S. 317 (1976), decided last Term. Some, such as *Griffin, supra*, and *Douglas v. California*, 372 U.S. 353 (1963), appear to depend upon the principle that indigent convicts must be given a meaningful opportunity to pursue a state-created right to appeal, even though the pursuit of such a remedy requires that the State must provide a transcript or furnish counsel. Others, such as *Johnson v. Avery*, 393 U.S. 483 (1969), *Procurier v. Martinez*, 416 U.S. 396 [***90] (1974), and *Wolff v. McDonnell*, 418 U.S. 539 (1974), depend on the principle that the State, having already incarcerated the convict and thereby virtually eliminated his contact with people outside the prison walls, [*839] may not further limit contacts which would otherwise be permitted simply because such contacts would aid the incarcerated prisoner in preparation of a petition seeking judicial relief from the conditions or terms of his confinement. Clearly neither of these principles supports the Court's present holding: The prisoners here in question have all pursued all avenues [**1504] of direct appeal available to them from their judgments of conviction, and North Carolina imposes no invidious regulations which allow visits from all persons except those knowledgeable in the law. All North Carolina has done in this case is to decline to expend public funds to make available law libraries to those who are incarcerated within its penitentiaries.

If respondents' constitutional arguments were grounded on the *Equal Protection Clause*, and were in

430 U.S. 817, *839; 97 S. Ct. 1491, **1504;
52 L. Ed. 2d 72, ***90; 1977 U.S. LEXIS 79

effect that rich prisoners could employ attorneys who could in turn consult law libraries and prepare petitions for habeas corpus, whereas indigent prisoners could not, they would have superficial appeal. See *Griffin, supra*; *Douglas, supra*. I believe that they would nonetheless fail under *Ross v. Moffitt*, 417 U.S. 600 (1974). There we held that although our earlier cases had required the State to provide meaningful access to state-created judicial remedies for indigents, the only right on direct appeal was that "indigents have an adequate opportunity to present their claims fairly within the adversary system." *Id.*, at 612.

In any event, the Court's opinion today does not appear to proceed upon the guarantee of equal protection of the laws, a guarantee which at least has the merit of being found in the *Fourteenth Amendment to the Constitution*. It proceeds instead to enunciate a "fundamental constitutional right of access to the courts," *ante*, at 828, which is found nowhere in the Constitution. But if a prisoner incarcerated pursuant to a final judgment of conviction is not prevented from physical access to the federal courts in order that he may file therein petitions for relief which Congress has authorized those courts [*840] to grant, he has been accorded the only constitutional right of access to the courts that our cases have articulated in a reasoned way. *Ex parte Hull, supra*. Respondents here make no additional claims that prison regulations invidiously deny them access to those with knowledge of the law so that such regulations would be inconsistent with *Johnson, supra*, *Procunier, supra*, and *Wolff, supra*. Since none of these reasons is present here, the "fundamental constitutional right of access to the courts" which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived.

Our decisions have recognized on more than one occasion that lawful imprisonment properly results in a "retraction [of rights] justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 [***91] (1948); *Pell v. Procunier*, 417 U.S. 817, 822 (1974). A convicted prisoner who has exhausted his avenues of direct appeal is no longer to be accorded every presumption of innocence, and his former constitutional liberties may be substantially restricted by the exigencies of the incarceration in which he has been placed. See *Meachum v. Fano*, 427 U.S. 215 (1976). Where we come to the point where the prisoner is seeking to collaterally attack a final judgment of conviction, the

right of physical access to the federal courts is essential because of the congressional provisions for federal habeas review of state convictions. *Ex parte Hull, supra*. And the furnishing of a transcript to an indigent who makes a showing of probable cause, in order that he may have any realistic chance of asserting his right to such review, was upheld in *United States v. MacCollom, supra*. We held in *Ross v. Moffitt, supra*, that the *Douglas* holding of a right to counsel on a first direct appeal as of right would not be extended to a discretionary second appeal from an intermediate state appellate court to the state court of last resort, or from the state court of last resort to this Court. It would seem, *a fortiori*, to follow from that case that an [*841] incarcerated prisoner who has pursued all his avenues of direct review would have no constitutional right whatever to state appointed counsel to represent him in a collateral attack on his conviction, and none of our cases has ever suggested that a prisoner would have such a right. See *Johnson v. Avery*, 393 U.S., at 488. Yet this is the logical destination of the Court's reasoning today. [**1505] If "meaningful access" to the courts is to include law libraries, there is no convincing reason why it should not also include lawyers appointed at the expense of the State. Just as a library may assist some inmates in filing papers which contain more than the bare factual allegations of injustice, appointment of counsel would assure that the legal arguments advanced are made with some degree of sophistication.

I do not believe anything in the Constitution requires this result, although state and federal penal institutions might as a matter of policy think it wise to implement such a program. I conclude by indicating the same respect for *Younger v. Gilmore*, 404 U.S. 15 (1971), as has the Court, in relegating it to a final section set apart from the body of the Court's reasoning. *Younger* supports the result reached by the Court of Appeals in this case, but it is a two-paragraph opinion which is most notable for the unbridged distance between its premise and its conclusion. The Court's opinion today at least makes a reasoned defense of the result which it reaches, but I am not persuaded by those reasons. Because of that fact I would not have the slightest reluctance to overrule *Younger* and reverse the judgment of the Court of Appeals in this case.

REFERENCES

What, in view of Supreme Court, constitutes the constitutional right of access to the courts

430 U.S. 817, *841; 97 S. Ct. 1491, **1505;
52 L. Ed. 2d 72, ***91; 1977 U.S. LEXIS 79

- 60 Am Jur 2d, Penal and Correctional Institutions 41, 45, 49* 779.
- 5 Federal Procedural Forms, Civil Rights 10:151-10:162 Precedential weight of Supreme Court's memorandum decision summarily affirming lower federal court judgment on appeal or summarily dismissing appeal from state court. *45 L Ed 2d 791.*
- 19 Am Jur Pl & Pr Forms (Rev Ed), Penal and Correctional Institutions, Form 12 Right under the Federal Constitution of indigent defendant in criminal case to aid of state as regards appeal or postconviction remedy. *6 L Ed 2d 1295, 21 L Ed 2d 879.*
- 22 Am Jur Trials, Prisoners' Rights Litigation Accused's right to counsel under the *Federal Constitution. 93 L Ed 137, 2 L Ed 2d 1644, 9 L Ed 2d 1260, 18 L Ed 2d 1420.*
- US L Ed Digest, Prisons and Convicts 1 Relief under Federal Civil Rights Act to state prisoners complaining of interference with access to courts. *23 ALR Fed 6.*
- ALR Digests, Prisons and Convicts 5 Right of indigent defendant in criminal case to aid of state as regards new trial or appeal. *100 ALR 321, 55 ALR2d 1072.*
- L Ed Index to Annos, Criminal Law; Habeas Corpus; Prisons and Prisoners Right to aid of counsel in application or hearing for habeas corpus. *162 ALR 922.*
- ALR Quick Index, Assistance of Counsel; Habeas Corpus; Prisons and Convicts
- Federal Quick Index, Assistance of Counsel; Habeas Corpus; Prisons and Prisoners
- Annotation References:
- What, in view of Supreme Court, constitutes the constitutional right to access to the *Courts* . *52 L Ed 2d*

APPENDIX 16



CALIFORNIA MOTOR TRANSPORT CO. ET AL. v. TRUCKING UNLIMITED
ET AL.

No. 70-92

SUPREME COURT OF THE UNITED STATES

404 U.S. 508; 92 S. Ct. 609; 30 L. Ed. 2d 642; 1972 U.S. LEXIS 157; 1972 Trade Cas.
(CCH) P73,795

November 10, 1971, Argued
January 13, 1972, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: 432 F.2d 755, affirmed and remanded for trial.

SUMMARY:

The complaint in a civil suit, instituted under 4 of the Clayton Act in the United States District Court for the Northern District of California, alleged that the defendant highway carriers had conspired to put the plaintiff highway carriers out of business as competitors by instituting actions in state and federal proceedings to resist and defeat the plaintiffs' applications concerning operating rights, and that the defendants had combined to deter the plaintiffs from having "free and unlimited access" to the agencies and courts, and to defeat such right by massive, concerted, and purposeful activities of the combination. The District Court dismissed the complaint for failure to state a cause of action (1967 Trade Cas 72,298), but the United States Court of Appeals for the Ninth Circuit reversed (432 F2d 755).

On certiorari, the United States Supreme Court affirmed the Court of Appeals' judgment and remanded the case for trial. In an opinion by Douglas, J., expressing the view of five members of the court, it was held that (1)

although highway carriers, as part of the right of petition protected by the *First Amendment*, had the right of access to agencies and courts to be heard on applications sought by competitive highway carriers, nevertheless they were not necessarily thereby given immunity from the antitrust laws, and (2) a violation of the antitrust laws would be established in the case at bar if the plaintiffs' allegations were proved as facts, particularly the allegations that the defendants, through massive, concerted, and purposeful group activities, had combined to deter the plaintiffs from having "free and unlimited access" to the agencies and courts, it being immaterial whether the means used by the defendants might have been lawful.

Stewart, J., joined by Brennan, J., concurred in the result, stating that (1) absent the defendants' involvement in perjury, fraud, bribery, or misrepresentations to the tribunals involved, none of which conduct was alleged, their joint exercise of the constitutional right of access to the tribunals was immune from the antitrust laws, but (2) the case should be remanded for trial, since under certain allegations, liberally construed, the plaintiffs were entitled to prove that the defendants' real intent was not to invoke the processes of the administrative agencies and courts, but to discourage and prevent the plaintiffs from invoking those processes, which intent would make the conspiracy an attempt to interfere directly with the business relationships of a competitor, justifying application of the Sherman Act.

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Powell and Rehnquist, JJ., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAW §7

character of agencies --

Headnote:[1]

Administrative agencies are both creatures of the legislature, and arms of the executive.

[***LEdHN2]

LAW §940

right to petition -- access to courts --

Headnote:[2]

The right to petition extends to all departments of the government; the right of access to the courts is but one aspect of the right of petition.

[***LEdHN3]

LAW §940

MONOPOLIES §29

rights of association and petition -- business groups -- interference with competitors --

Headnote:[3]

It would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests in relation to their competitors; however, there may be instances where an alleged conspiracy is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

[***LEdHN4]

MONOPOLIES §9

misrepresentations --

Headnote:[4]

Misrepresentations, condoned in the political arena, are not immunized under antitrust laws when used in the adjudicatory process.

[***LEdHN5]

MONOPOLIES §29

barring competitors' access to agencies or courts --

Headnote:[5]

Actions by businesses which effectively bar their competitors from access to administrative or judicial processes cannot acquire immunity from the antitrust laws by seeking refuge under the umbrella of "political expression."

[***LEdHN6]

LAW §940

MONOPOLIES §29

highway carriers -- access to agencies and courts --

Headnote:[6]

Although highway carriers, as part of the right of petition protected by the *First Amendment*, have the right of access to agencies and courts to be heard on applications sought by competitive highway carriers, nevertheless they are not necessarily thereby given immunity from the antitrust laws.

[***LEdHN7]

LAW §925

First Amendment rights -- regulation --

Headnote:[7]

First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.

[***LEdHN8]

LAW §940

MONOPOLIES §15

highway carriers -- access to agencies or courts --

Headnote:[8]

With regard to the *First Amendment* right of petition and the prohibitions of the antitrust laws, any carrier has the right of access to agencies and courts, within the limits of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers, and its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit in such opposition.

[***LEdHN9]

LAW §925

First Amendment rights --

Headnote:[9]

First Amendment rights may not be used as the means or the pretext for achieving substantive evils which the legislature has the power to control.

[***LEdHN10]

MONOPOLIES §4

antitrust laws -- constitutionality --

Headnote:[10]

The constitutionality of the antitrust laws is not open to debate.

[***LEdHN11]

MONOPOLIES §29

highway carriers -- conspiracy to deny access to agencies and courts --

Headnote:[11]

A violation of the antitrust laws is established if, as alleged in a complaint under 4 of the Clayton Act (*15 USC 15*), it is proved that the defendant highway carriers conspired to put the plaintiff highway carriers out of

business as competitors by instituting actions in state and federal proceedings to resist and defeat the plaintiffs' applications to acquire, transfer, or register operating rights, and that the defendants combined to harass and deter the plaintiffs from having "free and unlimited access" to the agencies and courts, and to defeat such right by massive, concerted, and purposeful activities of the combination, it being immaterial that the means used by the defendants in violation of the antitrust laws may have been lawful.

[***LEdHN12]

MONOPOLIES §14

violation of antitrust laws -- lawful means --

Headnote:[12]

If the end result of the activities of a combination of entrepreneurs is unlawful as violative of the antitrust laws, it matters not that the means used in violation may be lawful.

[***LEdHN13]

ERROR §1293

motion to dismiss complaint -- allegations --

Headnote:[13]

In reviewing a United States Court of Appeals' reversal of a District Court judgment granting a motion to dismiss the complaint in a civil suit under 4 of the Clayton Act (*15 USC 15*), the United States Supreme Court must take the allegations of the complaint at face value for the purposes of the motion to dismiss.

SYLLABUS

Respondent highway carriers filed this civil action under § 4 of the Clayton Act for injunctive relief and damages against petitioner highway carriers charging that petitioners conspired to monopolize the transportation of goods by instituting state and federal proceedings to resist and defeat applications by respondents to acquire, transfer, or register operating rights. Respondents alleged that the purpose of the conspiracy was "putting their competitors . . . out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, and of monopolizing

404 U.S. 508, *; 92 S. Ct. 609, **;
30 L. Ed. 2d 642, ***; 1972 U.S. LEXIS 157

the highway common carrier business in California and elsewhere," and deterring respondents from having free and unlimited access to the agencies and the courts. The District Court dismissed the complaint for failure to state a cause of action but the Court of Appeals reversed. *Held*: While any carrier has the right of access to administrative agencies and courts to defeat applications of competitors for certificates as highway carriers, and its purpose to eliminate an applicant as a competitor may be implicit in such opposition, its *First Amendment* rights are not immunized from regulation when they are used as an integral part of conduct violative of the antitrust laws. If the allegations that petitioners combined to harass and deter respondents from having "free and unlimited access" to agencies and courts, and to defeat that right by massive, concerted, and purposeful group activities are established as facts, a violation of the antitrust laws will have been demonstrated, and it is immaterial that the means used in violation may be lawful. Pp. 509-516.

COUNSEL: Boris H. Lakusta argued the cause for petitioners. With him on the briefs were W. D. Benson, John MacDonald Smith, and Daniel H. Benson.

Michael N. Khourie argued the cause and filed a brief for respondents.

Dennis N. Garvey filed a brief for Landmarks Holding Corp. et al. as amici curiae.

JUDGES: Douglas, J., wrote the opinion of the Court, in which Burger, C. J., and White, Marshall, and Blackmun, JJ., joined. Stewart, J., filed an opinion concurring in the judgment, in which Brennan, J., joined, post, p. 516. Powell and Rehnquist, JJ., took no part in the consideration or decision of the case.

OPINION BY: DOUGLAS

OPINION

[*509] [***645] [**611] Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. CHIEF JUSTICE BURGER.

This is a civil suit under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, for injunctive relief and damages instituted by respondents, who are highway carriers operating in California, against petitioners, who are also highway carriers operating within, into, and from California. Respondents and petitioners are, in other

words, competitors. The charge is that the petitioners conspired to monopolize trade and commerce in the transportation of goods in violation of the antitrust laws. The conspiracy alleged is a concerted action by petitioners to institute state and federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or register those rights. These activities, it is alleged, extend to rehearings and to reviews or appeals from agency or court decisions on these matters.

The District Court dismissed the [***646] complaint for failure to state a cause of action, 1967 Trade Cas. para. 72,298. The Court of Appeals reversed, 432 F.2d 755. The case is here on a petition for a writ of certiorari, which we granted. 402 U.S. 1008.

The present case is akin to *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127, where a group of trucking companies sued a group of railroads to restrain them from an alleged conspiracy to monopolize [*510] the long-distance freight business in violation of the antitrust laws and to obtain damages. We held that no cause of action was alleged insofar as it was predicated upon mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement. We rested our decision on two grounds:

(1) "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.*, at 137.

(2) "The right of petition is one of the freedoms protected by the *Bill of Rights*, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.*, at 138.

We followed that view in *United Mine Workers v. Pennington*, 381 U.S. 657, 669-671.

[***LEdHR1] [1] [***LEdHR2] [2]The same

404 U.S. 508, *510; 92 S. Ct. 609, **611;
30 L. Ed. 2d 642, ***LEdHR2; 1972 U.S. LEXIS 157

philosophy governs the approach of citizens or groups of [**612] them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. See *Johnson v. Avery*, 393 U.S. 483, 485; *Ex parte Hull*, 312 U.S. 546, 549.

[***LEdHR3] [3]We conclude that it would be destructive of rights of association and of petition to hold that groups with [*511] common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

We said, however, in *Noerr* that there may be instances where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S., at 144.

In that connection the complaint in the present case alleged that the aim and purpose of the conspiracy was "putting their competitors, including plaintiff, out of business, of weakening such competitors, of destroying, eliminating and weakening existing and potential competition, [***647] and of monopolizing the highway common carriage business in California and elsewhere."

More critical are other allegations, which are too lengthy to quote, and which elaborate on the "sham" theory by stating that the power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them "free and unlimited access" to those tribunals. The result, it is alleged, was that the machinery of the agencies and the courts was effectively closed to respondents, and petitioners indeed became "the regulators of the grants of rights, transfers and registrations" to respondents -- thereby depleting and diminishing the value of the businesses of respondents and aggrandizing petitioners' economic and monopoly power. See Note, 57 Calif. L. Rev. 518 (1969).

Petitioners rely on our statement in *Pennington* that "*Noerr* shields from the Sherman Act a concerted effort

to influence public officials regardless of intent or purpose." 381 U.S., at 670. In the present case, however, [*512] the allegations are not that the conspirators sought "to influence public officials," but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process. It is alleged that petitioners "instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." The nature of the views pressed does not, of course, determine whether *First Amendment* rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be "to discourage and ultimately to prevent the respondents from invoking" the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*.

The political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics. We said:

"Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be [**613] termed unethical." 365 U.S., at 141.

Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in *Walker* [*513] *Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 175-177. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707; *Harman v. Valley National Bank*, 339 F.2d 564 (CA9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2 (c) of the Clayton

404 U.S. 508, *513; 92 S. Ct. 609, **613;
30 L. Ed. 2d 642, ***648; 1972 U.S. LEXIS 157

[***648] Act, as amended by the Robinson-Patman Act. *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (CA9 1965).

[***LEdHR4] [4] [***LEdHR5] [5] There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

[***LEdHR6] [6] Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the *First Amendment*. Yet that does not necessarily give them immunity from the antitrust laws.

[*514] [***LEdHR7] [7] It is well settled that *First Amendment* rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. *Giboney v. Empire Storage Co.*, 336 U.S. 490. In that case Missouri enacted a statute banning secondary boycotts and we sustained an injunction against picketing to enforce the boycott, saying:

"It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part

initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." 336 U.S., at 502.

In *Associated Press v. United States*, 326 U.S. 1, we held that the Associated Press was not immune from the antitrust laws by reason of the fact that the press is under the shelter of the *First Amendment*. We said:

"Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish [*614] is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under [***649] the [*515] *First Amendment* does not sanction repression of that freedom by private interests." *Id.*, at 20.

Accord, *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139-140. Cf. *Eastern States Lumber Assn. v. United States*, 234 U.S. 600.

[***LEdHR8] [8] The rationale of those cases, when applied to the instant controversy, makes the following conclusions clear: (1) that any carrier has the right of access to agencies and courts, within the limits, of course, of their prescribed procedures, in order to defeat applications of its competitors for certificates as highway carriers; and (2) that its purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit in that opposition.

[***LEdHR9] [9] [***LEdHR10] [10] [***LEdHR11] [11] [***LEdHR12] [12] *First Amendment* rights may not be used as the means or the pretext for achieving "substantive evils" (see *NAACP v. Button*, 371 U.S. 415, 444) which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate. A combination of entrepreneurs to harass and deter their competitors from having "free and

404 U.S. 508, *515; 92 S. Ct. 609, **614;
30 L. Ed. 2d 642, ***LEdHR12; 1972 U.S. LEXIS 157

unlimited access" to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another. As stated in the opinion concurring in the judgment, that is the essence of those parts of the complaint to which we refer. If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.

[**LEdHR13] [13]What the proof will show is not known, for the District Court granted the motion to dismiss the complaint. We must, of course, take the allegations of the complaint at face value for the purposes of that motion. *Walker* [*516] *Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S., at 174-175. On their face the above-quoted allegations come within the "sham" exception in the *Noerr* case, as adapted to the adjudicatory process.

Accordingly we affirm the Court of Appeals and remand the case for trial.

So ordered.

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

CONCUR BY: STEWART

CONCUR

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

In the *Noerr* case¹ this Court held, in a unanimous opinion written by Mr. Justice Black, that a conspiracy by railroads to influence legislative and executive action in order to destroy the competition of truckers in the long-haul freight business was wholly immune from the antitrust laws.² This conclusion, [***650] we held, was required in order to preserve the informed operation of governmental processes and to protect the right of petition guaranteed by the *First Amendment*.³ Today the Court retreats from *Noerr*, and in the process tramples upon important *First Amendment* values. For that reason I cannot join the Court's opinion.

¹ *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127.

² See also *United Mine Workers v. Pennington*, 381 U.S. 657, 669-671.

³ This conclusion, the Court held, was a corollary of our decisions in *United States v. Rock Royal Co-operative*, 307 U.S. 533, and *Parker v. Brown*, 317 U.S. 341, holding that when a monopoly or restraint of trade is the result of valid governmental action, there cannot be an antitrust violation.

In [**615] *Noerr* the defendants were joined together in an effort to induce legislative and executive action. Here, [*517] so the complaint alleges, the defendants (petitioners) have joined to induce administrative and judicial action. The difference in type of governmental body might make a difference in the applicability of the antitrust laws if the petitioners had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery.⁴ But, contrary to implications in the Court's opinion, there are in this case no allegations whatever of any such conduct on the part of the petitioners. And, in the absence of such conduct, I can see no difference, so far as the antitrust laws and the *First Amendment* are concerned, between trying to influence executive and legislative bodies and trying to influence administrative and judicial bodies. *NAACP v. Button*, 371 U.S. 415; *Brotherhood of Railroad Trainmen v. Virginia Bar*, 377 U.S. 1; *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217; *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576.

⁴ In *Noerr*, the Court emphasized that the defendants' "unethical" conduct did not affect their antitrust immunity for jointly exerting pressure on the Legislative and Executive Branches, 365 U.S., at 141. See, however, *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172.

The Court concedes that the petitioners' "right of access to the agencies and courts to be heard on applications sought by competitive highway carriers . . . is part of the right of petition protected by the *First Amendment*." Yet, says the Court, their joint agreement to exercise that right "does not necessarily give them immunity from the antitrust laws." *Ante*, at 513. It is difficult to imagine a statement more totally at odds with *Noerr*. For what that case explicitly held is that the joint exercise of the constitutional right of petition is given

404 U.S. 508, *517; 92 S. Ct. 609, **615;
30 L. Ed. 2d 642, ***650; 1972 U.S. LEXIS 157

immunity from the antitrust laws.

While disagreeing with the Court's opinion, I would [*518] nonetheless remand this case to the District Court for trial. The complaint contains allegations that the petitioners have:

1. *Agreed* jointly to finance and to carry out and publicize a consistent, systematic and uninterrupted program of opposing 'with or without probable cause and regardless of the merits' every application, with insignificant exceptions, for additional operating rights or for the registration or transfer of operating rights, before the California [***651] PUC, the ICC, and the courts on appeal.

2. *Carried out* such agreement (a) by appearing as protestants in all proceedings instituted by plaintiffs and others in like position or by instituting complaints in opposition to applications or transfers or registrations; (b) by establishing a trust fund to finance the foregoing, consisting of contributions monthly in amounts proportionate to each defendant's annual gross income; (c) by publicizing and making known to plaintiffs and others in like position the foregoing program.

Under these allegations, liberally construed, the respondents are entitled to prove that the real *intent* of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes. Such an intent would make the conspiracy "an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Eastern Railroad*

Conference v. Noerr Motor Freight, 365 U.S., at 144.

It is only on this basis that I concur in the judgment of the Court.

REFERENCES

The Supreme Court and the *First Amendment* right to petition the Government for a redress of grievances

54 *Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices* 107, 108

14 *Am Jur Pl & Pr Forms, Monopolies, Combinations, and Restraints of Trade*, Form 14:319

US L Ed Digest, Constitutional Law 940; Restraints of Trade and Monopolies 29

ALR Digests, Constitutional Law 803; Restraints of Trade and Monopolies 26

L Ed Index to Anno, Motor Vehicles and Carriers; Restraints of Trade and Monopolies

ALR Quick Index, Carriers; Restraints of Trade and Monopolies

Federal Quick Index, Carriers; Monopolies and Restraints of Trade

Annotation References:

The Supreme Court and the *First Amendment* right to petition the Government for a redress of grievances. 30 *L Ed 2d* 914.

APPENDIX 17



CHAMBERS v. BALTIMORE AND OHIO RAILROAD COMPANY.

No. 22.

SUPREME COURT OF THE UNITED STATES

207 U.S. 142; 28 S. Ct. 34; 52 L. Ed. 143; 1907 U.S. LEXIS 1210; 6 Ohio L. Rep. 498

Argued October 17, 18, 1907.

November 18, 1907, Decided

PRIOR HISTORY: ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

THE facts are stated in the opinion.

LAWYERS' EDITION HEADNOTES:

Error to state court -- Federal question -- how raised.

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Headnote:

The objection that the Federal question was not properly and seasonably raised in the state courts is not available to defeat the jurisdiction of the Supreme Court of the United States of a writ of error to the highest court of a state, where it clearly and unmistakably appears from the opinion of that court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered.

Constitutional law -- privileges and immunities. --

Headnote:

The privileges and immunities of citizens in the several states, secured, by U. S. Const. art. 4, 2, 1, to the citizens of each state, are not denied by the provision of an Ohio statute under which, as construed by the highest court of that state, the right of action created by Pa. act of

April 15, 1851, p. 674, 19, in favor of the widow or personal representatives of one whose death is caused by negligence, can be maintained in the Ohio courts only when the deceased was an Ohio citizen.

SYLLABUS

This court has jurisdiction to review the judgment on writ of error under § 709, Rev. Stat., if the opinion of the highest court of the State clearly shows that the Federal question was assumed to be in issue, was decided adversely, and the decision was essential to the judgment rendered.

The right to sue and defend in the courts of the States is one of the privileges and immunities comprehended by § 2 of Art. IV of the Constitution of the United States, and equality of treatment in regard thereto does not depend upon comity between the States, but is granted and protected by that provision in the Constitution; subject, however, to the restrictions of that instrument that the limitations imposed by a State must operate in the same way on its own citizens and on those of other States. The State's own policy may determine the jurisdiction of its courts and the character of the controversies which shall be heard therein.

The statute of Ohio of 1902 providing that no action can be maintained in the courts of that State for wrongful death occurring in another State except where the deceased was a citizen of Ohio, the restriction operating equally upon representatives of the deceased whether

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they are citizens of Ohio or of other States, does not violate the privilege and immunity provision of the Federal Constitution.

73 *Ohio St. 1*, affirmed.

COUNSEL: Mr. Charles Koonce, Jr., with whom Mr. R. B. Murray and Mr. W. S. Anderson were on the brief, for plaintiff in error:

The right to maintain a transitory action by a citizen of one of the States of the United States, in the courts of a sister State, is one of the privileges and immunities comprehended by § 2 of Art. IV of the Constitution of the United States. *Corfield v. Coryell*, 4 Wash. C.C. 371-380; *Ward v. Maryland*, 12 Wall. 418, 430; *Cole v. Cunningham*, 133 U.S. 107-114; *Blake v. McClung*, 172 U.S. 239-256; *Moredock v. Kirby*, 118 Fed. Rep. 180-182; *Paul v. Virginia*, 8 Wall. 168-180; *Cofrode v. Gartner*, 79 Michigan, 332-343; *Railroad Co. v. Hendricks*, 41 *Indiana*, 48; *Schell v. Youngstown Sheet & Tube Co.*, 26 O.C.C. Repts. 209; *State v. Cadigan*, 73 *Vermont*, 245; *Hoadley v. Insurance Commissioners*, 37 *Florida*, 564; S.C., 33 L.R.A. 388; *Roby v. Smith*, 131 *Indiana*, 342; *Shirk v. Lafayette* 52 *Fed. Rep.* 857; *Farmers' &c. Co. v. Railroad Co.*, 27 *Fed. Rep.* 146; *State v. Duckworth*, 5 *Idaho*, 642; S.C., 39 L.R.A. 365.

While the doctrine of comity with reference to the maintenance of an action applies as between the citizens of different nations, and between the citizens of foreign nations and the several States of the United States, it is not the foundation upon which the citizens of the several States rest their right in invoking the courts of sister States. The foundation of that right is the privilege and immunity provision of the Federal Constitution and it is not within the power of either legislature or court to annul a constitutional right on the pretended theory that the right exists only in comity any is subject to the rules and principles governing comity rather than those which control constitutional guarantees.

The statute is not saved by the holding of the Supreme Court of Ohio that non-resident next of kin have equal rights, and the courts of Ohio are equally open to them, as to resident next of kin, provided only that the person whose wrongful death is the subject of action, was at the time of his death a citizen of Ohio.

The real purpose and effect of the act, as construed, was and is to discriminate in favor of citizens of Ohio and

against citizens of other States. Theoretical exceptions cannot save it from the ban of the constitutional provision herein in question.

The statute, as construed, is a denial of the right of the citizens of a sister State to have the cause of action resulting from the wrongful act enforced in favor of his wife and children.

The State of Ohio cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people. *Eingartner v. Steel Company*, 94 *Wisconsin*, 70-78; *Blake v. McClung*, 172 U.S. 239-256.

In order that the statement that it is against the public policy of the State of Ohio to enforce in its courts a cause of action in favor of a citizen of another State can avail, it must first appear that it would be against the public policy of said State to enforce a like cause of action in favor of a citizen of its own State, or a like cause of action arising in its own State. The only qualification which can be attached to the right of such non-resident to maintain his action in the courts of a sister State is that the character of the cause of action must not be against the actual public policy of the State. And, to justify a court in refusing to enforce a right of action accruing under the laws of another State because against the policy of the laws of the forum, it must appear that it is against good morals or natural justice. *Huntington v. Attrill*, 146 U.S. 657, and cases there cited; *Stewart v. B. & O.R.R. Co.*, 168 U.S. 445; *Railroad Co. v. Rouse*, 178 *Illinois*, 132; *Railroad Company v. Babcock*, 154 U.S. 190; *Law v. Railroad Company*, 91 *Fed. Rep.* 817; *Davidow v. Railroad Company*, 85 *Fed. Rep.* 193; *Van Dorn v. Railroad Company*, 35 C.C.A. 282; *Wilson v. Tootle*, 55 *Fed. Rep.* 211; *Walsh v. Railroad Company*, 160 *Massachusetts*, 571; *Burns v. Railroad Company*, 113 *Indiana*, 169.

Mr. George F. Arrel, with whom Mr. James P. Wilson and Mr. John G. Wilson were on the brief, for defendant in error:

This statute creates no discrimination between the citizens of Ohio and citizens of any other State. Under its provisions it is only essential to the maintenance of the action to enforce the right in the courts of Ohio, that the decedent shall have been, at the time of his death, a citizen of Ohio. If the beneficiary under the statute of the State, giving the right, and in which the wrongful act took place, and the death resulted, happens to be a citizen of

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Ohio, the right secured by the statute could not be enforced in the courts of Ohio.

Unless an act of the state legislature in fact, and in some way discriminates as to the right in question between its citizens and citizens of another State, such act does not offend against this provision in the *Federal Constitution*. *Paul v. Virginia*, 8 Wall. 180; *Slaughter House Cases*, 16 Wall. 36.

True, the right to maintain the action in the courts of Ohio is made to depend in part upon the fact that the decedent at the time of his wrongful death was a citizen of Ohio, but such fact does not in any wise tend to show discrimination between or among beneficiaries, no matter where they may reside, or of what State or States they may be citizens. The act is open to no constitutional objection on the ground that it provides that an action may be maintained in the courts of Ohio for the wrongful death of one of its citizens, if the statutory law of the State in which he came to his death by wrongful act gives a right of such action. In other words, the act is free from objection in so far as it relates to the death of a citizen of Ohio. It is only objectionable, if at all, when applied to the maintenance of an action in the courts of Ohio for the wrongful death of a citizen of another State. It cannot be possible that by this provision of the Federal Constitution, the legislature of Ohio is inhibited from providing that where a citizen of another State meets his death by wrongful act in the State of which he is a citizen, that an action to recover compensation for his death cannot be maintained in the courts of Ohio.

The decision of the Supreme Court of Ohio herein clearly determines and establishes the public policy of the State of Ohio upon this subject, and this public policy, so determined and established, is clearly the result not only of legislative enactment, but of judicial decision. This is clearly a subject upon which a State by its legislative and judicial departments may establish its own public policy. *Texas & Pacific Ry. Co. v. Cox*, 145 U.S. 829; *Stewart's Admr. v. B. & O.R.R. Co.*, 168 U.S. 445.

If, then, a foreign statute may not be enforced in a State whose policy is directly opposed to the policy of the State wherein the death occurred, under the doctrine of the Stewart case and other cases in this Supreme Court, no privilege or immunity has been denied to this citizen of the State of Pennsylvania.

OPINION BY: MOODY

OPINION

[*146] [**34] [***145] MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error directed to the Supreme Court of the State of Ohio. The plaintiff in error is the widow of Henry E. Chambers, who, while in the employ of the defendant in error as a locomotive engineer and engaged in the performance of his duty, received injuries from which he shortly afterwards died. Both husband and wife were at the time of the injuries and death citizens of Pennsylvania, and the wife has since continued to be such. The injuries and death occurred in Pennsylvania. The widow brought an action, in the Court of Common Pleas of the State of Ohio, against the defendant railroad, alleging that the injuries were caused by its negligence. In that action she sought to recover damages under certain parts of the Constitution and laws of Pennsylvania printed in the margin,¹ which provided for the recovery of [***146] damages [*147] for death. The plaintiff had a verdict and judgment in the Court of Common Pleas, from which, by petition in error, the case was removed first to an intermediate court and then to the Supreme Court of the State. There it was insisted by the defendant that the action could not be maintained in the courts of Ohio. The Supreme Court sustained this contention, reversed the judgments of the court below, and entered judgment for the defendant. A statute of Ohio provided that "whenever the death of a citizen of this State has been or may be caused by a wrongful act, neglect or default in another State, territory or foreign country, for which a right to maintain an action and recover damages in [**35] respect thereof is given by a statute of such other State, territory or foreign country, such right of action may be enforced in this State within the time prescribed for the commencement of such action by the statute of such other State, territory or foreign country." There was no other statutory provision on the subject. The Supreme Court held that the action authorized by this statute for a death occurring in another State was only when the death was that of a citizen of Ohio; that the common law of the State forbade such action; and that as the person, for whose death damages were demanded in this case, was not a citizen of Ohio, the action would not lie. The plaintiff brings the case here on writ of error, alleging that the statute thus construed and the judgment [*148] based upon that construction violates Article IV, section 2, paragraph 1, of the Constitution of the United States, which provides

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that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This allegation presents the only question for our consideration.

1 Sections 18 and 19 of the act of April 15, 1851, are as follows, Pennsylvania Laws, 1851, p. 674: "SEC. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction. SEC. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned." Sections 1 and 2 of the act of April 26, 1855, are as follows, Pennsylvania Laws, 1856, p. 309: "SEC. 1. The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they take his or her personal estate in case of intestacy, and that without liability to creditors. SEC. 2. The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death and not thereafter." By section 21, article III, of the constitution of the State of Pennsylvania of 1874, it is provided as follows, to wit: "SEC. 21. No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

The defendant objects to our jurisdiction to reexamine the judgment because the Federal question was not properly and seasonably raised in the courts of the State. But it clearly and unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the

question was essential to the judgment rendered. This is enough to give this court the authority to reexamine that question on writ of error. *San Jose Land & Water Company v. San Jose Ranch Company*, 189 U.S. 177; *Haire v. Rice*, 204 U.S. 291.

In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution. *Corfield v. Coryell*, 4 Wash. C.C. 371, 380, per Washington, J.; *Ward v. Maryland*, 12 Wall. 418, 430, per Clifford, J.; *Cole v. Cunningham*, 133 U.S. 107, 114, per Fuller, C.J.; *Blake v. McClung*, 172 U.S. 239, 252, per Harlan, J.

But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what [*149] extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies and the same State may have different policies at different times. But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because in conflict with the supreme law of the land.

The law of Ohio must be brought to the test of these fundamental principles. It appears from the decision under review (and we need no other authority) that by the common law of the State the courts had no jurisdiction to entertain actions to recover damages for death where the cause of action arose under the laws of other State or countries. This rule was universal in its application. The citizenship of the persons who brought action or of the person for whose death a remedy [**36] was sought was immaterial. If the death was caused outside the State and

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the right of action arose under laws foreign to the State, its courts were impartially closed to all persons seeking a remedy, entirely irrespective of their citizenship. The common law, however, was modified by a statute which, as amended, became the statute under consideration here. By this statute the [***147] courts were given jurisdiction over certain actions of this description, while the common law was left to control all others. A discrimination was thus introduced into the law of the State. The discrimination was based solely on the citizenship of the deceased. The courts were open in such cases to plaintiffs who were citizens of other State if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another State. So far as the parties to the litigation are concerned, the State by its laws made no discrimination based on citizenship, and offered precisely the same privileges to citizens of [*150] other States which it allowed to its own. There is, therefore, at least a literal conformity with the requirements of the Constitution.

But it may be urged, on the other hand, that the conformity is only superficial; that the death action may be given by the foreign law to the person killed, at the instant when he was *vivus et mortuus*, and made to survive and pass to his representatives (*Higgins v. Railroad*, 155 Massachusetts, 176); that in such cases it is the right of action of the deceased which is brought into court by those who have it by survivorship; and that, as the test of jurisdiction is the citizenship of the person in whom the right of action was originally vested, and the action is entertained if that person was a citizen of Ohio and declined if he was a citizen of another State, there is in a real and substantial sense a discrimination forbidden by the Constitution.

If such a case should arise, and be denied hearing in the Ohio courts by the Ohio law, then as the denial would be based upon the citizenship of that person in whom the right of action originally vested, it might be necessary to consider whether the Ohio law did not in substance grant privileges to Ohio citizens which it withheld from citizens of other States. But no such case is before us. The Pennsylvania statute, which created the right of action sought to be enforced in the Ohio courts, has been construed by the courts of Pennsylvania. The applicable section is section 19 of the act of 1851. Of it the Pennsylvania court said in *Fink v. Gbarman*, 40 Pa. St. 95, 103:

"The 18th section was apparently intended to regulate a common law right of action, by securing to it survivorship; but the 19th section was creative of a new cause of action, wholly unknown to the common law. And the right of action was not given to the person suffering the injury, since no man could sue for his own death, but to his widow or personal representative. It was not survivorship of the cause of action which the legislature meant to provide for by this section, but [*151] the creation of an original cause of action in favor of a surviving widow or personal representative."

This is the settled interpretation of the act. *Mann v. Weiland* 81 1/ 2 Pa. St. 243; *Pennsylvania Railroad v. Bock*, 93 Pa. St. 427; *Engle's Estate*, 21 Pa. C.C. 299; *McCafferty v. Pennsylvania Railroad*, 193 Pa. St. 339. It appears clearly, therefore, that the cause of action which the plaintiff sought to enforce was one created for her benefit and vested originally in her. She has not been denied access to the Ohio Courts because she is not a citizen of that State, but because the cause of action which she presents is not cognizable in those courts. She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. In excluding her cause of action from the courts the law of Ohio has not been influenced by her citizenship, which is regarded as immaterial. We are unable to see that in this case the plaintiff has been refused any right which the Constitution of the United States confers upon her, and accordingly the judgment is

Affirmed.

CONCUR BY: HOLMES

CONCUR

MR. JUSTICE HOLMES, concurring.

Although I do not dissent from the reasoning of the judgment, I prefer to rest my agreement on the proposition that if the statute cannot operate as it purports to operate it does not operate at all. I do not think that it can be presumed to mean to give to all persons a right to sue in case the Constitution forbids it to make the more limited grant that it attempts. *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565. Apart from the statute no one can maintain an action like this in Ohio. I may add that I do not understand that there is anything in the judgment that contradicts my opinion as to the law.

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DISSENT BY: HARLAN

DISSENT

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA), dissenting.

The plaintiff in error, Elizabeth M. Chambers, a citizen of Pennsylvania, sought [**37] by this action against the Baltimore and [*152] Ohio Railroad Company in the Common Pleas Court of Mahoning County, Ohio, to recover damages on account of her husband's death in Pennsylvania in 1902 -- his death having been caused, it was alleged, by the negligence of the defendant railroad company while operating a part of its line in Pennsylvania. The railroad company [***148] was brought into court by due service of summons, and there was a trial resulting in a verdict and judgment in favor of the plaintiff for three thousand dollars. The case was carried upon writ of error to the Circuit Court of Mahoning County and the judgment was there affirmed. That judgment of affirmance was reversed by the Supreme Court of Ohio with directions to enter judgment for the railroad company.

That the laws of Pennsylvania give a right of action, in favor of the widow of a deceased whose death is "occasioned by unlawful violence or negligence," is not disputed. It is equally clear that the present plaintiff's cause of action is not local but is transitory in its nature, and, speaking generally, can be maintained in any jurisdiction where the wrongdoer may be found and be brought before the court. *Dennick v. Railroad Company*, 103 U.S. 11; *Stewart v. B. & O.R.R. Co.*, 168 U.S. 445.

By a statute of Ohio (1902) in force when this action was brought, it was provided that "whenever the death of a citizen of this State has been or may be caused by a wrongful act, neglect or default in another State, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other State, territory, or foreign country, such right of action may be enforced in this State within the time prescribed for the commencement of such action by the statute of such other State, territory or foreign country." 95 O.L. 401. By a previous statute (1894) suits of that kind were allowed in Ohio when death was caused by a wrongful act, negligence or default in another State if such suits were allowed in the State where the death occurred. But that statute, as stated by the court in this

case, was repealed by the above act of 1902. So that the [*153] court, in the present case, held that the act of 1902 changed the former law in two essential particulars: "1. It dispenses with the condition that the State in which the wrongful death occurs shall enforce in its courts the statute of this State of like character. 2. It in terms limits the right therein given to maintain an action in this State for wrongful death occurring in another State, to actions for causing the death of citizens of Ohio, whereas the original section 6134a gave such right without limitation or restriction as to citizenship." Again, the court said: "Having regard then to the scope and effect of the provisions of the second amended, and to the special character of the amendments made, we think it clear that the legislature, by the adoption of amended section 6134a [the act of 1902], undertook and intended thereby to limit and restrict the right to recover in the courts of this State for a wrongful death occurring in another State, to those cases where the person killed was, at the time of his death, a citizen of Ohio." That there may be no mistake as to the decision, I quote the official syllabus of the present case which, by the law of Ohio, is to be taken as indicating the point actually in judgment: "No action can be maintained in the courts of this State upon a cause of action for wrongful death occurring in another State, except where the person wrongfully killed was a citizen of the State of Ohio." 73 *Ohio St. 1*.

It thus appears that the final judgment in this case for the railroad company rests upon the distinct ground that the courts of Ohio cannot, under the statute of that State, take cognizance of an action for damages, on account of death occurring in another State and caused by wrongful act, neglect or default, except where the person wrongfully killed was a citizen of Ohio. In that view, if two persons, one a citizen of Ohio and the other a citizen of Pennsylvania, traveling together on a railroad in Pennsylvania, should both be killed at the same moment and under precisely the same circumstances, in consequence of the negligence or default of the railroad company, the courts of Ohio are closed, by its statute against any suit [*154] for damages brought by the widow or the estate of the citizen of Pennsylvania against the railroad company, but will be open to suit by the widow or the estate of the deceased citizen of Ohio, although by the laws of the State where the death occurred the widow or estate of each decedent would have in the latter State a valid cause of action.

Is a state enactment, having such effect, repugnant to

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the clause of the Federal Constitution, Art. 4, § 2, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States?" Will not that constitutional guaranty be shorn of much of its value if any State can reserve either for its own citizens, or for the estates of its citizens, privileges and immunities which, even where the facts are same, it denies [**38] to citizens or to the estates of citizens of other States?

It is not necessary to fully enumerate the privileges and immunities secured against hostile discrimination by the constitutional provision in question. All agree that among such privileges and immunities are those which, under our institutions, are fundamental in their nature. I cordially [***149] assent to what is said upon this point in the opinion just delivered for the majority of the court. The opinion says: "In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution. . . . The privileges which it [the State] affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other [*155] States is void, because in conflict with the supreme law of the land."

These views are supported by the former decisions of this and other courts. In the leading case of *Corfield v. Coryell*, 4 Wash. C.C. 571, 580, Mr. Justice Washington said: "The inquiry is what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would perhaps be more tedious than difficult to enumerate." Among the particular privileges and immunities which are clearly to be deemed

fundamental, the court in that case specifies the right "to institute and maintain actions of any kind in the courts of the State."

In *Paul v. Virginia*, 8 Wall. 168, 180, the court, speaking by Mr. Justice Field, said: "It was undoubtedly the object of the clause in question [Const. Art. 4, § 2] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of [*156] those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

So, in *Ward v. Maryland*, 12 Wall. 418, 430, the court, after referring to *Corfield v. Coryell*, above cited, and, speaking by Mr. Justice Clifford, stated that the right "to maintain actions in the courts of the State" was fundamental and was protected by the constitutional clause in question against state enactments that discriminated against citizens of other States.

Referring to the cases just cited, and to the constitutional clause in question, Mr. Justice Miller, speaking for the court in the *Slaughter-House Cases*, 16 Wall. 36, 77, said: "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

In *Cole v. Cunningham*, 133 U.S. 107, 114, the present Chief Justice, speaking for the court, said: "The intention of section 2 of Article IV was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the

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citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."

In the more recent case of *Blake v. McClung*, 172 U.S. 239, 256, the court said: "We must not be understood as saying that a citizen of one State is entitled to enjoy [**39] in another State every privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a State to its own people in which citizens of other States may not participate except in conformity to such reasonable regulations as may be established by the State. For instance, a State cannot forbid citizens of other States from suing in its [***150] courts, that right being enjoyed by its own people; but it may require a non-resident, although a citizen of another State, to give bond for costs, although such bond be not required of a resident. Such [*157] a regulation of the internal affairs of a State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States. . . . The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the Government of the Union was ordained and established."

These cases, I think, require the reversal of the judgment of the Supreme Court upon the ground that it denies to the plaintiff a right secured by the Constitution of the United States. The statute of Ohio, we have seen, closes the doors of the courts of that State against the present plaintiff alone because her deceased husband was not at the time of his death a citizen of Ohio. Thus, every citizen of Ohio, when in another State, for whatever purpose, is accompanied by the assurance on the part of his State that its courts will be open for suit by his widow or representative if his death, while in another State, is caused by the negligence or default of another person or company. But that privilege is denied by the Ohio statute to the representative of citizens of other States meeting death under like circumstances. Indeed, if a citizen of Ohio should go into another State and while there willfully, or by some wrongful act, neglect or default on his part, cause the death of some one, although he might be liable to a suit for damages in the State where death

occurred, yet if sued for damages in the courts of his own State, he need only plead in bar of the action in Ohio that the decedent was not, at the time of his death, a citizen of Ohio. Such, it seems to me, is the operation of the statute of Ohio as it is interpreted by the court below.

The Supreme Court of Ohio, it will be observed, does not base its judgment upon any common law of the State apart from its statutes. It says: "From a consideration of the statutes [*158] hereinbefore referred to, and the former decisions of this court, we think it must now be held to be the recognized policy and established law of this State, that an action for wrongful death occurring in another State, will not be enforced in the courts of this State, except where the person killed was, at the time of his death, a citizen of Ohio." It places its judgment on its statutes and judicial decisions, which it regards as together indicating the policy and law of the State to be such as to preclude an action for damages, except where the deceased was a citizen of Ohio. That exception, upon whatever basis it may be rested, must fall before the Constitution of the United States and be treated as a nullity. The denial to the widow or representative of Chambers of the right to sue in Ohio upon the ground that he was not a citizen of Ohio when killed was the denial, in every essential sense, of a fundamental privilege belonging to him under the Constitution in virtue of his being a citizen of one of the States of the Union -- the right to sue and defend in the courts of justice, which right this court concedes to be "one of the highest and most essential privileges of citizenship." While in life Chambers enjoyed the right -- and it was a most valuable right -- of such protection as came from the rule established in Pennsylvania, that, in case of his death in consequence of the negligence of others, the wrong done to the deceased in his lifetime could be remedied by means of suit brought in the name and for the benefit of his widow or personal representative. But Ohio takes this right of protection from him; for, the Ohio court would have taken cognizance of this action if the decedent Chambers had been, when killed, a citizen of Ohio, while it denies relief to his widow, and puts her out of court solely because her husband was, when killed, a citizen of another State. It thus accords to the Ohio widow of a deceased Ohio citizen a privilege which it withholds from the Pennsylvania widow of a deceased Pennsylvania citizen. If the statutes of Ohio had excluded from the jurisdiction of the courts of that State all actions for damages on account of death a different question would be presented.

But that is [*159] not what Ohio has assumed to do. As already shown, it allows suits for damages like the present one, where the death occurred in another State, provided the deceased was a citizen of Ohio, but prohibits them where he was a citizen of some other State. The final judgment in this case therefore denies a fundamental right inhering in citizenship, and protected by section [**40] 2 of Article IV of the Constitution. The Constitution is the supreme law of the land. But it would not be supreme if any right given by it could be overridden either by state enactment or by judicial decision. In *Higgins v. Central New Eng. &c. Railroad*, 155 Massachusetts, 176, 180, the Supreme Judicial Court of Massachusetts, after referring [***151] to transitory causes of action which did not exist at common law, but were created by the statute of another State and passed to the administrator of the deceased, said: "When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other States shall be heard here. These principles require that, in case of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties." The statute of Pennsylvania which gave the plaintiff as widow of the deceased a right to sue for damages does not offend natural justice or good morals, nor is it calculated to injure the citizens of any State, not even those of Ohio, nor can it be said to offend any policy of that State which has been made applicable equally to its own citizens and

citizens of other States. The case is plainly one in which Ohio attempts, in reference to certain kinds of actions that are maintainable in perhaps every State of the Union, including Ohio, to give to its own citizens privileges which it denies, under like circumstances, [*160] to citizens of other States. To a citizen of Ohio it says: "If you go into Pennsylvania, and are killed while there, in consequence of the negligence or default of some one, your widow may have access to the Ohio courts in a suit for damages, provided the wrongdoer can be reached in Ohio by service of process." But to the citizen of Pennsylvania it says: "If you come to your death in that State by reason of the negligence or default of some one, even if the wrongdoer be a citizen of Ohio, your widow shall not sue the Ohio wrongdoer in an Ohio court for damages because, and only because, you are a citizen of another State." This is an illegal discrimination against living citizens of other States, and the difficulty is not met by the suggestion that no discrimination is made against the widow of the deceased because of her citizenship in another State. The statute of Pennsylvania in question had in view the protection of persons, while alive, against negligence or default causing death. It must have had that object in view. I submit that no State can authorize its courts to deny or disregard the constitutional guaranty that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

With entire respect for the views of others, I am constrained to say that, in my opinion, so much of the local law, whether statutory or otherwise, as permits suits of this kind for damages, where the deceased was a citizen of Ohio, but forbids such suits where the deceased was not a citizen of Ohio, is unconstitutional. The judgment under review should be reversed.

APPENDIX 18



CITY OF CLEBURNE, TEXAS, ET AL. v. CLEBURNE LIVING CENTER, INC.,
ET AL.

No. 84-468

SUPREME COURT OF THE UNITED STATES

473 U.S. 432; 105 S. Ct. 3249; 87 L. Ed. 2d 313; 1985 U.S. LEXIS 118; 53 U.S.L.W.
5022

March 18, 1985, Argued

July 1, 1985, Decided

SUBSEQUENT HISTORY: Reargued April 23, 1985.

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: 726 F.2d 191, affirmed in part, vacated in part, and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner city sought review of the judgment of the United States Court of Appeals for the Fifth Circuit which held that mental retardation was a quasi-suspect classification and that the zoning ordinance of petitioner violated the *Equal Protection Clause* because it did not substantially further an important government purpose.

OVERVIEW: Respondent sought to open a home for the mentally retarded in petitioner city. Under the zoning

ordinance, petitioner refused to give respondent the permit. The zoning ordinance specifically restricted the home because the occupants were mentally retarded even though the home complied with space requirements for the occupants. Respondent alleged that the ordinance was unconstitutional and in violation of the *Equal Protection Clause*. The Court held that the mentally retarded were not a quasi-suspect class. The Court held that to withstand equal protection review, legislation that distinguished between the mentally retarded and others must be rationally related to a legitimate governmental purpose. As no rational purpose was present, the Court held that the ordinance was invalid and remanded the action to the lower court.

OUTCOME: The court affirmed the appellate court's judgment that petitioner's zoning ordinance was invalid as it applied to respondent, vacated the judgment that mental retardation was a quasi-suspect class, and held that mental retardation was a characteristic that the government may legitimately take into account.

LexisNexis(R) Headnotes***Constitutional Law > Equal Protection > Scope of Protection***

[HN1] The *Equal Protection Clause of the Fourteenth Amendment* commands that no state shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike. *U.S. Const. amend. XIV, § 5* empowers congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection.

Constitutional Law > Equal Protection > Scope of Protection

[HN2] Legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.

Constitutional Law > Equal Protection > Scope of Protection***Pensions & Benefits Law > Railroad Workers > General Overview***

[HN3] When social or economic legislation is at issue, the *Equal Protection Clause* allows the states wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

Constitutional Law > Equal Protection > Scope of Protection

[HN4] The general rule that legislation is presumed to be valid gives way when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy, a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. Similar

oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.

Constitutional Law > Equal Protection > Gender & Sex

[HN5] Legislative classifications based on gender also call for a heightened standard of review.

Constitutional Law > Equal Protection > Level of Review***Constitutional Law > Equal Protection > Parentage***

[HN6] Because illegitimacy is beyond the individual's control and bears no relation to the individual's ability to participate in and contribute to society, official discriminations resting on that characteristic are also subject to somewhat heightened review. Those restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.

Constitutional Law > Equal Protection > Disability

[HN7] Where individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts are very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the *Equal Protection Clause* requires only a rational means to serve a legitimate end.

Constitutional Law > Equal Protection > Disability

[HN8] To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.

Constitutional Law > Equal Protection > Scope of Protection

[HN9] A state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.

Constitutional Law > Equal Protection > Scope of Protection

[HN10] Some objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state

interests.

Constitutional Law > Equal Protection > Disability

[HN11] The mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.

Constitutional Law > Equal Protection > Scope of Protection

[HN12] Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

DECISION:

City ordinance requiring special use permit for group home for the mentally retarded held invalid.

SUMMARY:

A corporation which proposed to lease a building for the operation of a group home for the mentally retarded filed suit in a Federal District Court, alleging that a city zoning ordinance requiring a special use permit for the operation of a group home for the mentally retarded was invalid on its face and as applied because it discriminated against the mentally retarded in violation of the *equal protection clause*. The District Court held the ordinance and its application constitutional. The United States Court of Appeals for the Fifth Circuit reversed, holding that mental retardation is a quasi-suspect classification, that under the applicable "heightened scrutiny" standard of review, the ordinance was invalid on its face because it did not substantially further any important governmental interests, and that the ordinance was also invalid as applied (*726 F2d 191*).

On certiorari, the United States Supreme Court affirmed in part and vacated in part. In an opinion by White, J., joined by Burger, Ch. J., and by Powell, Rehnquist, Stevens, and O'Connor, JJ., it was held (1) that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation, and (2) that because the record did not reveal any rational basis for believing that the home for the mentally retarded would pose any special threat to the city's legitimate interests, the ordinance was invalid as applied.

Stevens, J., joined by Burger, Ch. J., concurred, expressing the view that the rational basis test, properly understood, is sufficient to decide equal protection claims and that there is no need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny," to decide such cases.

Marshall, J., joined by Brennan and Blackmun, JJ., concurred in the judgment in part and dissented in part, expressing disagreement with the way in which the court reached its result and with the narrow, as-applied remedy it provided for the city's equal protection violation.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §319

equal protection -- classification -- standard of scrutiny -- mentally retarded --

Headnote:[1A][1B][1C]

A Federal Court of Appeals errs in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation challenged on equal protection grounds; to withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose; this standard affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental matter. (Marshall, Brennan and Blackmun, JJ., dissented from this holding.)

[***LEdHN2]

CONSTITUTIONAL LAW §335

ZONING §1

equal protection -- requirement of special use permit for home for mentally retarded -- validity --

Headnote:[2A][2B]

A city zoning ordinance requiring a special use permit for group homes for the mentally retarded but not

for other care and multiple-dwelling facilities violates the *equal protection clause* where no rational basis is shown for believing that the homes would pose any special threat to the city's legitimate interests.

[***LEdHN3]

CONSTITUTIONAL LAW §317

equal protection -- classification -- standard of review --

Headnote:[3]

The general rule is that legislation is presumed to be valid and will be sustained on an equal protection challenge if the classification drawn by the statute is rationally related to a legitimate state interest; when social or economic legislation is at issue, the *equal protection clause* allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

[***LEdHN4]

CONSTITUTIONAL LAW §318

equal protection -- classification -- state interest -- standard of review --

Headnote:[4]

Where individuals in a group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, courts are reluctant to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued, and in such cases the *equal protection clause* requires only a rational means to serve a legitimate end.

[***LEdHN5]

CONSTITUTIONAL LAW §316

equal protection -- arbitrary or irrational classification --

Headnote:[5]

Under the *equal protection clause*, a state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational; furthermore, some objectives, such as a bare

desire to harm a politically unpopular group, are not legitimate state interests.

SYLLABUS

Respondent Cleburne Living Center, Inc. (CLC), which anticipated leasing a certain building for the operation of a group home for the mentally retarded, was informed by petitioner city that a special use permit would be required, the city having concluded that the proposed group home should be classified as a "hospital for the feebleminded" under the zoning ordinance covering the area in which the proposed home would be located. Accordingly, CLC applied for a special use permit, but the City Council, after a public hearing, denied the permit. CLC and others (also respondents here) then filed suit against the city and a number of its officials, alleging that the zoning ordinance, on its face and as applied, violated the equal protection rights of CLC and its potential residents. The District Court held the ordinance and its application constitutional. The Court of Appeals reversed, holding that mental retardation is a "quasi-suspect" classification; that, under the applicable "heightened-scrutiny" equal protection test, the ordinance was facially invalid because it did not substantially further an important governmental purpose; and that the ordinance was also invalid as applied.

Held:

1. The Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. Pp. 439-447.

(a) Where individuals in a group affected by a statute have distinguishing characteristics relevant to interests a State has the authority to implement, the *Equal Protection Clause* requires only that the classification drawn by the statute be rationally related to a legitimate state interest. When social or economic legislation is at issue, the *Equal Protection Clause* allows the States wide latitude. Pp. 439-442.

(b) Mentally retarded persons, who have a reduced ability to cope with and function in the everyday world, are thus different from other persons, and the States' interest in dealing with and providing for them is plainly a legitimate one. The distinctive legislative response, both national and state, to the plight of those who are

mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary than is afforded under the normal equal protection standard. Moreover, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. The equal protection standard requiring that legislation be rationally related to a legitimate governmental purpose affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. Pp. 442-447.

2. Requiring a special use permit for the proposed group home here deprives respondents of the equal protection of the laws, and thus it is unnecessary to decide whether the ordinance's permit requirement is facially invalid where the mentally retarded are involved. Although the mentally retarded, as a group, are different from those who occupy other facilities -- such as boarding houses and hospitals -- that are permitted in the zoning area in question without a special permit, such difference is irrelevant unless the proposed group home would threaten the city's legitimate interests in a way that the permitted uses would not. The record does not reveal any rational basis for believing that the proposed group home would pose any special threat to the city's legitimate interests. Requiring the permit in this case appears to rest on an irrational prejudice against the mentally retarded, including those who would occupy the proposed group home and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law. Pp. 447-450.

COUNSEL: Earl Luna reargued the cause for petitioners. With him on the briefs were Robert T. Miller, Jr., and Mary Milford.

Renea Hicks reargued the cause for respondents. With him on the brief were Diane Shisk and Caryl Oberman. *

* Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General

Fried, Deputy Assistant Attorney General Cooper, and Walter W. Barnett filed a brief for the United States as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the State of Connecticut et al. by Joseph I. Lieberman, Attorney General of Connecticut, Elliot F. Gerson, Deputy Attorney General, and Henry S. Cohn, Assistant Attorney General, John Steven Clark, Attorney General of Arkansas, John K. Van de Kamp, Attorney General of California, Duane Woodard, Attorney General of Colorado, Neil F. Hartigan, Attorney General of Illinois, Jill Wine-Banks, Solicitor General, and Robert J. Connor, Special Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and Robert A. Barnett, Assistant Attorney General, Nicholas J. Spaeth, Attorney General of North Dakota, Arlene Violet, Attorney General of Rhode Island, W. J. Michael Cody, Attorney General of Tennessee, and Charles G. Brown, Attorney General of West Virginia; for the State of Maryland by Stephen H. Sachs, Attorney General, Dennis M. Sweeney, Deputy Attorney General, and Judith K. Sykes, Assistant Attorney General; for the State of Pennsylvania et al. by LeRoy S. Zimmerman, Attorney General of Pennsylvania, Allen C. Warshaw, Chief Deputy Attorney General, and Andrew S. Gordon, Senior Deputy Attorney General, and by the Attorneys General for their respective States as follows: Thomas J. Miller of Iowa, Frank J. Kelley of Michigan, Hubert H. Humphrey III of Minnesota, Stephen E. Merrill of New Hampshire, Irwin I. Kimmelman of New Jersey, Anthony J. Celebrezze, Jr., of Ohio, and Bronson C. La Follette of Wisconsin; for the State of Texas et al. by Jim Mattox, Attorney General of Texas, David R. Richards, J. Patrick Wiseman, and James C. Todd and Philip Durst, Assistant Attorneys General; for the American Association on Mental Deficiency et al. by James W. Ellis, Ruth A. Luckasson, Stanley S. Herr, and Donald N. Bersoff; for the American Civil Liberties Union Foundation et al. by Burt Neuborne, Charles S. Sims, Robert M. Levy, Paul Hoffman, Stanley Fleishman, Joseph Lawrence, James Preis, and James C. Harrington; for the Association for Retarded Citizens/USA et al. by Thomas K. Gilhool, Frank J. Laski, Michael Churchill, and

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Timothy M. Cook; for the Disability Rights Education and Defense Fund by Arlene Brynne Mayerson; for Disabled Peoples' International and Human Rights Advocates, Inc., by Karen Parker; and for the National Conference of Catholic Charities et al. by Lewis Golinker, Herbert Semmel, and Kathleen E. Surgalla.

Elliott W. Atkinson, Jr., filed a brief for the Federation of Greater Baton Rouge Civic Associations, Inc., as amicus curiae.

JUDGES: WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, in which BURGER, C. J., joined, post, p. 451. MARSHALL, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BRENNAN and BLACKMUN, JJ., joined, post, p. 455.

OPINION BY: WHITE

OPINION

[*435] [***317] [**3251] JUSTICE WHITE delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A]A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the *Equal Protection Clause* because it did not substantially further an important governmental [**3252] purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.

I

In July 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Center, Inc. (CLC),¹ for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be

under the constant supervision of CLC staff members. The house had four bedrooms and two baths, with a half bath to be added. CLC planned to comply with all applicable state and federal regulations.²

1 Cleburne Living Center, Inc., is now known as Community Living Concepts, Inc. Hannah is the vice president and part owner of CLC. For convenience, both Hannah and CLC will be referred to as "CLC." A third respondent is Advocacy, Inc., a nonprofit corporation that provides legal services to developmentally disabled persons.

2 It was anticipated that the home would be operated as a private Level I Intermediate Care Facility for the Mentally Retarded, or ICF-MR, under a program providing for joint federal-state reimbursement for residential services for mentally retarded clients. See 42 U. S. C. § 1396d(a)(15); *Tex. Human Resources Code Ann. § 32.001 et seq.* (1980 and Supp. 1985). ICF-MR's are covered by extensive regulations and guidelines established by the United States Department of Health and Human Services and the Texas Departments of Human Resources, Mental Health and Mental Retardation, and Health. See App. 92. See also 42 *CFR* § 442.1 *et seq.* (1984); 40 *Tex. Adm. Code* § 27.101 *et seq.* (1981).

[*436] The city informed CLC that a special use permit would be required for the operation of a group home at the site, and CLC accordingly submitted a permit application. In response to a subsequent inquiry from CLC, the city explained that under the zoning regulations applicable to the site, a special use permit, renewable annually, was required for the construction of "[hospitals] for the insane or feeble-minded, or alcoholic [***318] *[sic]* or drug addicts, or penal or correctional institutions."³ The city had determined that the proposed [*437] group home should be classified as a "hospital for the feeble-minded." After holding a public hearing on CLC's application, the City Council voted 3 to 1 to deny a special use permit.⁴

3 The site of the home is in an area zoned "R-3," an "Apartment House District." App. 51. Section 8 of the Cleburne zoning ordinance, in pertinent part, allows the following uses in an R-3 district:

"1. Any use permitted in District R-2.

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"2. Apartment houses, or multiple dwellings.

"3. Boarding and lodging houses.

"4. Fraternity or sorority houses and dormitories.

"5. Apartment hotels.

"6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the insane or feeble-minded* or alcoholics or drug addicts."

"7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.

"8. Philanthropic or eleemosynary institutions, other than penal institutions.

"9. Accessory uses customarily incident to any of the above uses" *Id.*, at 60-61 (emphasis added).

Section 16 of the ordinance specifies the uses for which a special use permit is required. These include "[hospitals] for the insane or feeble-minded, or alcoholic [*sic*] or drug addicts, or penal or correctional institutions." *Id.*, at 63. Section 16 provides that a permit for such a use may be issued by "the Governing Body, after public hearing, and after recommendation of the Planning Commission." All special use permits are limited to one year, and each applicant is required "to obtain the signatures of the property owners within two hundred (200) feet of the property to be used." *Ibid.*

⁴ The city's Planning and Zoning Commission had earlier held a hearing and voted to deny the permit. *Id.*, at 91.

CLC then filed suit in Federal District Court against the city and a number of its officials, alleging, *inter alia*, that the zoning ordinance was invalid on its face and as applied because it discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents. The District Court found that "[if] the potential residents of the Featherston Street home were not mentally retarded, [***3253*] but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance," and that the

City Council's decision "was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded." App. 93, 94. Even so, the District Court held the ordinance and its application constitutional. Concluding that no fundamental right was implicated and that mental retardation was neither a suspect nor a quasi-suspect classification, the court employed the minimum level of judicial scrutiny applicable to equal protection claims. The court deemed the ordinance, as written and applied, to be rationally related to the city's legitimate interests in "the legal responsibility of CLC and its residents, . . . the safety and fears of residents in the adjoining neighborhood," and the number of people to be housed in the home. ⁵ *Id.*, at 103.

⁵ The District Court also rejected CLC's other claims, including the argument that the city had violated due process by improperly delegating its zoning powers to the owners of adjoining property. App. 105. Cf. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). The Court of Appeals did not address this argument, and it has not been raised by the parties in this Court.

The Court of Appeals for the Fifth Circuit reversed, determining that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance [**438*] [****319*] under intermediate-level scrutiny. 726 F.2d 191 (1984). Because mental retardation was in fact relevant to many legislative actions, strict scrutiny was not appropriate. But in light of the history of "unfair and often grotesque mistreatment" of the retarded, discrimination against them was "likely to reflect deep-seated prejudice." *Id.*, at 197. In addition, the mentally retarded lacked political power, and their condition was immutable. The court considered heightened scrutiny to be particularly appropriate in this case, because the city's ordinance withheld a benefit which, although not fundamental, was very important to the mentally retarded. Without group homes, the court stated, the retarded could never hope to integrate themselves into the community. ⁶ Applying the test that it considered appropriate, the court held that the ordinance was invalid on its face because it did not substantially further any important governmental interests. The Court of Appeals went on to hold that the ordinance was also invalid as applied. ⁷ Rehearing en banc was [**439*] denied [***3254*] with six judges dissenting in an opinion urging en banc consideration of

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the panel's adoption of a heightened standard of review. We granted certiorari, 469 U.S. 1016 (1984).⁸

6 The District Court had found:

"Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community." App. 94.

7 The city relied on a recently passed state regulation limiting group homes to 6 residents in support of its argument that the CLC home would be overcrowded with 13. But, the Court of Appeals observed, the city had failed to justify its apparent view that any other group of 13 people could live under these allegedly "crowded" conditions, nor had it explained why 6 would be acceptable but 13 not.

CLC concedes that it could not qualify for certification under the new Texas regulation. Tr. of Oral Rearg. 31. The Court of Appeals stated that the new regulation applied only to applications made after May 1, 1982, and therefore did not apply to the CLC home. 726 F.2d, at 202. The regulation itself contains no grandfather clause, see App. 78-81, and the District Court made no specific finding on this point. See *id.*, at 96. However, the State has asserted in an *amici* brief filed in this Court that "'the six bed rule' would not pose an obstacle to the proposed Featherston Street group home at issue in this case." Brief for State of Texas et al. as *Amici Curiae* 15, n. 7. If the six-bed requirement were to apply to the home, there is a serious possibility that CLC would no longer be interested in injunctive relief. David Southern, an officer of CLC, testified that "to break even on a facility of this type, you have to have at least ten or eleven residents." App. 32. However, because CLC requested damages as well as an injunction, see *id.*, at 15, the case would not be moot.

After oral argument, the city brought to our attention the recent enactment of a Texas statute, effective September 1, 1985, providing that

"family homes" are permitted uses in "all residential zones or districts in this state." The statute defines a "family home" as a community-based residence housing no more than six disabled persons, including the mentally retarded, along with two supervisory personnel. The statute does not appear to affect the city's actions with regard to group homes that plan to house more than six residents. The enactment of this legislation therefore does not affect our disposition of this case.

8 *Macon Assn. for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n*, 252 Ga. 484, 314 S. E. 2d 218 (1984), *dism'd* for want of a substantial federal question, 469 U.S. 802 (1984), has no controlling effect on this case. *Macon Assn. for Retarded Citizens* involved an ordinance that had the effect of excluding a group home for the retarded only because it restricted dwelling units to those occupied by a single family, defined as no more than four unrelated persons. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), we upheld the constitutionality of a similar ordinance, and the Georgia Supreme Court in *Macon Assn.* specifically held that the ordinance did not discriminate against the retarded. 252 Ga., at 487, 314 S. E. 2d, at 221.

II

[***320] [***LEdHR3] [3][HN1] The *Equal Protection Clause of the Fourteenth Amendment* commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for [*440] determining the validity of state legislation or other official action that is challenged as denying equal protection. [HN2] The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. [HN3] *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166,

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174-175 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). When social or economic legislation is at issue, the *Equal Protection Clause* allows the States wide latitude, *United States Railroad Retirement Board v. Fritz*, *supra*, at 174; *New Orleans v. Dukes*, *supra*, at 303, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

[HN4] The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365 (1971). Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution. [HN5] *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[What] differentiates [***321] sex from such nonsuspect statuses as intelligence or physical disability . . . is that the [**3255] sex characteristic [*441] frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest. [HN6] *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976). Because illegitimacy is beyond the individual's control and bears "no relation to the individual's ability to participate in and contribute to society," *Mathews v. Lucas*, 427 U.S. 495, 505 (1976), official discriminations resting on that

characteristic are also subject to somewhat heightened review. Those restrictions "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

We have declined, however, to extend heightened review to differential treatment based on age:

"While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

[***LEdHR4] [4]The lesson of *Murgia* is that [HN7] where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be [*442] pursued. In such cases, the *Equal Protection Clause* requires only a rational means to serve a legitimate end.

III

[***LEdHR1B] [1B]Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those [***322] who must be constantly cared for.⁹ They are thus different, immutably [**3256] so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one.¹⁰ How this large and diversified group is to be treated [*443] under the law is a difficult and often a technical

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matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

9 Mentally retarded individuals fall into four distinct categories. The vast majority -- approximately 89% -- are classified as "mildly" retarded, meaning that their IQ is between 50 and 70. Approximately 6% are "moderately" retarded, with IQs between 35 and 50. The remaining two categories are "severe" (IQs of 20 to 35) and "profound" (IQs below 20). These last two categories together account for about 5% of the mentally retarded population. App. 39 (testimony of Dr. Philip Roos).

Mental retardation is not defined by reference to intelligence or IQ alone, however. The American Association on Mental Deficiency (AAMD) has defined mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Brief for AAMD et al. as *Amici Curiae* 3 (quoting AAMD, Classification in Mental Retardation 1 (H. Grossman ed. 1983)). "Deficits in adaptive behavior" are limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group. Brief for AAMD et al. as *Amici Curiae* 4, n. 1. Mental retardation is caused by a variety of factors, some genetic, some environmental, and some unknown. *Id.*, at 4.

10 As Dean Ely has observed:

"Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the

commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?" J. Ely, *Democracy and Distrust* 150 (1980) (footnote omitted). See also *id.*, at 154-155.

Second, the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary. Thus, the Federal Government has not only outlawed discrimination against the mentally retarded in federally funded programs, see § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794, but it has also provided the retarded with the right to receive "appropriate treatment, services, and habilitation" in a setting that is "least restrictive of [their] personal liberty." Developmental Disabilities Assistance and *Bill of Rights* Act, 42 U. S. C. §§ 6010(1), (2). In addition, the Government has conditioned federal education funds on a State's assurance that retarded children will enjoy an education that, "to the maximum extent appropriate," is integrated with that of nonmentally retarded children. Education of the Handicapped Act, 20 U. S. C. § 1412(5)(B). The Government has also facilitated the hiring of the [***323] mentally retarded into the federal civil service by exempting them from the requirement of competitive examination. [*444] See 5 CFR § 213.3102(t) (1984). The State of Texas has similarly enacted legislation that acknowledges the special status of the mentally retarded by conferring certain rights upon them, such as "the right to live in the least restrictive setting appropriate to [their] individual needs and abilities," including "the right to live . . . in a group home." Mentally Retarded Persons Act of 1977, *Tex. Rev. Civ. Stat. Ann., Art. 5547-300, § 7* (Vernon Supp. 1985).¹¹

11 CLC originally sought relief under the Act, but voluntarily dismissed this pendent state claim when the District Court indicated that its presence might make abstention appropriate. The Act had never been construed by the Texas courts. App. 12, 14, 84-87.

A number of States have passed legislation prohibiting zoning that excludes the retarded. See,

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e. g., *Cal. Health & Safety Code Ann. § 1566 et seq.* (West 1979 and Supp. 1985); *Conn. Gen. Stat. § 8-3e* (Supp. 1985); *N. D. Cent. Code § 25-16-14(2)* (Supp. 1983); *R. I. Gen. Laws. § 45-24-22* (1980). See also *Md. Health Code Ann. § 7-102* (Supp. 1984).

Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable. It may be, as CLC contends, that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. See Brief for Respondents 38-41. The relevant inquiry, however, is whether heightened [*3257] scrutiny is constitutionally mandated in the first instance. Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all. Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them. The Education of the Handicapped Act, for example, requires an "appropriate" education, not one that is equal in all respects [*445] to the education of nonretarded children; clearly, admission to a class that exceeded the abilities of a retarded child would not be appropriate.¹² Similarly, the Developmental Disabilities Assistance Act and the Texas Act give the retarded the right to live only in the "least restrictive setting" appropriate to their abilities, implicitly assuming the need for at least some restrictions that would not be imposed on others.¹³ Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight [***324] in shaping and limiting their remedial efforts.

¹² The Act, which specifically included the mentally retarded in its definition of handicapped, see *20 U. S. C. § 1401(1)*, also recognizes the great variations within the classification of retarded children. The Act requires that school authorities devise an "individualized educational program," § *1401(19)*, that is "tailored to the unique needs of the handicapped child." *Hendrick*

Hudson District Board of Education v. Rowley, 458 U.S. 176, 181 (1982).

¹³ The Developmental Disabilities Assistance Act also withholds public funds from any program that does not prohibit the use of physical restraint "unless absolutely necessary." *42 U. S. C. § 6010(3)*.

Third, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.

Fourth, if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only [*446] the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

[***LEdHR1C] [1C] [***LEdHR5] [5]Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious [**3258] discrimination. [HN8] To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. [HN9] The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. See *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973). Furthermore, [HN10] some objectives -- [*447] such as "a bare . . . desire to harm a politically unpopular group," *id.*, at 534 -- are not legitimate state interests. See also [***325] *Zobel*, *supra*, at 63. Beyond that, [HN11] the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.

IV

[***LEdHR2B] [2B]We turn to the issue of the validity of the zoning ordinance insofar as it requires a special use permit for homes for the mentally retarded.¹⁴ We inquire first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R-3 zone. This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-502 (1985); *United States v. Grace*, 461 U.S. 171 (1983); *NAACP v. Button*, 371 U.S. 415 (1963).

¹⁴ It goes without saying that there is nothing before us with respect to the validity of requiring a special use permit for the other uses listed in the ordinance. See n. 3, *supra*.

The constitutional issue is clearly posed. The city

does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feeble-minded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the mentally [*448] retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?

It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

The District Court found that the City Council's insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners [**3259] located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But [***326] mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the *Equal Protection Clause*, *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737 (1964), and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private [HN12] biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

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[*449] Second, the Council had two objections to the location of the facility. It was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation. The other objection to the home's location was that it was located on "a five hundred year flood plain." This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit. The same may be said of another concern of the Council -- doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. The District Court found, and the Court of Appeals repeated, that "[if] the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance." App. 93; 726 F.2d, at 200. Given this finding, there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability [*450] not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston [***327] home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in

the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type. See 42 CFR § 442.447 (1984). In the words of the Court of Appeals, "[the] City never justifies its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons cannot." 726 F.2d, at 202.

In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening [**3260] congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.

The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

The judgment of the Court of Appeals is affirmed insofar as it invalidates the zoning ordinance as applied to the Featherston home. The judgment is otherwise vacated, and the case is remanded.

It is so ordered.

CONCUR BY: STEVENS; MARSHALL (In Part)

CONCUR

[*451] JUSTICE STEVENS, with whom THE CHIEF JUSTICE joins, concurring.

The Court of Appeals disposed of this case as if a critical question to be decided were which of three clearly defined standards of equal protection review should be applied to a legislative classification discriminating against the mentally retarded.¹ In fact, our cases have not delineated three -- or even one or two -- such well-defined standards.² [***328] Rather, our cases reflect a continuum of judgmental responses to differing

classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so-called "standards" adequately explain the decisional process.³ Cases involving classifications based on alienage, [*452] illegal residency, illegitimacy, gender, age, or -- as in this case -- mental retardation, do not fit well into sharply defined classifications.

1 The three standards -- "rationally related to a legitimate state interest," "somewhat heightened review," and "strict scrutiny" are briefly described *ante*, at 440, 441.

2 In *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176-177, n. 10 (1980), after citing 11 cases applying the rational-basis standard, the Court stated: "The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles." Commenting on the intermediate standard of review in his dissent in *Craig v. Boren*, 429 U.S. 190, 220-221 (1976), JUSTICE REHNQUIST wrote:

"I would think we have had enough difficulty with the two standards of review which our cases have recognized -- the norm of 'rational basis,' and the 'compelling state interest' required where a 'suspect classification' is involved -- so as to counsel weightily against the insertion of still another 'standard' between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough."

3 Cf. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98 (1973) (MARSHALL, J., dissenting, joined by Douglas, J.) (criticizing "the Court's rigidified approach to equal protection analysis").

"I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims

does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." *Craig v. Boren*, 429 U.S. 190, 212 (1976) (STEVENS, J., concurring). In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes [**3261] a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.⁴ Thus, the word "rational" -- for me at least -- includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.⁵

4 "I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred." *United States Railroad Retirement Board v. Fritz*, 449 U.S., at 180-181 (STEVENS, J., concurring in judgment).

5 See *Lehr v. Robertson*, 463 U.S. 248, 265 (1983); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976).

The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the *Equal Protection Clause*. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all [*453] on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny," to decide such cases.

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation,

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and has it been subjected to a " [***329] tradition of disfavor" by our laws? ⁶ What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? ⁷ In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, ⁸ gender, ⁹ or illegitimacy. ¹⁰ But that is not because we [*454] apply an "intermediate standard of review" in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant [**3262] to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve. ¹¹

6 The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a "tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship -- other than pure prejudicial discrimination -- to the stated purpose for which the classification is being made." *Mathews v. Lucas*, 427 U.S. 495, 520-521 (1976) (STEVENS, J., dissenting). See also *New York Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979).

7 See *Foley v. Connelie*, 435 U.S. 291, 308 (1978) (STEVENS, J., dissenting).

8 See *Mathews v. Diaz*, 426 U.S. 67, 78-80 (1976); compare *Sugarman v. Dougall*, 413 U.S. 634 (1973), and *In re Griffiths*, 413 U.S. 717 (1973), with *Ambach v. Norwick*, 441 U.S. 68 (1979), and *Foley v. Connelie*, 435 U.S. 291 (1978).

9 Compare *Reed v. Reed*, 404 U.S. 71 (1971), and *Califano v. Goldfarb*, 430 U.S. 199 (1977), with *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979), and *Heckler v. Mathews*, 465 U.S. 728 (1984).

10 Compare *Lalli v. Lalli*, 439 U.S. 259 (1978), with *Trimble v. Gordon*, 430 U.S. 762 (1977).

11 See *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 497-498, and n. 4 (1981) (STEVENS, J., dissenting). See also *Caban v. Mohammed*, 441 U.S. 380, 406-407 (1979) (STEVENS, J., dissenting) ("But as a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process").

Every law that places the mentally retarded in a special class is not presumptively irrational. The differences between mentally retarded persons and those with greater mental capacity are obviously relevant to certain legislative decisions. An impartial lawmaker -- indeed, even a member of a class of persons defined as mentally retarded -- could rationally vote in favor of a law providing funds for special education and special treatment for the mentally retarded. A mentally retarded person could also recognize that he is a member of a class that might need special supervision in some situations, both to protect himself and to protect others. Restrictions on his right to drive cars or to [***330] operate hazardous equipment might well seem rational even though they deprived him of employment opportunities and the kind of freedom of travel enjoyed by other citizens. "That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable." *Ante*, at 444.

Even so, the Court of Appeals correctly observed that through ignorance and prejudice the mentally retarded "have been subjected to a history of unfair and often grotesque mistreatment." 726 F.2d 191, 197 (CA5 1984). The discrimination [*455] against the mentally retarded that is at issue in this case is the city's decision to require an annual special use permit before property in an apartment house district may be used as a group home for persons who are mildly retarded. The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in respondent's home. ¹²

12 In fact, the ordinance provides that each

applicant for a special use permit "shall be required to obtain the signatures of the property owners within two hundred (200) feet of the property to be used." App. 63.

Although the city argued in the Court of Appeals that legitimate interests of the neighbors justified the restriction, the court unambiguously rejected that argument. *Id.*, at 201. In this Court, the city has argued that the discrimination was really motivated by a desire to protect the mentally retarded from the hazards presented by the neighborhood. Zoning ordinances are not usually justified on any such basis, and in this case, for the reasons explained by the Court, *ante*, at 447-450, I find that justification wholly unconvincing. I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case.

Accordingly, I join the opinion of the Court.

DISSENT BY: MARSHALL (In Part)

DISSENT

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in the judgment in part and dissenting in part.

The Court holds that all retarded individuals cannot be grouped together as the "feble-minded" and deemed presumptively unfit to live in a community. Underlying this holding is the principle that mental retardation *per se* cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability. [*456] With this holding and principle I agree. The *Equal Protection Clause* requires attention to the capacities [**3263] and needs of retarded people as individuals.

I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for the city of Cleburne's equal protection violation. The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial [***331] regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning

ordinance to the searching review -- the heightened scrutiny -- that actually leads to its invalidation. Moreover, in invalidating Cleburne's exclusion of the "feble-minded" only as applied to respondents, rather than on its face, the Court radically departs from our equal protection precedents. Because I dissent from this novel and truncated remedy, and because I cannot accept the Court's disclaimer that no "more exacting standard" than ordinary rational-basis review is being applied, *ante*, at 442, I write separately.

I

At the outset, two curious and paradoxical aspects of the Court's opinion must be noted. First, because the Court invalidates Cleburne's zoning ordinance on rational-basis grounds, the Court's wide-ranging discussion of heightened scrutiny is wholly superfluous to the decision of this case. This "two for the price of one" approach to constitutional decisionmaking -- rendering two constitutional rulings where one is enough to decide the case -- stands on their head traditional and deeply embedded principles governing exercise of the Court's Article III power. Just a few weeks ago, the Court "[called] to mind two of the cardinal rules governing [*457] the federal courts: 'One, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (WHITE, J.) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)).¹ When a lower court correctly decides a case, albeit on what this Court concludes are unnecessary constitutional grounds,² "our usual custom" is not to compound the problem by following suit but rather to affirm on the narrower, dispositive ground available. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).³ The Court offers no principled justification for departing from these principles, nor, given our equal protection precedents, [***332] could it. See *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, n. 9 (1982) (declining to address strict scrutiny when heightened [**3264] scrutiny sufficient to invalidate action challenged); *Stanton v. Stanton*, 421 U.S. 7, 13 (1975) [*458] (same); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (declining to reach heightened scrutiny in review of residency-based classifications that fail rational-basis test); *Zobel v.*

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Williams, 457 U.S. 55, 60-61 (1982) (same); cf. *Mitchell v. Forsyth*, 472 U.S. 511, 537-538 (1985) (O'CONNOR, J., concurring in part).

1 See also *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"); *Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"); see generally *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

Even today, the Court again "calls to mind" these principles, *ante*, at 447, but given the Court's lengthy dicta on heightened scrutiny, this call to principle must be read with some irony.

2 I do not suggest the lower court erred in relying on heightened scrutiny, for I believe more searching inquiry than the traditional rational-basis test is required to invalidate Cleburne's ordinance. See *infra*, at 458-460.

3 See also *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 157-158 (1984); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 181 (1979).

Second, the Court's heightened-scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny. To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational-basis review rather than "heightened scrutiny." But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), and their progeny.

The Court, for example, concludes that legitimate concerns for fire hazards or the serenity of the neighborhood do not justify singling out respondents to bear the burdens of these concerns, for analogous permitted uses appear to pose similar threats. Yet under the traditional and most minimal version of the

rational-basis test, "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 of Oklahoma, Inc.*, *supra*, at 489; see *American Federation of Labor v. American Sash Co.*, 335 U.S. 538 (1949); *Semler v. Dental Examiners*, 294 U.S. 608 (1935). The "record" is said not to support the ordinance's classifications, *ante*, at 448, 450, but under the traditional standard we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-462, 464 (1981); [*459] *Firemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 138-139 (1968). Finally, the Court further finds it "difficult to believe" that the retarded present different or special hazards inapplicable to other groups. In normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional, and a State "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference" to its goals. *Allied Stores of Ohio, Inc. v. Bowers*, *supra*, at [***333] 527; see *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 68-70 (1913).

I share the Court's criticisms of the overly broad lines that Cleburne's zoning ordinance has drawn. But if the ordinance is to be invalidated for its imprecise classifications, it must be pursuant to more powerful scrutiny than the minimal rational-basis test used to review classifications affecting only economic and commercial matters. The same imprecision in a similar ordinance that required opticians but not optometrists to be licensed to practice, see *Williamson v. Lee Optical of Oklahoma, Inc.*, *supra*, or that excluded new but not old businesses from parts of a community, see *New Orleans v. Dukes*, *supra*, would hardly be fatal to the statutory scheme.

The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate [**3265] in at least two respects.⁴ The suggestion that [*460] the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational-basis review -- a small and regrettable step back toward the days of *Lochner v. New York*, 198

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U.S. 45 (1905). Moreover, by failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny. Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives.

4 The two cases the Court cites in its rational-basis discussion, *Zobel v. Williams*, 457 U.S. 55 (1982), and *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), expose the special nature of the rational-basis test employed today. As two of only a handful of modern equal protection cases striking down legislation under what purports to be a rational-basis standard, these cases must be and generally have been viewed as intermediate review decisions masquerading in rational-basis language. See, e. g., L. Tribe, *American Constitutional Law* § 16-31, p. 1090, n. 10 (1978) (discussing *Moreno*); see also *Moreno, supra*, at 538 (Douglas, J., concurring); *Zobel, supra*, at 65 (BRENNAN, J., concurring).

II

I have long believed the level of scrutiny employed in an equal protection case should vary with "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 99 (1973) (MARSHALL, J., dissenting). See also *Plyler v. Doe*, 457 U.S. 202, 230-231 (1982) (MARSHALL, J., concurring); *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (MARSHALL, J., dissenting). When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations [***334] require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes. *Plyler, supra*; *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Mills v. Habluetzel*, 456 U.S. 91 (1982); see also *Buchanan v. Warley*, 245

U.S. 60 (1917).

[*461] First, the interest of the retarded in establishing group homes is substantial. The right to "establish a home" has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). For retarded adults, this right means living together in group homes, for as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community. The District Court found as a matter of fact that

"[the] availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community." App. to Pet. for Cert. A-8.

Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment -- the ability to form bonds and take part in the life of a community.⁵

5 Indeed, the group home in this case was specifically located near a park, a school, and a shopping center so that its residents would have full access to the community at large.

[**3266] Second, the mentally retarded have been subject to a "lengthy and tragic history," *University of California Regents v. Bakke*, 438 U.S. 265, 303 (1978) (opinion of POWELL, J.), of segregation and discrimination that can only be called grotesque. During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices.⁶ By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme [*462] xenophobia of those years,⁷ leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems."⁸ A regime [***335] of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the

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retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race."⁹ Retarded children were categorically excluded from [*463] public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them.¹⁰ State laws deemed the retarded "unfit for citizenship."¹¹

6 S. Herr, *Rights and Advocacy for Retarded People* 18 (1983).

7 On the role of these ideologies in this era, see K. Stamp, *Era of Reconstruction, 1865-1877*, pp. 18-22 (1965).

8 H. Goddard, *The Possibilities of Research as Applied to the Prevention of Feeble-mindedness*, *Proceedings of the National Conference of Charities and Correction* 307 (1915), cited in A. Deutsch, *The Mentally Ill in America* 360 (2d ed. 1949). See also Fernald, *The Burden of Feeble-mindedness*, 17 *J. Psycho-Asthenics* 87, 90 (1913) (the retarded "cause unutterable sorrow at home and are a menace and danger to the community"); Terman, *Feeble-Minded Children in the Public Schools of California*, 5 *Schools & Society* 161 (1917) ("[Only] recently have we begun to recognize how serious a menace [feeble-mindedness] is to the social, economic and moral welfare of the state . . . [It] is responsible . . . for the majority of cases of chronic and semi-chronic pauperism, and for much of our alcoholism, prostitution, and venereal diseases"). Books with titles such as "The Menace of the Feeble Minded in Connecticut" (1915), issued by the Connecticut School for Imbeciles, became commonplace. See C. Frazier, (Chairman, Executive Committee of Public Charities Assn. of Pennsylvania), *The Menace of the Feeble-Minded In Pennsylvania* (1913); W. Fernald, *The Burden of Feeble-Mindedness* (1912) (Mass.); Juvenile Protection Association of Cincinnati, *The Feeble-Minded, Or the Hub to Our Wheel of Vice* (1915) (Ohio). The resemblance to such works as R. Shufeldt, *The Negro: A Menace to American Civilization* (1907), is striking, and not coincidental.

9 A. Moore, *The Feeble-Minded in New York* 3 (1911). This book was sponsored by the State Charities Aid Association. See also P. Tyor & L. Bell, *Caring for the Retarded in America* 71-104 (1984). The segregationist purpose of these laws

was clear. See, e. g., Act of Mar. 22, 1915, ch. 90, 1915 Tex. Gen. Laws 143 (repealed 1955) (Act designed to relieve society of "the heavy economic and moral losses arising from the existence at large of these unfortunate persons").

10 See *Pennsylvania Assn. for Retarded Children v. Pennsylvania*, 343 *F.Supp.* 279, 294-295 (ED Pa. 1972); see generally S. Sarason & J. Doris, *Educational Handicap, Public Policy, and Social History* 271-272 (1979).

11 Act of Apr. 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294.

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the "basic civil rights of man" -- the right to marry and procreate. *Skinner v. Oklahoma ex rel. Williamson*, 316 *U.S.* 535, 541 (1942). Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense.¹² The [**3267] purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating.¹³ To assure this end, 29 States enacted compulsory eugenic sterilization laws between 1907 and 1931. J. Landman, *Human Sterilization* 302-303 (1932). See *Buck v. Bell*, 274 *U.S.* 200, 207 (1927) (Holmes, J.); cf. *Plessy v. Ferguson*, [*464] 163 *U.S.* 537 (1896); *Bradwell v. Illinois*, 16 *Wall.* 130, 141 (1873) (Bradley, J., concurring in judgment).

12 See, e. g., Act of Mar. 19, 1928, ch. 156, 1928 Ky. Acts 534, *remains in effect*, *Ky. Rev. Stat. § 402.990(2)* (1984); Act of May 25, 1905, No. 136, § 1, 1905 Mich. Pub. Acts 185, 186, *remains in effect* *Mich. Comp. Laws § 551.6* (1979); Act of Apr. 3, 1920, ch. 210, § 29, 1920 Miss. Gen. Laws 288, 300, *remains in effect* with minor changes, *Miss. Code Ann. § 41-21-45* (1972).

13 See Chamberlain, *Current Legislation -- Eugenics and Limitations of Marriage*, 9 *A.B.A.J.* 429 (1923); *Lau v. Lau*, 81 *N.H.* 44, 122 *A.* 345, 346 (1923); *State v. Wyman*, 118 *Conn.* 501, 173 *A.* 155, 156 (1934). See generally Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons -- The Eternal Child Grows Up*, 13 *Gonz. L. Rev.* 625 (1978); Shaman, *Persons Who Are Mentally Retarded: Their Right to*

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Marry and Have Children, 12 Family L.Q. 61 (1978); Note, The Right of the Mentally Disabled to Marry: A Statutory Evaluation, 15 J. Family L. 463 (1977).

Prejudice, [***336] once let loose, is not easily cabined. See *University of California Regents v. Bakke*, 438 U.S., at 395 (opinion of MARSHALL, J.). As of 1979, most States still categorically disqualified "idiots" from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials.¹⁴ Not until Congress enacted the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U. S. C. § 1400 *et seq.*, were "the [doors] of public education" opened wide to handicapped children. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 192 (1982).¹⁵ But most important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.¹⁶

¹⁴ See Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979).

¹⁵ Congress expressly found that most handicapped children, including the retarded, were simply shut out from the public school system. See 20 U. S. C. § 1400(b).

¹⁶ See generally G. Allport, *The Nature of Prejudice* (1958) (separateness among groups exaggerates differences).

In light of the importance of the interest at stake and the history of discrimination the retarded have suffered, the *Equal Protection Clause* requires us to do more than review the distinctions drawn by Cleburne's zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation.¹⁷ The searching scrutiny I would give to restrictions [*465] on the ability of the retarded to establish community group homes leads me to conclude that Cleburne's vague generalizations for classifying the "feeble-minded" with drug addicts, alcoholics, and the insane, and excluding them where the elderly, the ill, the boarder, and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible assumptions or outmoded [**3268] and perhaps invidious stereotypes. See *Plyler v. Doe*, 457 U.S. 202 (1982); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Mills v. Habluetzel*, 456 U.S. 91 (1982).

¹⁷ This history of discrimination may well be directly relevant to the issue before the Court. Cleburne's current exclusion of the "feeble-minded" in its 1965 zoning ordinance appeared as a similar exclusion of the "feeble-minded" in the city's 1947 ordinance, see Act of Sept. 26, 1947, § 5; the latter tracked word for word a similar exclusion in the 1929 comprehensive zoning ordinance for the nearby city of Dallas. See Dallas Ordinance, No. 2052, § 4, passed Sept. 11, 1929.

Although we have been presented with no legislative history for Cleburne's zoning ordinances, this genealogy strongly suggests that Cleburne's current exclusion of the "feeble-minded" was written in the darkest days of segregation and stigmatization of the retarded and simply carried over to the current ordinance. Recently we held that extant laws originally motivated by a discriminatory purpose continue to violate the *Equal Protection Clause*, even if they would be permissible were they reenacted without a discriminatory motive. See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). But in any event, the roots of a law that by its terms excludes from a community the "feeble-minded" are clear. As the examples above attest, see n. 7, *supra*, "feeble-minded" was the defining term for all retarded people in the era of overt and pervasive discrimination.

III

[***337] In its effort to show that Cleburne's ordinance can be struck down under no "more exacting standard . . . than is normally accorded economic and social legislation," *ante*, at 442, the Court offers several justifications as to why the retarded do not warrant heightened judicial solicitude. These justifications, however, find no support in our heightened-scrutiny precedents and cannot withstand logical analysis.

The Court downplays the lengthy "history of purposeful unequal treatment" of the retarded, see *San Antonio Independent School District v. Rodriguez*, 411 U.S., at 28, by pointing to recent legislative action that is said to "[believe] a continuing antipathy or prejudice." *Ante*, at 443. Building on this point, the Court similarly concludes that the retarded [*466] are not "politically powerless" and deserve no greater judicial protection than

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"[any] minority" that wins some political battles and loses others. *Ante*, at 445. The import of these conclusions, it seems, is that the only discrimination courts may remedy is the discrimination they alone are perspicacious enough to see. Once society begins to recognize certain practices as discriminatory, in part because previously stigmatized groups have mobilized politically to lift this stigma, the Court would refrain from approaching such practices with the added skepticism of heightened scrutiny.

Courts, however, do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Bradwell v. Illinois*, *supra*, at 141 (Bradley, J., concurring in judgment), with *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Reed v. Reed*, 404 U.S. 71 (1971). Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the *Equal Protection Clause*. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality. In an analysis the Court today ignores, the Court reached this very conclusion when it extended heightened scrutiny to gender classifications and drew on parallel legislative developments to support that extension:

"[Over] the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications [*467] [citing examples]. Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without [***338] significance to the question presently under consideration." *Frontiero v. Richardson*, 411 U.S., at 687.¹⁸

¹⁸ Although *Frontiero* was a plurality opinion, it is now well established that gender classifications receive heightened scrutiny. See, e. g., *Mississippi University for Women v. Hogan*, 458 U.S. 718

(1982).

Moreover, even when judicial action *has* catalyzed legislative change, that change certainly does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that race-based classifications became any less suspect [**3269] once extensive legislation had been enacted on the subject. See *Palmore v. Sidoti*, 466 U.S. 429 (1984).

For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; outdated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people. Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the *Fourteenth Amendment*.

The Court also offers a more general view of heightened scrutiny, a view focused primarily on when heightened scrutiny does *not* apply as opposed to when it does apply.¹⁹ Two [*468] principles appear central to the Court's theory. First, heightened scrutiny is said to be inapplicable where *individuals* in a group have distinguishing characteristics that legislatures properly may take into account in some circumstances. *Ante*, at 441-442. Heightened scrutiny is also purportedly inappropriate when many legislative classifications affecting the *group* are likely to be valid. We must, so the Court says, "look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us," in deciding whether to apply heightened scrutiny. *Ante*, at 446.

¹⁹ For its general theories about heightened scrutiny, the Court relies heavily, indeed virtually exclusively, on the "lesson" of *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). The brief *per curiam* in *Murgia*, however, was handed down in the days before the Court explicitly acknowledged the existence of heightened scrutiny. See *Craig v. Boren*, 429 U.S. 190 (1976); *id.*, at 210 (POWELL, J., concurring). *Murgia* explains why age-based distinctions do not trigger strict scrutiny, but says nothing about whether such distinctions warrant heightened

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scrutiny. Nor have subsequent cases addressed this issue. See *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

If the Court's first principle were sound, heightened scrutiny would have to await a day when people could be cut from a cookie mold. Women are hardly alike in all their characteristics, but heightened scrutiny applies to them because legislatures can rarely use gender itself as a proxy for these other characteristics. Permissible distinctions between persons must bear a reasonable relationship to their *relevant* characteristics, *Zobel v. Williams*, 457 U.S., at 70 (BRENNAN, J., concurring), and gender *per se* is almost never relevant. Similarly, that some retarded [***339] people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist.

The Court's second assertion -- that the standard of review must be fixed with reference to the number of classifications to which a characteristic would validly be relevant -- is similarly flawed. Certainly the assertion is not a logical one; that a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says "men only" looks very [*469] different on a bathroom door than a courthouse door. But see *Bradwell v. Illinois*, 16 Wall. 130 (1873).

Our heightened-scrutiny precedents belie the claim that a characteristic must virtually always be irrelevant to warrant heightened scrutiny. *Plyler*, for example, held that the status of being an undocumented alien is not a "constitutional irrelevancy," and therefore declined to review with strict scrutiny classifications affecting undocumented aliens. 457 U.S., at 219, n. 19. While *Frontiero* stated that gender "frequently" and "often [**3270] " bears no relation to legitimate legislative aims, it did not deem gender an impermissible basis of state action in all circumstances. 411 U.S., at 686-687. Indeed, the Court has upheld some gender-based classifications. *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). Heightened but not strict scrutiny is considered appropriate in areas such as gender, illegitimacy, or alienage²⁰ because the Court views the trait as relevant under some circumstances but not others. 21 That view -- indeed the very concept of heightened, as

opposed to strict, scrutiny -- is flatly inconsistent with the notion that heightened scrutiny should not apply to the retarded because "mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions." *Ante*, at 446. Because the government also may not take this characteristic into account in many circumstances, such as those presented here, careful review is required to separate the permissible from the invalid in classifications relying on retardation.

20 Alienage classifications present a related variant, for strict scrutiny is applied to such classifications in the economic and social area, but only heightened scrutiny is applied when the classification relates to "political functions." *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); see also *Bernal v. Fainter*, 467 U.S. 216, 220-222 (1984). Thus, characterization of the area to which an alienage classification applies is necessary to determine how strongly it must be justified.

21 I express no view here as to whether strict scrutiny ought to be extended to these classifications.

[*470] The fact that retardation may be deemed a constitutional irrelevancy in *some* circumstances is enough, given the history of discrimination the retarded have suffered, to require careful judicial review of classifications singling out the retarded for special burdens. Although the Court acknowledges that many instances of invidious discrimination [***340] against the retarded still exist, the Court boldly asserts that "in the vast majority of situations" special treatment of the retarded is "not only legitimate but also desirable." *Ante*, at 444. That assertion suggests the Court would somehow have us calculate the percentage of "situations" in which a characteristic is validly and invalidly invoked before determining whether heightened scrutiny is appropriate. But heightened scrutiny has not been "triggered" in our past cases only after some undefined numerical threshold of invalid "situations" has been crossed. An inquiry into constitutional principle, not mathematics, determines whether heightened scrutiny is appropriate. Whenever evolving principles of equality, rooted in the *Equal Protection Clause*, require that certain classifications be viewed as *potentially* discriminatory, and when history reveals systemic unequal treatment, more searching judicial inquiry than

minimum rationality becomes relevant.

Potentially discriminatory classifications exist only where some constitutional basis can be found for presuming that equal rights are required. Discrimination, in the *Fourteenth Amendment* sense, connotes a substantive constitutional judgment that two individuals or groups are entitled to be treated equally with respect to something. With regard to economic and commercial matters, no basis for such a conclusion exists, for as Justice Holmes urged the *Lochner* Court, the *Fourteenth Amendment* was not "intended to embody a particular economic theory . . ." *Lochner v. New York*, 198 U.S., at 75 (dissenting). As a matter of substantive policy, therefore, government is free to move in any [*471] direction, or to change directions, ²² in the economic and commercial [**3271] sphere. ²³ The structure of economic and commercial life is a matter of political compromise, not constitutional principle, and no norm of equality requires that there be as many opticians as optometrists, see *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), or new businesses as old, see *New Orleans v. Dukes*, 427 U.S. 297 (1976).

²² Constitutional provisions other than the *Equal Protection Clause*, such as the *Contracts Clause*, the *Just Compensation Clause*, or the *Due Process Clause*, may constrain the extent to which government can upset settled expectations when changing course and the process by which it must implement such changes.

²³ Only when it can be said that "Congress misapprehended what it was doing," *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 193 (1980) (BRENNAN, J., dissenting), will a classification fail the minimal rational-basis standard. Even then, the classification fails not because of limits on the directions which substantive policy can take in the economic and commercial area, but because the classification reflects *no* underlying substantive policy -- it is simply arbitrary.

But the *Fourteenth Amendment* does prohibit other results under virtually all circumstances, such as castes created by law along racial or ethnic lines, see *Palmore v. Sidoti*, 466 U.S., at 432-433; *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948); *Hernandez v. Texas*, 347 U.S. 475 (1954), and significantly constrains

the range of permissible government choices where gender or [***341] illegitimacy, for example, are concerned. Where such constraints, derived from the *Fourteenth Amendment*, are present, and where history teaches that they have systemically been ignored, a "more searching judicial inquiry" is required. *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938).

That more searching inquiry, be it called heightened scrutiny or "second order" rational-basis review, is a method of [*472] approaching certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered. The government must establish that the classification is substantially related to important and legitimate objectives, see, e. g., *Craig v. Boren*, 429 U.S. 190 (1976), so that valid and sufficiently weighty policies actually justify the departure from equality. Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the *Fourteenth Amendment*. Where classifications based on a particular characteristic have done so in the past, and the threat that they may do so remains, heightened scrutiny is appropriate. ²⁴

²⁴ No single talisman can define those groups likely to be the target of classifications offensive to the *Fourteenth Amendment* and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide. The "political powerlessness" of a group may be relevant, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973), but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates. Minors cannot vote and thus might be considered politically powerless to an extreme degree. Nonetheless, we see few statutes reflecting prejudice or indifference to minors, and I am not aware of any suggestion that legislation affecting them be viewed with the suspicion of heightened scrutiny. Similarly, immutability of the trait at issue may be

473 U.S. 432, *472; 105 S. Ct. 3249, **3271;
87 L. Ed. 2d 313, ***341; 1985 U.S. LEXIS 118

relevant, but many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances. See *ante*, at 442-443, n. 10.

The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs. Statutes discriminating against the young have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.

The discreteness and insularity warranting a "more searching judicial inquiry," *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938), must therefore be viewed from a social and cultural perspective as well as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

[*473] As [***342] [**3272] the history of discrimination against the retarded and its continuing legacy amply attest, the mentally retarded have been, and in some areas may still be, the targets of action the *Equal Protection Clause* condemns. With respect to a liberty so valued as the right to establish a home in the community,

and so likely to be denied on the basis of irrational fears and outright hostility, heightened scrutiny is surely appropriate.

IV

In light of the scrutiny that should be applied here, Cleburne's ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community. The Court, while disclaiming that special scrutiny is necessary or warranted, reaches the same conclusion. Rather than striking the ordinance down, however, the Court invalidates it merely as applied to respondents. I must dissent from the novel proposition that "the preferred course of adjudication" [*474] is to leave standing a legislative Act resting on "irrational prejudice" *ante*, at 450, thereby forcing individuals in the group discriminated against to continue to run the Act's gauntlet.

The Court appears to act out of a belief that the ordinance might be "rational" as applied to some subgroup of the retarded under some circumstances, such as those utterly without the capacity to live in a community, and that the ordinance should not be invalidated *in toto* if it is capable of ever being validly applied. But the issue is not "whether the city may never insist on a special use permit for the mentally retarded in an R-3 zone." *Ante*, at 447. The issue is whether the city may require a permit pursuant to a blunderbuss ordinance drafted many years ago to exclude all the "feebleminded," or whether the city must enact a new ordinance carefully tailored to the exclusion of some well-defined subgroup of retarded people in circumstances in which exclusion might reasonably further legitimate city purposes.

By leaving the sweeping exclusion of the "feebleminded" to be applied to other groups of the retarded, the Court has created peculiar problems for the future. The Court does not define the relevant characteristics of respondents or their proposed home that make it unlawful to require them to seek a special permit. Nor does the Court delineate any principle that defines to which, if any, set of retarded people the ordinance *might* validly be applied. Cleburne's City Council and retarded applicants are left without guidance as to the potentially valid, and invalid, applications of the ordinance. As a consequence, the Court's as-applied remedy relegates future retarded applicants to the standardless discretion of

473 U.S. 432, *474; 105 S. Ct. 3249, **3272;
87 L. Ed. 2d 313, ***342; 1985 U.S. LEXIS 118

low-level officials who have already shown an all too willing readiness to be captured by the "vague, undifferentiated fears," *ante*, at 449, of ignorant or frightened residents.

Invalidating on its face the ordinance's [***343] special treatment of the "feeble-minded," in contrast, would place the responsibility for tailoring and updating Cleburne's unconstitutional [*475] ordinance where it belongs: [**3273] with the legislative arm of the city of Cleburne. If Cleburne perceives a legitimate need for requiring a certain well-defined subgroup of the retarded to obtain special permits before establishing group homes, Cleburne will, after studying the problem and making the appropriate policy decisions, enact a new, more narrowly tailored ordinance. That ordinance might well look very different from the current one; it might separate group homes (presently treated nowhere in the ordinance) from hospitals, and it might define a narrow subclass of the retarded for whom even group homes could legitimately be excluded. Special treatment of the retarded might be ended altogether. But whatever the contours such an ordinance might take, the city should not be allowed to keep its ordinance on the books intact and thereby shift to the courts the responsibility to confront the complex empirical and policy questions involved in updating statutes affecting the mentally retarded. A legislative solution would yield standards and provide the sort of certainty to retarded applicants and administrative officials that case-by-case judicial rulings cannot provide. Retarded applicants should not have to continue to attempt to surmount Cleburne's vastly overbroad ordinance.

The Court's as-applied approach might be more defensible under circumstances very different from those presented here. Were the ordinance capable of being cleanly severed, in one judicial cut, into its permissible and impermissible applications, the problems I have pointed out would be greatly reduced. Cf. *United States v. Grace*, 461 U.S. 171 (1983) (statute restricting speech and conduct in Supreme Court building and on its grounds invalid as applied to sidewalks); but cf. *id.*, at 184-188 (opinion concurring in part and dissenting in part). But no readily apparent construction appears, nor has the Court offered one, to define which group of retarded people the city might validly require a permit of, and which it might not, in the R-3 zone. The Court's as-applied holding is particularly inappropriate here, [*476] for nine-tenths of the group covered by the statute

appears similarly situated to respondents, see *ante*, at 442, n. 9 -- a figure that makes the statutory presumption enormously overbroad. Cf. *Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating statutory presumption despite State's insistence that it validly applied to "most" of those covered).

To my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis. When statutes rest on impermissibly overbroad generalizations, our cases have invalidated the presumption on its face.²⁵ We do not [***344] instead leave to the courts the task [**3274] of redrafting the statute through an ongoing and cumbersome process of "as applied" constitutional rulings. In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), for [*477] example, we invalidated, *inter alia*, a maternity leave policy that required pregnant schoolteachers to take unpaid leave beginning five months before their expected due date. The school board argued that some teachers became physically incapable of performing adequately in the latter stages of their pregnancy, and we accepted this justification for purposes of our decision. Assuming the policy might validly be applied to some teachers, particularly in the last few weeks of their pregnancy, *id.*, at 647, n. 13, we nonetheless invalidated it *in toto*, rather than simply as applied to the particular plaintiff. The Court required school boards to employ "alternative administrative means" to achieve their legitimate health and safety goal, *id.*, at 647, or the legislature to enact a more carefully tailored statute, *id.*, at 647, n. 13.

25 The Court strongly suggests that the loose fit of the ordinance to its purported objectives signifies that the ordinance rests on "an irrational prejudice," *ante*, at 450, an unconstitutional legislative purpose. See *Mississippi University for Women v. Hogan*, 458 U.S., at 725. In that event, recent precedent should make clear that the ordinance must, in its entirety, be invalidated. See *Hunter v. Underwood*, 471 U.S. 222 (1985). *Hunter* involved a 1902 constitutional provision disenfranchising various felons. Because that provision had been motivated, at least in part, by a desire to disenfranchise Negroes, we invalidated it on its face. In doing so, we did not suggest that felons could not be deprived of the vote through a statute motivated by some purpose other than racial discrimination. See *Richardson v. Ramirez*, 418 U.S. 24 (1974). Yet that possibility, or the

473 U.S. 432, *477; 105 S. Ct. 3249, **3274;
87 L. Ed. 2d 313, ***344; 1985 U.S. LEXIS 118

possibility that the provision might have been only partly motivated by the desire to disenfranchise Negroes, did not suggest the provision should be invalidated only "as applied" to the particular plaintiffs in *Hunter* or even as applied to Negroes more generally. Instead we concluded:

"Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights* [v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)]." 471 U.S., at 233. If a discriminatory purpose infects a legislative Act, the Act itself is inconsistent with the *Equal Protection Clause* and cannot validly be applied to anyone.

Similarly, *Caban v. Mohammed*, 441 U.S. 380 (1979), invalidated a law that required parental consent to adoption from unwed mothers but not from unwed fathers. This distinction was defended on the ground, *inter alia*, that unwed fathers were often more difficult to locate, particularly during a child's infancy. We suggested the legislature might make proof of abandonment easier or proof of paternity harder, but we required the legislature to draft a new statute tailored more precisely to the problem of locating unwed fathers. The statute was not left on the books by invalidating it only as applied to unwed fathers who actually proved they could be located. When a presumption is unconstitutionally overbroad, the preferred course of adjudication is to strike it down. See also *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Stanley v. Illinois*, *supra*; *Vlandis v. Kline*, 412 U.S. 441, 453-454 (1973); *Carrington v. Rash*, 380 U.S. 89 (1965); *Sugarman v. Dougall*, 413 U.S. 634, 646-649 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 [***345] (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

In my view, the Court's remedial approach is both unprecedented in the equal protection area and unwise. This doctrinal [*478] change of course was not sought by the parties, suggested by the various *amici*, or discussed at oral argument. Moreover, the Court does not persuasively reason its way to its novel remedial holding

nor reconsider our prior cases directly on point. Instead, the Court simply asserts that "this is the preferred course of adjudication." Given that this assertion emerges only from today's decision, one can only hope it will not become entrenched in the law without fuller consideration.

V

The Court's opinion approaches the task of principled equal protection adjudication in what I view as precisely the wrong way. The formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one. Yet in focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake or to articulate the principle that classifications based on mental retardation must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need. No guidance is thereby given as to when the Court's freewheeling, and potentially dangerous, "rational-basis standard" is to be employed, nor is attention directed to the invidiousness of grouping all retarded individuals together. Moreover, the Court's narrow, as-applied remedy fails to deal adequately [**3275] with the overbroad presumption that lies at the heart of this case. Rather than leaving future retarded individuals to run the gauntlet of this overbroad presumption, I would affirm the judgment of the Court of Appeals in its entirety and would strike down on its face the provision at issue. I therefore concur in the judgment in part and dissent in part.

REFERENCES

16A Am Jur 2d, *Constitutional Law*, 748-751

16 Am Jur Trials 99, *Relief from Zoning Ordinance*

USCS, *Constitution, 14th Amend*

US L Ed Digest, *Constitutional Law*, 316-319, 335, 347.5; *Zoning* 1

L Ed Index to Annos, *Civil Rights; Equal Protection of the Laws; Zoning*

473 U.S. 432, *478; 105 S. Ct. 3249, **3275;
87 L. Ed. 2d 313, ***345; 1985 U.S. LEXIS 118

ALR Quick Index, Discrimination; Equal Protection of
Law; Zoning

Supreme Court's views as to constitutionality of
residential zoning restrictions. *52 L Ed 2d 863*.

Federal Quick Index, Civil Rights; Discrimination; Equal
Protection of the Laws; Zoning

Housing facilities for former patients of mental hospitals
as violating zoning restrictions. *100 ALR3d 876*.

Annotation References:

APPENDIX 19



**THE CITY OF PHOENIX, a Municipal Corporation, Appellant, v. BETTY
DICKSON and WILLIAM DICKSON, Her Husband, Appellees.**

Civil No. 3187.

Supreme Court of Arizona

40 Ariz. 403; 12 P.2d 618; 1932 Ariz. LEXIS 221

June 27, 1932, Filed.

PRIOR HISTORY: [***1] APPEAL from a judgment of the Superior Court of the County of Maricopa. M. T. Phelps, Judge. Judgment modified, and as so modified, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant city sought review of a judgment of the Superior Court of the County of Maricopa (Arizona), which permitted plaintiff wife's counsel to amend her complaint by adding her husband as a party plaintiff in the wife's action against the city to recover for personal injuries. The trial court found in favor of both the wife and her husband.

OVERVIEW: The wife claimed that the city negligently injured her while she was a passenger on one of its streetcars. The complaint failed to disclose whether the wife was married or single. The wife was married and the mother of minor children. The wife and her husband had lived separate and apart for about six years at the time of trial. The wife's marital status being disclosed, her counsel asked permission to amend her complaint by adding her husband as a party plaintiff. There was

nothing in the record to show that the husband knew that the wife had been injured or had brought an action for damages. The town's counsel objected to the amendment. The court found that the wife was entitled to maintain an action for personal injuries sustained by her during coverture. Under the circumstances, the claim of damages against the city was the wife's separate property under Ariz. Rev. Code § 2173 (1928), and the action was properly brought in her name. Under Ariz. Rev. Code § 3729 (1928), the wife was authorized to prosecute the action alone because it concerned her separate property. The husband was not a necessary party and could not have been made a party without his knowledge or consent.

OUTCOME: The court affirmed as modified the judgment of the trial court. The court modified the judgment by striking the name of the husband from it.

LexisNexis(R) Headnotes

Civil Procedure > Justiciability > Standing > General

40 Ariz. 403, *; 12 P.2d 618, **;
1932 Ariz. LEXIS 221, ***1

Overview

Estate, Gift & Trust Law > Community Property > General Overview

Family Law > Marital Duties & Rights > Property Rights > General Overview

[HN1] Regarding whether a wife may maintain an action for personal injuries sustained by her during coverture, in community property states like Arizona, the holding has been quite uniform against such right, except where the wife has been wilfully deserted by the husband. This ruling has been based upon the community property law as adopted from Spain or upon local statutes making the husband the agent of the community in its management, control, and disposition. The right is predicated upon and is incidental to the husband's status as the head of the community. Accordingly, the husband's right to sue for personal injuries to the wife during coverture has generally been upheld. In some of the states this rule has been changed by the legislature so that the wife may, in consonance with her new status, prosecute a suit for tort in her own name. A wilful desertion of the wife by the conventional head of the community, so that its management and control automatically pass to the wife, has ever been regarded as creating an exception to the general rule, so that the wife could in such case sue alone to enforce community property rights.

Contracts Law > Types of Contracts > Choses in Action Torts > Damages > General Overview

[HN2] A claim for damages is a chose in action, and accordingly is properly classified as property. A right to sue for an injury, is a right of action. It is a thing in action, and is property.

Contracts Law > Types of Contracts > Choses in Action Estate, Gift & Trust Law > Personal Gifts > General Overview

Family Law > Marital Duties & Rights > Property Rights > General Overview

[HN3] Ariz. Rev. Code § 2173 (1928), besides naming property acquired by the wife by gift, devise or descent, and the increase, rents, issues and profits thereof, as her separate property, states that the earnings and accumulations of the wife and of her minor children in her custody while she has lived or may live, separate and apart from her husband, shall be the separate property of the wife. "Earnings" applies to any income accruing through the mental or physical efforts of a person, either as a laborer or in a trade or business or profession.

"Accumulations," is broad enough to cover all these and all other property acquisitions of whatever nature, except acquisitions by gift, devise or descent.

Family Law > Marital Duties & Rights > Property Rights > General Overview

[HN4] When one speaks generally of accumulation of property, he is understood to refer to any property which a person acquires and retains, without regard to the means by which it is obtained.

Civil Procedure > Justiciability > Standing > General Overview

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Consensual Relations > General Overview

Family Law > Marital Duties & Rights > Property Rights > Characterization > Separate Property

[HN5] Ariz. Rev. Code § 2174 (1928) provides that married women shall have the sole and exclusive control of their separate property, and Ariz. Rev. Code § 3729 (1928) in effect authorizes the wife to prosecute actions alone when they concern her separate property.

COUNSEL: Mr. Charles A. Carson, Jr., City Attorney, and Mr. James E. Nelson, Assistant City Attorney, for Appellant.

Mr. L. C. McNabb and Mr. O. B. De Camp, for Appellees.

OPINION BY: ROSS

OPINION

[*404] [**619] ROSS, J. Betty Dickson, claiming the defendant, city of Phoenix, negligently injured her while she was a passenger on one of its street-cars, brought this action to recover damages.

The complaint failed to disclose whether she was married or single. At the trial (October 3, 1931) it was developed that she was married and the mother of some minor children, whom she was supporting by her labors as a short order cook or waitress; that she had lived in and around Phoenix the past three or four years; that her husband, William Dickson, and she had lived separate and apart since 1925; that she had been informed by a sister that her husband, who was a resident of the state of

40 Ariz. 403, *404; 12 P.2d 618, **619;
1932 Ariz. LEXIS 221, ***1

Mississippi, had secured a divorce, but later learned that this was not true. The appellee's marital status being disclosed, her [*405] counsel asked permission [***2] to amend her complaint by adding her husband as a party plaintiff. There is nothing in the record to show that the husband, either before the suit was brought or thereafter, knew appellee had been injured or had brought an action for damages. The court permitted the trial amendment, over objection of opposing counsel. Judgment was in favor of both the wife and husband. The city appeals.

The ruling allowing the trial amendment of the complaint is assigned as error.

Whether the wife may maintain an action for personal injuries sustained by her during coverture has not been decided in this state. [HN1] In community property states like ours we think the holding has been quite uniform against such right, except where the wife has been wilfully deserted by the husband. This ruling has been based upon the community property law as adopted from Spain or upon local statutes making the husband the agent of the community in its management, control, and disposition. The right is predicated upon and is incidental to the husband's status as the head of the community. 31 C.J. 148, § 1234. Accordingly, the husband's right to sue for personal injuries to the wife during coverture has generally [***3] been upheld. 31 C.J. 149, § 1238. In some of the states this rule has been changed by the legislature so that the wife may, in consonance with her new status, prosecute a suit for tort in her own name. A wilful desertion of the wife by the conventional head of the community, so that its management and control automatically pass to the wife, has ever been regarded as creating an exception to the general rule, so that the wife could in such case sue alone to enforce community property rights. *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200. But in this case it is not shown whose fault it is that the husband and wife are not living together. For [*406] aught the record shows, the blame may lie entirely with the wife.

Whether the wife can maintain the suit alone or not depends, as we see it, upon whose property the right of action is. If it belongs to the community, then the action should be in the name of the husband, or perhaps in his and the wife's name jointly; but, if the claim of damages against the city is her separate property, the action was properly brought in her name.

[HN2] A claim for damages is a chose in action, and

accordingly is properly classified as property. [***4] As was said in *Chicago, B. & Q.R. Co. v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606:

"A right to sue for an injury, is a right of action -- it is a thing in action, and is property."

The chose in action here accrued while the plaintiff and her husband were living separate and apart from each other. Our statute, section 2173 of the Revised Code of 1928, [HN3] besides naming property acquired by the wife by gift, devise or descent, and the increase, rents, issues and profits thereof, as her separate property, states:

"The earnings and accumulations of the wife and of her minor children in her custody while she has lived or may live, separate and apart from her husband, shall be the separate property of the wife."

[**620] "The property right here involved cannot be said to be "earnings" of the wife. That word, we take it, applies to any income accruing through the mental or physical efforts of a person, either as a laborer or in a trade or business or profession. "Accumulations," however, is broad enough to cover all these and all other property acquisitions of whatever nature, except acquisitions by gift, devise or descent.

The quotation from our statute is taken from California, [***5] and, in *Union Oil Co. v. Stewart*, 158 Cal. 149, [*407] Ann. Cas. 1912A 567, 110 Pac. 313, it was held that property acquired by the wife by adverse possession was an "accumulation," as that word is used in the text. The court there said:

[HN4] "When one speaks generally of accumulation of property, he is understood to refer to any property which a person acquires and retains, without regard to the means by which it is obtained."

We approve of this definition. If the money paid in settlement of the claim would be an "accumulation," it seems the claim itself would be one.

We conclude that the claim for damages was, under the circumstances, the separate property of the wife, and why not? The injury did not accrue to the husband; "it was wholly personal to the wife. It was her body that was bruised; it was she who suffered the agonizing, mental and physical pain." *Chicago, B. & Q.R. Co. v. Dunn*, *supra*. Indeed, if the contention of counsel for

40 Ariz. 403, *407; 12 P.2d 618, **620;
1932 Ariz. LEXIS 221, ***5

appellant be upheld, the only safe way for a wife, living separate and apart from her husband and earning her and her children's living, to pursue in the vindication of her rights, is first to obtain her husband's consent to bring [***6] an action in his name. If he refuses to give his consent, or she is unable to locate him, she is without remedy. It was doubtless in part to prevent such an injustice that the legislature made her earnings and accumulations and those of her minor children in her custody, while living separate and apart from the husband, her separate property.

Section 2174, Revised Code of 1928, [HN5] provides that married women shall have the sole and exclusive control of their separate property, and section 3729, Id., in effect authorizes the wife to prosecute actions alone when they concern her separate property.

Appellant complains that counsel for appellee in his argument to the jury commented on an offer to compromise [*408] made by appellant, but fails to point out in the record where such comment may be found or what action was taken thereon by the court. For that reason this assignment will not be considered.

The husband was not a necessary party. He had no interest in the subject matter, and, at all events, could not be made a party without his knowledge or consent.

The judgment should be modified by striking therefrom the name of the husband, William Dickson, and, as so modified, it [***7] is affirmed.

McALISTER, C. J., and LOCKWOOD, J., concur.

APPENDIX 20



Myra Jo Collins, Petitioner v. City of Harker Heights, Texas.

No. 90-1279

SUPREME COURT OF THE UNITED STATES

503 U.S. 115; 112 S. Ct. 1061; 117 L. Ed. 2d 261; 1992 U.S. LEXIS 1376; 60 U.S.L.W. 4182; 7 I.E.R. Cas. (BNA) 233; 15 OSHC (BNA) 1513; 92 Cal. Daily Op. Service 1591; 92 Daily Journal DAR 2547; 6 Fla. L. Weekly Fed. S 39

November 5, 1991, Argued

February 26, 1992, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: *916 F.2d 284*, affirmed.

DECISION:

42 USCS 1983 held not to provide remedy for municipal employee's death, because failure to train or warn about known workplace hazards does not violate *Fourteenth Amendment's due process clause*.

SUMMARY:

An employee of the sanitation department of a Texas city died of asphyxia after entering a manhole to unstop a sewer line. The employee's widow brought suit against the city under *42 USCS 1983*, which suit alleged that (1) the employee had a right, under the due process clause of the *Federal Constitution's Fourteenth Amendment*, to be free from unreasonable risks of harm to his body, mind, and emotions and to be protected from the city's supposed custom and policy of deliberate indifference toward the safety of its employees, and (2) the city had violated that right by following a custom and policy of not training its employees about the dangers of working in sewer lines and manholes, not providing safety equipment at job sites, and not providing safety warnings. The United

States District Court for the Western District of Texas dismissed the complaint on the ground that a constitutional violation had not been alleged. The United States Court of Appeals for the Fifth Circuit, affirming, (1) did not reach the question whether the city had violated the employee's constitutional rights, but (2) denied recovery on the ground that there had been no abuse of government power, which the Court of Appeals had found to be a necessary element of a 1983 action (*916 F2d 284*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., expressing the unanimous view of the court, it was held that no remedy for the employee's death was provided under *42 USCS 1983*, because (1) the due process clause did not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace, since (a) the text of the clause, being phrased as a limitation on a state's power to act rather than as a guarantee of certain minimal levels of safety and security, did not support the view that a governmental employer's duty to provide its employees with a safe working environment was a substantive component of the clause, and (b) historically, the guarantee of due process had been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property; and (2) the city's alleged failure to train or warn its employees was not arbitrary, or conscience-shocking, in a constitutional sense, since (a)

503 U.S. 115, *; 112 S. Ct. 1061, **;
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the due process clause did not purport to supplant traditional state tort law in laying down rules of conduct to regulate liability for injuries that attended living together in society, (b) this principle applied with special force to claims asserted against public employees, because state law, rather than the Federal Constitution, generally governed the substance of the employment relationship, and (c) the due process clause was not a guarantee against incorrect or ill-advised personnel decisions, as it was presumed that the administration of government programs was based on a rational decisionmaking process, and decisions concerning such matters as the training of sewer-maintenance employees must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of government for the entire country.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CIVIL RIGHTS §27

CONSTITUTIONAL LAW §514

death of city employee -- workplace safety -- 42
USCS 1983 -- due process -- deprivation of liberty --

Headnote:[1A][1B][1C][1D][1E][1F][1G][1H]

42 USCS 1983 does not provide a remedy for a city sanitation department employee who dies of asphyxia after entering a manhole to unstop a sewer line--where the 1983 action brought by the employee's widow against the city is based on the allegation that the city violated the employee's substantive rights under the due process clause of the *Federal Constitution's Fourteenth Amendment* by violating a duty to provide city employees with minimal levels of safety and security in the workplace, or by showing, with respect to the employee's safety, deliberate indifference constituting arbitrary government action that must shock the conscience of federal judges--because (1) the due process clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace, since (a) the text of the clause does not support the allegation that a governmental employer's duty to provide its employees with a safe working environment is a substantive component of the clause, where the clause's language, which is phrased as a limitation on a state's power to act and not as a guarantee

of certain minimal levels of safety and security, cannot fairly be extended to impose an affirmative obligation on a state to insure that the interests protected under the clause do not come to harm through other means, and (b) history does not support such an expansive reading of the text of the clause, where (i) historically, the guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property, and (ii) this history reflects the traditional and common-sense notion that the due process clause is intended to secure the individual from the arbitrary exercise of government power; and (2) the city's alleged failure to train or warn its employees cannot properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense, since (a) the due process clause does not purport to supplant traditional state tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society, (b) the reasoning supporting this principle applies with special force to claims asserted against public employees, because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship, and (c) the due process clause is not a guarantee against incorrect or ill-advised personnel decisions, as it is presumed that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces, and decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of government for the entire country.

[***LEdHN2]

CIVIL RIGHTS §27

CONSTITUTIONAL LAW §313

city employee -- 42 USCS 1983 -- protected rights --
abuse of government power --

Headnote:[2A][2B]

Recovery under 42 USCS 1983 by the widow of a city sanitation department employee who died of asphyxia after entering a manhole to unstop a sewer line is not precluded by a finding that the city's conduct with

503 U.S. 115, *; 112 S. Ct. 1061, **;
117 L. Ed. 2d 261, ***LEdHN2; 1992 U.S. LEXIS 1376

respect to the employee did not constitute an abuse of government power--where the widow alleges that (1) the employee had a right, under the due process clause of the *Federal Constitution's Fourteenth Amendment*, to be free from the city's "custom and policy of deliberate indifference toward the safety of its employees," and (2) the city violated that right by failing to train or warn its employees about the dangers of working in sewer lines and manholes--because neither the fact that the sanitation worker was a government employee nor his widow's characterization of the alleged deliberate indifference of the city to his safety as something other than an "abuse of governmental power" is a sufficient reason for the court's refusal to entertain the 1983 claim, since (1) the employment relationship is not of controlling significance, where (a) the *First Amendment*, the equal protection and *due process clauses of the Fourteenth Amendment*, and other provisions of the Federal Constitution afford protection to employees who serve the government, as well as those who are served by them, and (b) 1983 provides a cause of action for all citizens injured by an abridgement of those protections; (2) the United States Supreme Court's cases do not support the view that 1983 requires an abuse of governmental power separate and apart from the proof of a constitutional violation; and (3) 1983 does not draw any distinction between abusive and nonabusive federal violations.

[***LEdHN3]

CIVIL RIGHTS §22

42 USCS 1983 -- acts covered --

Headnote:[3]

Although 42 USCS 1983 provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law.

[***LEdHN4]

CIVIL RIGHTS §22

42 USCS 1983 -- constitutional violation --
municipal responsibility --

Headnote:[4]

Proper analysis of a claim, based on an alleged violation of the Federal Constitution, asserted against a

municipality under 42 USCS 1983, requires separation of the different issues (1) whether the alleged harm to the citizen was caused by a constitutional violation, and (2) if so, whether the municipality is responsible for that violation.

[***LEdHN5]

CIVIL RIGHTS §22

42 USCS 1983 -- vicarious liability of city --

Headnote:[5]

A city is not vicariously liable under 42 USCS 1983 for the "constitutional torts" of its agents; the city is liable only when it can be fairly said that the city itself is the wrongdoer.

[***LEdHN6]

CONSTITUTIONAL LAW §514

procedural protections -- substantive protections --

Headnote:[6]

Although the most familiar office of the due process clause of the *Federal Constitution's Fourteenth Amendment*--which forbids any state to deprive any person of life, liberty, or property, without due process of law--is to provide a guarantee of fair procedure in connection with any such deprivation by a state, the substantive component of the clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.

[***LEdHN7]

CONSTITUTIONAL LAW §513

intention of due process clause --

Headnote:[7]

The due process clause of the *Federal Constitution's Fourteenth Amendment* is intended to prevent government from abusing its power or employing that power as an instrument of oppression.

[***LEdHN8]

CONSTITUTIONAL LAW §525

503 U.S. 115, *; 112 S. Ct. 1061, **;
117 L. Ed. 2d 261, ***LEdHN8; 1992 U.S. LEXIS 1376

due process -- deprivation of liberty -- custodial standards --

Headnote:[8]

The "process" that the due process clause of the *Federal Constitution's Fourteenth Amendment*--which forbids any state to deprive any person of life, liberty, or property, without due process of law--guarantees in connection with any deprivation of liberty includes a continuing obligation to satisfy certain minimal custodial standards with respect to those who have already been deprived by a state of their liberty; but it cannot be maintained that a city deprives a person of his or her liberty when the city makes, and the person voluntarily accepts, an offer of employment.

[***LEdHN9]

CIVIL RIGHTS §27

CONSTITUTIONAL LAW §745

EVIDENCE §97

death of city employee -- workplace safety -- violation of state statute -- 42 USCS 1983 -- due process -- deprivation of liberty --

Headnote:[9]

A 42 USCS 1983 claim that is based on the alleged violation of a state statute concerning workplace safety and is brought by the widow of a city sanitation department employee who died of asphyxia after entering a manhole to unstop a sewer line, must fail--even if it is assumed that the state statute (1) imposed a duty on the city to warn its sanitation employees about the dangers of noxious gases in the sewers and to provide safety training and protective equipment to minimize those dangers, and (2) created an entitlement that qualifies as a liberty interest protected by the due process clause of the *Federal Constitution's Fourteenth Amendment*--because of the widow's failure to allege that the supposed safety-related deprivation of the employee's liberty interest under the due process clause was arbitrary in the constitutional sense; the reasons indicated by the United States Supreme Court why the city's alleged failure to train and warn its employees about workplace hazards do not constitute a constitutionally arbitrary deprivation of the employee's life--that (1) the due process clause does not purport to supplant traditional state tort law in laying

down rules of conduct to regulate liability for injuries that attend living together in society, (2) this principle applies with special force to claims asserted against public employees, because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship, and (3) the due process clause is not a guarantee against incorrect or ill-advised personnel decisions--apply a fortiori to the less significant liberty interest created by the state statute.

SYLLABUS

Larry Collins, an employee in respondent city's sanitation department, died of asphyxia after entering a manhole to unstop a sewer line. Petitioner, his widow, brought this action under 42 U. S. C. § 1983, alleging, *inter alia*, that Collins had a right under the *Due Process Clause of the Fourteenth Amendment* "to be free from unreasonable risks of harm . . . and . . . to be protected from the [city's] custom and policy of deliberate indifference toward [its employees'] safety"; that the city had violated that right by following a custom and policy of not training its employees about the dangers of working in sewers and not providing safety equipment and warnings; and that the city had systematically and intentionally failed to provide the equipment and training required by a Texas statute. The District Court dismissed the complaint on the ground that it did not allege a constitutional violation. Without reaching the question whether the city had violated Collins' constitutional rights, the Court of Appeals affirmed on the theory that there had been no "abuse of governmental power," which the court found to be a necessary element of a § 1983 action.

Held: Because a city's customary failure to train or warn its employees about known hazards in the workplace does not violate the Due Process Clause, § 1983 does not provide a remedy for a municipal employee who is fatally injured in the course of his employment as a result of the city's failure. Pp. 119-130.

(a) This Court's cases do not support the Court of Appeals' reading of § 1983 as requiring an abuse of governmental power separate and apart from the proof of a constitutional violation. Contrary to that court's analysis, neither the fact that Collins was a government employee nor the characterization of the city's deliberate indifference to his safety as something other than an "abuse of governmental power" is a sufficient reason for

503 U.S. 115, *; 112 S. Ct. 1061, **;
117 L. Ed. 2d 261, ***; 1992 U.S. LEXIS 1376

refusing to entertain petitioner's federal claim under § 1983. Proper analysis requires that two issues be separated when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation. Pp. 119-120.

(b) It is assumed for the purpose of decision that the complaint's use of the term "deliberate indifference" to characterize the city's failure to train its sanitation department employees is sufficient to hold the city responsible if the complaint has also alleged a constitutional violation. See *Canton v. Harris*, 489 U.S. 378. Pp. 120-124, 103 L. Ed. 2d 412, 109 S. Ct. 1197.

(c) The complaint has not alleged a constitutional violation. Neither the Due Process Clause's text -- which, *inter alia*, guarantees due process in connection with any deprivation of liberty by a State -- nor its history supports petitioner's unprecedented claim that the Clause imposes an independent substantive duty upon municipalities to provide certain minimal levels of safety and security in the workplace. Although the "process" that the Clause guarantees includes a continuing obligation to satisfy certain minimal custodial standards for those who have already been deprived of their liberty, petitioner cannot maintain that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an employment offer. Also unpersuasive is petitioner's claim that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical tort claim under state law, which is not supplanted by the Due Process Clause, see, e. g., *Daniels v. Williams*, 474 U.S. 327, 332-333, 88 L. Ed. 2d 662, 106 S. Ct. 662, particularly in the area of public employment, see, e.g., *Bishop v. Wood*, 426 U.S. 341, 350, 48 L. Ed. 2d 684, 96 S. Ct. 2074. In light of the presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing forces, decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as employee training, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the country's basic charter of Government. For the same reasons, petitioner's suggestion that the Texas Hazard Communication Act

supports her substantive due process claim is rejected. Pp. 125-130.

COUNSEL: Sanford Jay Rosen argued the cause for petitioner. With him on the briefs were Don Busby and Andrea G. Asaro.

Lucas A. Powe, Jr., argued the cause for respondent. With him on the brief were Roy L. Barrett and Stuart Smith. *

* Briefs of amici curiae urging reversal were filed for the American Civil Liberties Union et al. by Edward Tuddenham, J. Patrick Wiseman, Steven R. Shapiro, John A. Powell, and Helen Hershkoff; for the Association of Trial Lawyers of America by Jeffrey L. Needle; and for the National Education Association by Robert H. Chanin and Jeremiah A. Collins.

Richard Ruda, Carter G. Phillips, and Mark D. Hopson filed a brief for the National League of Cities et al. as amici curiae urging affirmance.

JUDGES: STEVENS, J., delivered the opinion for a unanimous Court.

OPINION BY: STEVENS

OPINION

[*117] [***268] [**1064] JUSTICE STEVENS delivered the opinion of the Court.

[***LEdHR1A] [1A]The question presented is whether § 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U. S. C. § 1983, provides a remedy for a municipal employee who is fatally injured in the course of his employment because the city customarily failed to train or warn its employees about known hazards in the workplace. Even though the city's conduct may be actionable under state law, we hold that § 1983 does not apply because such conduct does not violate the Due Process Clause.

On October 21, 1988, Larry Michael Collins, an employee in the sanitation department of the city of Harker Heights, Texas, died of asphyxia after entering a manhole to unstop a sewer line. Petitioner, his widow, brought this action alleging that Collins "had a constitutional right to be free from unreasonable risks of

503 U.S. 115, *117; 112 S. Ct. 1061, **1064;
117 L. Ed. 2d 261, ***LEdHR1A; 1992 U.S. LEXIS 1376

harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees." App. 7. Her complaint alleged that the city violated that right by following a custom and policy of not training its employees about the dangers of working in sewer lines and manholes, not providing safety equipment at jobsites, and not providing safety warnings. The complaint also alleged that a prior incident [*118] had given the city notice of the risks of entering the sewer lines ¹ and that the city had systematically and intentionally failed to [*1065] provide the equipment and training required by a Texas statute. *Ibid.* The District Court dismissed the complaint on the ground that a constitutional violation had not been alleged. No. W-89-CA-168 (WD Tex., Oct. 30, 1988), App. 20. The Court of Appeals for the Fifth Circuit affirmed on a different theory. 916 F.2d 284 (1990). It did not reach the question whether the city had violated Collins' [***269] constitutional rights because it denied recovery on the ground that there had been no "abuse of governmental power," which the Fifth Circuit had found to be a necessary element of a § 1983 action. ² *Id.*, at 287-288, and n. 3.

1 In particular, the complaint alleged that "prior to October, 1988, the City of Harker Heights was on notice of the dangers to which the employees were exposed because Larry Michael Collins' supervisor had been rendered unconscious in a manhole several months prior to October, 1988, in fact, several months before Larry Michael Collins began work at the City of Harker Heights." App. 7.

2 The Court of Appeals explained:

"The question presented in this case is whether a plaintiff seeking recovery under § 1983 for injury to a governmental employee must demonstrate, *inter alia*, that the conduct in issue was an abuse of *governmental* power. More particularly, does alleged wrongful conduct by government -- in its capacity as employer rather than as a governing authority -- that deprives its employee of an alleged constitutional right give rise to a § 1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard. The district court appears to have merged those two standards, which are among

those necessary for bringing § 1983 into play here. In reviewing this Rule 12(b)(6) dismissal, we will keep them separate.

....

"In this Circuit, there is a separate standard that must also be satisfied -- an abuse of government power. While this element is in many ways similar to, and often blends with, other necessary elements for a § 1983 action, such as deprivation of a constitutional right, and springs from the same sources as the deprivation element, it is separate nonetheless." 916 F.2d at 286-287.

[*119] The contrary decision in *Ruge v. Bellevue*, 892 F.2d 738 (CA8 1989), together with our concern about the Court of Appeals' interpretation of the statute, prompted our grant of certiorari, 499 U.S. 958 (1991).

I

[***LEdHR2A] [2A] [***LEdHR3] [3]Our cases do not support the Court of Appeals' reading of § 1983 as requiring proof of an abuse of governmental power separate and apart from the proof of a constitutional violation. Although the statute provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law, see, e.g., *Martinez v. California*, 444 U.S. 277, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). More importantly, the statute does not draw any distinction between abusive and nonabusive federal violations.

[***LEdHR2B] [2B]The Court of Appeals' analysis rests largely on the fact that the city had, through allegedly tortious conduct, harmed one of its employees rather than an ordinary citizen over whom it exercised governmental power. The employment relationship, however, is not of controlling significance. On the one hand, if the city had pursued a policy of equally deliberate indifference to the safety of pedestrians that resulted in a fatal injury to one who inadvertently stepped into an open manhole, the Court of Appeals' holding would not speak to this situation at all, although it would seem that a claim by such a pedestrian should be analyzed in a similar manner as the claim by this petitioner. On the other hand, a logical application of the

503 U.S. 115, *119; 112 S. Ct. 1061, **1065;
117 L. Ed. 2d 261, ***LEdHR2B; 1992 U.S. LEXIS 1376

holding might also bar potentially meritorious claims by employees if, for example, the city had given an employee a particularly dangerous assignment in retaliation for a political speech, cf. *St. Louis v. Praprotnik*, 485 U.S. 112, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988), or because of his or her gender, cf. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). The First [***270] Amendment, the Equal Protection and [*120] Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution [**1066] afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgment of those protections. Neither the fact that petitioner's decedent was a government employee nor the characterization of the city's deliberate indifference to his safety as something other than an "abuse of governmental power" is a sufficient reason for refusing to entertain petitioner's federal claim under § 1983.

[***LEdHR4] [4]Nevertheless, proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 817, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985) (opinion of REHNQUIST, J.); *id.*, at 828-829 (opinion of Brennan, J., concurring in part and concurring in judgment). Because most of our opinions discussing municipal policy have involved the latter issue, it is appropriate to discuss it before considering the question whether petitioner's complaint has alleged a constitutional violation.

II

Section 1983 provides a remedy against "any person" who, under color of state law, deprives another of rights protected by the Constitution.³ In *Monell*, the Court held that Congress intended municipalities and other local government entities to be included among those persons to whom § 1983 applies. 436 U.S. at 690. At the same time, the Court [*121] made it clear that municipalities may not be held liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.*, at 691.⁴ The Court emphasized that

"a municipality cannot be held liable solely because it employs a tortfeasor -- or,

in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

....

"Therefore, . . . a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*, at 691, 694 [***271] (emphasis in original).

3 The section states, in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U. S. C. § 1983.

4 Petitioners in *Monell*, a class of female employees of the New York City Department of Social Services and Board of Education, alleged that the board and department violated their due process rights by implementing an official policy that compelled pregnant employees to take unpaid leaves of absences before such leaves were required for medical reasons. 436 U.S. at 660-661.

In a series of later cases, the Court has considered whether an alleged injury caused by municipal employees acting under color of state law provided a proper basis for imposing liability on a city. In each of those cases the Court assumed that a constitutional violation had been adequately alleged or proved and focused its attention on the separate issue of municipal liability. Thus, for example, in *Oklahoma City v. Tuttle*, *supra*, it was assumed that a police officer had violated the decedent's constitutional rights, but we held that the wrongful

503 U.S. 115, *121; 112 S. Ct. 1061, **1066;
117 L. Ed. 2d 261, ***271; 1992 U.S. LEXIS 1376

conduct of a single officer without any policymaking authority did not establish municipal policy. And in *St. Louis v. Praprotnik*, 485 U.S. 112, 99 L. Ed. 2d 107, 108 S. Ct. 915 [**1067] (1988), without reaching [*122] the question whether the adverse employment action taken against the plaintiff violated his *First Amendment* rights, the Court concluded that decisions by subordinate employees did not necessarily reflect official policy. On the other hand, in *Pembaur v. Cincinnati*, 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986), the Court held that a county was responsible for unconstitutional actions taken pursuant to decisions made by the county prosecutor and the county sheriff because they were the "officials responsible for establishing final policy with respect to the subject matter in question," *id.*, at 483-484.

[***LEdHR5] [5]Our purpose in citing these cases is to emphasize the separate character of the inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred. It was necessary to analyze whether execution of a municipal policy inflicted the injury in these cases because, unlike ordinary tort litigation, the doctrine of *respondeat superior* was inapplicable. The city is not vicariously liable under § 1983 for the constitutional torts of its agents: It is only liable when it can be fairly said that the city itself is the wrongdoer. Because petitioner in this case relies so heavily on our reasoning in *Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989) -- and in doing so, seems to assume that the case dealt with the constitutional issue -- it is appropriate to comment specifically on that case.

In *Canton* we held that a municipality can, in some circumstances, be held liable under § 1983 "for constitutional violations resulting from its failure to train municipal employees." *Id.*, at 380. Among the claims advanced by the plaintiff in that case was a violation of the "right, under the *Due Process Clause of the Fourteenth Amendment*, to receive necessary medical attention while in police custody." *Id.*, at 381.⁵ Because we assumed, *arguendo*, that the plaintiffs [*123] constitutional right to receive medical care had been denied, *id.*, at 388-389, n. 8, our [***272] opinion addressed only the question whether the constitutional deprivation was attributable to a municipal policy or custom.

⁵ "At the close of the evidence, the District Court submitted the case to the jury, which

rejected all of Mrs. Harris' claims except one: her § 1983 claim against the city resulting from its failure to provide her with medical treatment while in custody." *Canton v. Harris*, 489 U.S. at 382 (emphasis added).

We began our analysis by plainly indicating that we were not deciding the constitutional issue.

"In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), we decided that a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983. *Id.*, at 694-695. 'It is only when the "execution of the government's policy or custom . . . inflicts the injury" that the municipality may be held liable under § 1983.' *Springfield v. Kibbe*, 480 U.S. 257, 267, 94 L. Ed. 2d 293, 107 S. Ct. 1114 (1987) (O'CONNOR, J., dissenting) (quoting *Monell, supra*, at 694).

"Thus, our first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Id.*, at 385.

We did not suggest that all harm-causing municipal policies are actionable under § 1983 or that all such policies are unconstitutional. Moreover, we rejected the city's argument that only unconstitutional policies can create municipal liability under the statute. *Id.*, at 387. Instead, [**1068] we concluded that if a city employee violates another's constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation. In particular, we held that the inadequate training of police officers could be characterized as the cause of the constitutional tort if -- and only if -- the [*124] failure to train amounted to "deliberate indifference" to the rights of persons with whom the police come into contact. *Id.*, at 388.⁶

⁶ We added:

503 U.S. 115, *124; 112 S. Ct. 1061, **1068;
117 L. Ed. 2d 261, ***272; 1992 U.S. LEXIS 1376

"Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983.

....

"Consequently, while claims such as respondent's -- alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered -- are cognizable under § 1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants." *Id.*, at 389, 392.

Although the term "deliberate indifference" has been used in other contexts to define the threshold for finding a violation of the *Eighth Amendment*, see *Estelle v. Gamble*, 429 U.S. 97, 104, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), as we have explained, that term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents.⁷ In this case, petitioner has used that term [***273] to characterize the city's failure to train the employees in its sanitation department. We assume for the purpose of decision that the allegations in the complaint are sufficient to provide a substitute for the doctrine of *respondeat superior* as a basis for imposing liability on the city for the tortious conduct of its agents, but that assumption does not confront the question whether the complaint has alleged a constitutional violation. To that question we now turn.

7 Indeed, we expressly stated: "The 'deliberate indifference' standard we adopt for § 1983 'failure to train' claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation." *Id.*, at 388, n. 8.

[*125] III

[***LEdHR1B] [1B] [***LEdHR6] [6]Petitioner's constitutional claim rests entirely on the *Due Process Clause of the Fourteenth Amendment*.⁸ The most familiar office of that Clause is to provide a guarantee of

fair procedure in connection with any deprivation of life, liberty, or property by a State. Petitioner, however, does not advance a procedural due process claim in this case. Instead, she relies on the substantive component of the Clause that protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986).

8 The *Due Process Clause of the Fourteenth Amendment* states: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. It is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive her husband of that right.

[***LEdHR1C] [1C]A fair reading of petitioner's complaint does not charge the city with a willful violation [**1069] of Collins' rights. Petitioner does not claim that the city or any of its agents deliberately harmed her husband. In fact, she does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured. Instead, she makes the more general allegation that the city deprived him of [*126] life and liberty by failing to provide a reasonably safe work environment.⁹ Fairly analyzed, her claim advances two theories: that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or that the city's "deliberate indifference" to Collins' safety was arbitrary government action that must "shock the conscience" of federal [***274] judges. Cf. *Rochin v. California*, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (1952).

9 Petitioner alleges that her husband had "a constitutional right to be free from unreasonable

503 U.S. 115, *126; 112 S. Ct. 1061, **1069;
117 L. Ed. 2d 261, ***274; 1992 U.S. LEXIS 1376

risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees." App. 7. The city's policy and custom of not training its employees and not warning them of the danger allegedly caused Collins' death and thus deprived him of those rights. *Id.*, at 8.

[***LEdHR1D] [1D] [***LEdHR7] [7] Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause. "The *Due Process Clause of the Fourteenth Amendment* was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. at 196 (quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 88 L. Ed. 2d 677, 106 S. Ct. 668 (1986)). As we recognized in *DeShaney*:

"The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such [*127] an expansive reading of the constitutional text." 489 U.S. at 195.¹⁰

[***LEdHR1E] [1E]

¹⁰ "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. *E.g.*, *Davidson v. New Orleans*, 96 U.S. 97, 24 L. Ed. 616 (1878) (assessment of real estate); *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952) (stomach pumping); *Bell v. Burson*, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971)

(suspension of driver's license); *Ingraham v. Wright*, 430 U.S. 651, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977) (paddling student); *Hudson v. Palmer*, 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984) (intentional destruction of inmate's property). No decision of this Court before *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981),] supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911), was 'intended to secure the individual from the arbitrary exercise of the powers of government,' *Hurtado v. California*, 110 U.S. 516, 527, 28 L. Ed. 232, 4 S. Ct. 111 (1884)." *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986).

[***LEdHR1F] [1F] [***LEdHR8] [8] Petitioner's submission that the city violated a federal constitutional obligation to provide its employees with certain minimal levels of safety and security is unprecedented. It is quite different from the constitutional claim advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those who have already been deprived of their liberty. We have held, for example, that apart from the protection against cruel and unusual punishment provided by the *Eighth Amendment*, cf. [*1070] *Hutto v. Finney*, 437 U.S. 678, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978), the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, see *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16, 545, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979), for persons in mental institutions, *Youngberg v. Romeo*, 457 U.S. 307, 315-316, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982), for convicted felons, *Turner v. Safley*, 482 U.S. 78, 94-99, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), and for persons under arrest, see *Revere v. Massachusetts [***275] General Hospital*, 463 U.S. 239, 244-245, 77 L. Ed. 2d 605, 103 S. Ct. 2979 (1983). The "process" that the Constitution guarantees in [*128] connection with any deprivation of liberty thus includes a continuing obligation to satisfy certain

503 U.S. 115, *128; 112 S. Ct. 1061, **1070;
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minimal custodial standards. See *DeShaney*, 489 U.S. at 200. Petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment.

[**LEdHR1G] [1G]We also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society," *Daniels v. Williams*, 474 U.S. at 332, we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law, see, e. g., *id.*, at 332-333; *Baker v. McCollan*, 443 U.S. 137, 146, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979); *Paul v. Davis*, 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship. See, e.g., *Bishop v. Wood*, 426 U.S. 341, 350, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-578, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces. Cf. *Walker v. Rowe*, 791 F.2d 507, 510 (CA7 1986). Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects [*129] of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause "is not a guarantee against incorrect or ill-advised personnel decisions." *Bishop v. Wood*, 426 U.S. at 350. Nor does it guarantee municipal employees a workplace that is free of unreasonable risks

of harm.

[**LEdHR9] [9]Finally, we reject petitioner's suggestion that the Texas Hazard Communication Act ¹¹ supports her substantive due process claim. We assume that the Act imposed a duty on the city to warn its sanitation employees about the dangers of noxious gases in the sewers and to provide safety training and protective equipment to minimize [*1071] those dangers. ¹² [**276] We also assume, as petitioner argues, that the Act created an entitlement that qualifies as a "liberty interest" protected by the Due Process Clause. But even with these assumptions, petitioner's claim must fail for she has not alleged that the deprivation of this liberty interest was arbitrary in the constitutional sense. Cf. *Harrah Independent School Dist. v. [130] Martin*, 440 U.S. 194, 198-199, 59 L. Ed. 2d 248, 99 S. Ct. 1062 (1979). The reasons why the city's alleged failure to train and warn did not constitute a constitutionally arbitrary deprivation of Collins' life, see *supra*, at 128-129, apply *a fortiori* to the less significant liberty interest created by the Texas statute.

¹¹ *Tex. Rev. Civ. Stat. Ann., Art. 5182b* (Vernon 1987).

¹² Section 10(a) of the Act states, for example:

"Every employer shall provide, at least annually, an education and training program for employees using or handling hazardous chemicals. . . . Additional instruction shall be provided when the potential for exposure to hazardous chemicals is altered or when new and significant information is received by the employer concerning the hazards of a chemical. New or newly assigned employees shall be provided training before working with or in a work area containing hazardous chemicals."

And § 15(a)states:

"Employees who may be exposed to hazardous chemicals shall be informed of the exposure and shall have access to the workplace chemical list and [material safety data sheets] for the hazardous chemicals. . . . In addition, employees shall receive training on the hazards of the chemicals and on measures they can take to protect themselves from those hazards and shall be provided with appropriate personal protective equipment. These rights are guaranteed on the

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effective date of this Act."

[***LEdHR1H] [1H]In sum, we conclude that the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace and the city's alleged failure to train or to warn its sanitation department employees was not arbitrary in a constitutional sense. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

REFERENCES

15 Am Jur 2d, Civil Rights 19, 20, 20.5; 16A Am Jur 2d, Constitutional Law 816, 821, 822, 825

6 Federal Procedure, L Ed, Civil Rights 11:257, 11:260, 11:268

5 Federal Procedural Forms, L Ed, Civil Rights 10:93, 10:102, 10:109, 10:160

USCS, *Constitution, Amendment 14*; *42 USCS 1983*

L Ed Digest, Civil Rights 27; Constitutional Law 514, 528.5, 745, 779

L Ed Index, Civil Rights and Discrimination; Due Process; Municipal Corporations and Other Political Subdivisions; Public Officers and Employees; States

Index to Annotations, Discrimination; Due Process; *Fourteenth Amendment*; Municipal Corporations; Public Officers and Employees; States

Annotation References:

Supreme Court's views as to concepts of "liberty" under *due process clauses of Fifth and Fourteenth Amendments*. *47 L Ed 2d 975*.

Supreme Court's construction of Civil Rights Act of 1871 (*42 USCS 1983*) providing private right of action for violation of federal rights. *43 L Ed 2d 833*.

What constitutes policy or custom for purposes of determining liability of local government unit under *42 USCS 1983*--modern cases. *81 ALR Fed 549*.

Vicarious liability of superior under *42 USCS 1983* for subordinate's acts in deprivation of civil rights. *51 ALR Fed 285*.

APPENDIX 21



DANIELS v. WILLIAMS

No. 84-5872

SUPREME COURT OF THE UNITED STATES

474 U.S. 327; 106 S. Ct. 662; 88 L. Ed. 2d 662; 1986 U.S. LEXIS 43; 54 U.S.L.W. 4090

November 6, 1985, Argued

January 21, 1986, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: 748 F.2d 229, affirmed

CASE SUMMARY:

PROCEDURAL POSTURE: In an action that petitioner, a state prisoner, brought under 42 U.S.C.S. § 1983, the prisoner sought review of a judgment in which the Court of Appeals for the Fourth Circuit affirmed the district court's decision to grant summary judgment in favor of respondent, a correctional officer.

OVERVIEW: The prisoner sought to recover damages for personal injuries that he sustained when he slipped on a pillow case that had been negligently left on a stairway by the correctional officer. The prisoner's § 1983 claim rested on the contention that the officer's negligence deprived the prisoner of his *Fourteenth Amendment* liberty interest in freedom from bodily injury. The United States Supreme Court held that the prisoner's action was properly dismissed because a prison official's mere lack

of due care did not constitute a deprivation of liberty under the *Due Process Clause of the Fourteenth Amendment*.

OUTCOME: The Court affirmed the judgment of the court of appeals.

LexisNexis(R) Headnotes

Civil Rights Law > Section 1983 Actions > Scope Governments > Local Governments > Claims By & Against Torts > Damages > Compensatory Damages > Property Damage > Award Calculations

[HN1] The *Due Process Clause of the Fourteenth Amendment* is not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.

Civil Rights Law > Practice & Procedure > Criminal Penalties

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Civil Rights Law > Prisoner Rights > Discrimination

Civil Rights Law > Section 1983 Actions > Scope

[HN2] 42 U.S.C.S. § 1983, unlike its criminal counterpart, 18 U.S.C.S. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. But in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN3] *Parratt v. Taylor*, 451 U.S. 527 (1981), is overruled to the extent that it states that mere lack of due care by a state official may "deprive" an individual of life, liberty, or property under the *Fourteenth Amendment*.

**Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Transportation Law > Private Vehicles > Operator Licenses > Revocation & Suspension**

[HN4] The *Due Process Clause of the Fourteenth Amendment* provides: Nor shall any state deprive any person of life, liberty, or property, without due process of law. Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. The Due Process Clause was intended to secure the individual from the arbitrary exercise of the powers of government. By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., it serves to prevent governmental power from being used for purposes of oppression.

Civil Rights Law > Prisoner Rights > Medical Treatment

Constitutional Law > Substantive Due Process > Scope of Protection

Torts > Malpractice & Professional Liability > Healthcare Providers

[HN5] The protections of the *Due Process Clause of the Fourteenth Amendment* are not triggered by a lack of due

care by prison officials. Where a government official's act causing injury to life, liberty, or property is merely negligent no procedure for compensation is constitutionally required.

**Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Governments > Local Governments > Claims By & Against**

Torts > Negligence > Duty > General Overview

[HN6] Jailers may owe a special duty of care to those in their custody under state tort law, but the *Due Process Clause of the Fourteenth Amendment* does not embrace such a tort law concept. Whatever other provisions of state law or general jurisprudence that a prisoner may invoke to recover damages for injuries resulting from the negligence of a prison official, the *Fourteenth Amendment to the United States Constitution* does not afford him a remedy.

DECISION:

Due process clause held not implicated by jail officer's negligent acts causing inmate to slip and fall.

SUMMARY:

An inmate in a local jail, who had supposedly slipped on a pillow negligently left on a stairway by a corrections officer, filed suit, in the United States District Court for the Eastern District of Virginia, for alleged violations of his constitutional rights, claiming that the officer had negligently deprived him of his liberty interest in freedom from bodily injury, and that this deprivation was without due process of law because the officer claimed that he would be entitled to a defense of sovereign immunity in a state tort action. The District Court granted the officer's motion for summary judgment. A panel of the United States Court of Appeals for the Fourth Circuit affirmed, finding that the inmate would not be deprived of a meaningful opportunity to present his case in state court even if the officer could make out a defense of sovereign immunity (720 F2d 792). On rehearing en banc, the Court of Appeals again affirmed, holding that the negligent infliction of bodily injury does not constitute a deprivation of any interest protected by the due process clause, and that the inmate had an adequate remedy in state court, since the ministerial nature of the officer's duties would have precluded him from successfully defending on the ground

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of sovereign immunity (748 F2d 229).

On certiorari, the United States Supreme Court affirmed. In an opinion by Rehnquist, J., joined by Burger, Ch. J., and Brennan, White, Powell, and O'Connor, JJ., it was held, overruling in part *Parratt v Taylor* (1981) 451 US 527, 68 L Ed 2d 420, 101 S Ct 1908, that the due process clause is not implicated by negligent acts of state officials which cause unintended loss or injury, as these do not "deprive" a person of life, liberty, or property under the *Fourteenth Amendment*.

Marshall, J., concurred in the result.

Blackmun, J., concurred in the judgment, referring to his dissenting opinion in *Davidson v Cannon*, 88 L Ed 2d, at page 677, *infra*.

Stevens, J., concurred in the judgment, (1) expressing the view that negligence by state actors may result in a deprivation of liberty under the due process clause, but that state procedures for redressing such injuries must also be shown to be constitutionally inadequate in order to support a claim for denial of procedural due process, and (2) deferring to the finding of the Court of Appeals that sovereign immunity would not have defeated a state law tort claim in this case.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §513

due process -- state officials -- negligent injury --

Headnote:[1A][1B]

The due process clause is not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property; mere lack of due care by a state official does not "deprive" an individual of life, liberty, or property under the *Fourteenth Amendment*. (Stevens, J., dissented from this holding.)

[***LEdHN2]

CIVIL RIGHTS §29

liability -- state of mind --

Headnote:[2]

42 USCS 1983, unlike its criminal counterpart, 18 USCS 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right; but in any given 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right, and, depending on the right, merely negligent conduct may not be enough to state a claim.

[***LEdHN3]

CONSTITUTIONAL LAW §514

meaning of due process -- arbitrary exercises of power --

Headnote:[3]

The *due process clause of the Fourteenth Amendment* has historically been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property, reflecting the traditional and common-sense notion that it is intended to secure the individual from the arbitrary exercise of the powers of government.

[***LEdHN4]

CIVIL RIGHTS §46

CONSTITUTIONAL LAW §528.5

due process -- state prisoners -- negligently inflicted injury --

Headnote:[4A][4B]

The due process clause does not demand that the state protect those whom it incarcerates by exercising reasonable care to assure their safety and by compensating them for negligently inflicted injury; thus, the *Fourteenth Amendment* does not afford a remedy to an inmate who alleges, in an action under 42 USCS 1983, that he was injured by the negligence of a custodial official at a city jail who supposedly left a pillow on a stairway on which the inmate slipped and fell.

SYLLABUS

Petitioner brought an action in Federal District Court under 42 U. S. C. § 1983, seeking to recover damages for injuries allegedly sustained when, while an

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inmate in a Richmond, Virginia, jail, he slipped on a pillow negligently left on a stairway by respondent sheriff's deputy. Petitioner contends that such negligence deprived him of his "liberty" interest in freedom from bodily injury "without due process of law" within the meaning of the *Due Process Clause of the Fourteenth Amendment*. The District Court granted respondent's motion for summary judgment, and the Court of Appeals affirmed.

Held: The Due Process Clause is not implicated by a state official's *negligent* act causing unintended loss of or injury to life, liberty, or property. Pp. 329-336.

(a) The Due Process Clause was intended to secure an individual from an abuse of power by government officials. Far from an abuse of power, lack of due care, such as respondent's alleged negligence here, suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Due Process Clause would trivialize the centuries-old principle of due process of law. *Parratt v. Taylor*, 451 U.S. 527, overruled to the extent that it states otherwise. Pp. 329-332.

(b) The Constitution does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. While the Due Process Clause speaks to some facets of the relationship between jailers and inmates, its protections are not triggered by lack of due care by the jailers. Jailers may owe a special duty of care under state tort law to those in their custody, but the Due Process Clause does not embrace such a tort law concept. Pp. 332-336.

COUNSEL: Stephen Allan Saltzburg argued the cause and filed briefs for petitioner.

James Walter Hopper argued the cause and filed a brief for respondent.

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and O'CONNOR, JJ., joined. MARSHALL, J., concurred in the result. BLACKMUN, J., post, p. 336, and STEVENS, J., post, p. 336, filed opinions concurring in the judgment.

OPINION BY: REHNQUIST

OPINION

[*328] [***666] [**663] JUSTICE REHNQUIST delivered the opinion of the Court.

[***LEdHR1A] [1A]In *Parratt v. Taylor*, 451 U.S. 527 (1981), a state prisoner sued under 42 U. S. C. § 1983, claiming that prison officials had negligently deprived him of his property without due process of law. After deciding that § 1983 contains no independent state-of-mind requirement, we concluded that although petitioner had been "deprived" of property within the meaning of the *Due Process Clause of the Fourteenth Amendment*, the State's postdeprivation tort remedy provided the process that was due. Petitioner's claim in this case, which also rests on an alleged *Fourteenth Amendment* "deprivation" caused by the negligent conduct of a prison official, leads us to reconsider our statement in *Parratt* that "the alleged loss, even though negligently caused, amounted to a deprivation." *Id.*, at 536-537. We conclude that [HN1] the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.

In this § 1983 action, petitioner seeks to recover damages for back and ankle injuries allegedly sustained when he fell on a prison stairway. He claims that, while an inmate at the city jail in Richmond, Virginia, he slipped on a pillow negligently left on the stairs by respondent, a correctional deputy stationed at the jail. Respondent's negligence, the argument runs, "deprived" petitioner of his "liberty" interest in freedom from bodily injury, see *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); because respondent maintains that he is entitled to the defense of sovereign immunity in a state tort suit, petitioner is without an "adequate" state remedy, cf. *Hudson v. Palmer*, 468 U.S. 517, 534-536 (1984). Accordingly, the deprivation of liberty was without "due process of law."

[*329] The District Court granted respondent's motion for summary judgment. A panel of the Court of Appeals for the Fourth Circuit affirmed, concluding that even if respondent could make out an immunity defense in state court, petitioner would not be deprived of a meaningful opportunity to present his case. 720 F.2d 792 (1983). On rehearing, the en banc Court of Appeals affirmed the judgment of the District Court, but under reasoning different from that of the panel. 748 F.2d 229 [**664] (1984). First, a 5-4 majority ruled that negligent

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infliction of bodily injury, unlike the negligent loss of property in *Parratt*, does not constitute a deprivation of any interest protected by the Due Process Clause. The majority therefore believed that the postdeprivation process mandated by *Parratt* for property losses was not required. Second, the en banc court unanimously decided that even if a prisoner is entitled to some remedy for personal injuries attributable to the negligence of state officials, [***667] *Parratt* would bar petitioner's claim if the State provided an adequate postdeprivation remedy. Finally, a 6-3 majority concluded that petitioner had an adequate remedy in state court, even though respondent asserted that he would rely on sovereign immunity as a defense in a state suit. The majority apparently believed that respondent's sovereign immunity defense would fail under Virginia law.

Because of the inconsistent approaches taken by lower courts in determining when tortious conduct by state officials rises to the level of a constitutional tort, see *Jackson v. Joliet*, 465 U.S. 1049, 1050 (1984) (WHITE, J., dissenting from denial of certiorari) (collecting cases), and the apparent lack of adequate guidance from this Court, we granted certiorari. 469 U.S. 1207 (1985). We now affirm.

[***LEdHR2] [2]In *Parratt v. Taylor*, we granted certiorari, as we had twice before, "to decide whether mere negligence will support a claim for relief under § 1983." 451 U.S., at 532. After examining the language, legislative history, and prior interpretations of the statute, we concluded that § 1983, unlike [*330] its criminal counterpart, 18 U. S. C. § 242, [HN2] contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. *Id.*, at 534-535. We adhere to that conclusion. But in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim. See, e. g., *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under the *Equal Protection Clause*); *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) ("deliberate indifference" to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under the *Eighth Amendment*).

[***LEdHR1B] [1B]In *Parratt*, before concluding that Nebraska's tort remedy provided all the process that was

due, we said that the loss of the prisoner's hobby kit, "even though negligently caused, amounted to a deprivation [under the Due Process Clause]." 451 U.S., at 536-537. JUSTICE POWELL, concurring in the result, criticized the majority for "[passing] over" this important question of the state of mind required to constitute a "deprivation" of property. *Id.*, at 547. He argued that negligent acts by state officials, though causing loss of property, are not actionable under the Due Process Clause. To JUSTICE POWELL, mere negligence could not "[work] a deprivation in the constitutional sense." *Id.*, at 548 (emphasis in original). Not only does the word "deprive" in the Due Process Clause connote more than a negligent act, but we should not "open the federal courts to lawsuits where there has been no affirmative abuse of power." *Id.*, at 548-549; see also *id.*, at 545 (Stewart, J., concurring) ("To hold that this kind of loss is a deprivation of property within the meaning of the *Fourteenth* [***668] *Amendment* seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution"). Upon reflection, we agree and [HN3] overrule *Parratt* to the extent that it states that mere lack of due care by a state [*331] official may "deprive" an individual of life, liberty, or property under the *Fourteenth Amendment*.

[**665] [***LEdHR3] [3][HN4] The *Due Process Clause of the Fourteenth Amendment* provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. E. g., *Davidson v. New Orleans*, 96 U.S. 97 (1878) (assessment of real estate); *Rochin v. California*, 342 U.S. 165 (1952) (stomach pumping); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of driver's license); *Ingraham v. Wright*, 430 U.S. 651 (1977) (padding student); *Hudson v. Palmer*, 468 U.S. 517 (1984) (intentional destruction of inmate's property). No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, see Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911), was "intended to secure the individual from the arbitrary exercise of the powers of

474 U.S. 327, *331; 106 S. Ct. 662, **665;
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government," *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819)). See also *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)"); *Parratt*, *supra*, at 549 (POWELL, J., concurring in result). By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, *e. g.*, *Rochin*, *supra*, it serves to prevent governmental power from being "used for purposes of oppression," *Murray's Lessee* [*332] *v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856) (discussing *Due Process Clause of Fifth Amendment*).

We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the *Fourteenth Amendment* would trivialize the centuries-old principle of due process of law.

The *Fourteenth Amendment* is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that [***669] Government and the States, and to secure certain individual rights against both State and Federal Government. When dealing with a claim that such a document creates a right in prisoners to sue a government official because he negligently created an unsafe condition in the prison, we bear in mind Chief Justice Marshall's admonition that "we must never forget, that it is a constitution we are expounding," *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819) (emphasis in original). Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "would make of the *Fourteenth Amendment* a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul v. Davis*, 424 U.S. 693, 701 (1976),

[**666] quoted in *Parratt v. Taylor*, 451 U.S., at 544.

[***LEdHR4A] [4A]The only tie between the facts of this case and anything governmental in nature is the fact that respondent was a sheriff's deputy at the Richmond city jail and petitioner was an inmate confined in that jail. But while the *Due Process Clause of the Fourteenth Amendment* obviously speaks to some facets of this relationship, see, *e. g.*, *Wolff v. McDonnell*, [*333] *supra*, we do not believe [HN5] its protections are triggered by lack of due care by prison officials. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), and "false imprisonment does not become a violation of the *Fourteenth Amendment* merely because the defendant is a state official." *Baker v. McCollan*, 443 U.S. 137, 146 (1979). Where a government official's act causing injury to life, liberty, or property is merely negligent, "no procedure for compensation is constitutionally required." *Parratt*, *supra*, at 548 (POWELL, J., concurring in result) (emphasis added).¹

1 Accordingly, we need not decide whether, as petitioner contends, the possibility of a sovereign immunity defense in a Virginia tort suit would render that remedy "inadequate" under *Parratt* and *Hudson v. Palmer*, 468 U.S. 517 (1984).

That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests. The enactment of tort claim statutes, for example, reflects the view that injuries caused by such negligence should generally be redressed.² It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.

2 See, *e. g.*, the Virginia Tort Claims Act, *Va. Code* § 8.01-195.1 *et seq.* (1984), which applies only to actions accruing on or after July 1, 1982, and hence is inapplicable to this case.

In support of his claim that negligent conduct can give rise to a due process "deprivation," petitioner makes several arguments, none of which we find persuasive. He states, [***670] for example, that "it is almost certain that some negligence claims are within § 1983," and cites as an example the failure of a State to comply with the

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procedural requirements of *Wolff v. McDonnell*, *supra*, before depriving an inmate of good-time credit. We think the relevant action of the prison [*334] officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process Clause. But we need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care in order to hold, as we do, that such conduct does not implicate the *Due Process Clause of the Fourteenth Amendment*.

Petitioner also suggests that artful litigants, undeterred by a requirement that they plead more than mere negligence, will often be able to allege sufficient facts to support a claim of intentional deprivation. In the instant case, for example, petitioner notes that he could have alleged that the pillow was left on the stairs with the intention of harming him. This invitation to "artful" pleading, petitioner contends, would engender sticky (and needless) disputes over what is fairly pleaded. What's more, requiring complainants to allege something more than negligence would raise serious questions about what "more" than negligence -- intent, recklessness, or "gross negligence" -- is required,³ and indeed about what these elusive terms mean. [**667] See Reply Brief for Petitioner 9 ("what terms like willful, wanton, reckless or gross negligence mean" has "left the finest scholars puzzled"). But even if accurate, petitioner's observations do not carry the day. In the first place, many branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary:

"I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized." [*335] *LeRoy Fibre Co. v. Chicago, M. & St. P. R. Co.*, 232 U.S. 340, 354 (1914) (Holmes, J., partially concurring).

More important, the difference between one end of the spectrum -- negligence -- and the other -- intent -- is abundantly clear. See O. Holmes, *The Common Law* 3 (1923). In any event, we decline to trivialize the Due Process Clause in an effort to simplify constitutional litigation.

3 Despite his claim about what he might have pleaded, petitioner concedes that respondent was at most negligent. Accordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.

Finally, citing *South v. Maryland*, 18 How. 396 (1856), petitioner argues that respondent's conduct, even if merely negligent, breached a sheriff's "special duty of care" for those in his custody. Reply Brief for Petitioner 14. The Due Process Clause, petitioner notes, "was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the crown." *Ingraham v. Wright*, 430 U.S., at 672-673. And *South v. Maryland* suggests that one such protection was [***671] the right to recover against a sheriff for breach of his ministerial duty to provide for the safety of prisoners in his custody. 18 How., at 402-403. Due process demands that the State protect those whom it incarcerates by exercising reasonable care to assure their safety and by compensating them for negligently inflicted injury.

[***LEdHR4B] [4B]We disagree. We read *South v. Maryland*, *supra*, an action brought under federal diversity jurisdiction on a Maryland sheriff's bond, as stating no more than what this Court thought to be the principles of common law and Maryland law applicable to that case; it is not cast at all in terms of constitutional law, and indeed could not have been, since at the time it was rendered there was no due process clause applicable to the States. Petitioner's citation to *Ingraham v. Wright* does not support the notion that all common-law duties owed by government actors were somehow constitutionalized by the *Fourteenth Amendment*. [HN6] Jailers may owe a special duty of care to those in their custody under state tort law, see *Restatement (Second) of Torts* § 314A(4) (1965), but for the reasons previously stated we reject the contention that the [*336] *Due Process Clause of the Fourteenth Amendment* embraces such a tort law concept. Petitioner alleges that he was injured by the negligence of respondent, a custodial official at the city jail. Whatever other provisions of state law or general jurisprudence he may rightly invoke, the *Fourteenth Amendment to the United States Constitution* does not afford him a remedy.

Affirmed.

JUSTICE MARSHALL concurs in the result.

CONCUR BY: BLACKMUN; STEVENS

CONCUR

JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. See my opinion in dissent in *Davidson v. Cannon*, *post*, p. 349.

JUSTICE STEVENS, concurring in the judgments. *

* [This opinion applies also to *Davidson v. Cannon et al.*, No. 84-6470, *post*, p. 344.]

Two prisoners raise similar claims in these two cases. Both seek to recover for personal injuries suffered, in part, from what they allege was negligence by state officials. Both characterize their injuries as "deprivations of liberty" and both invoke 42 U. S. C. § 1983 as a basis for their claims.

Prisoner Roy Daniels was injured when he slipped on a newspaper and pillows left on a stairway in the Virginia jail where he is incarcerated; he alleges state negligence in the presence of the objects on the stairs. Prisoner Robert Davidson suffered injury when he was attacked by another inmate in the New Jersey prison where he is incarcerated; he alleges (and proved at trial) state negligence in the failure of prison authorities to prevent the assault after he had written a note expressing apprehension about the inmate who ultimately assaulted him. I agree with the majority that petitioners cannot prevail under § 1983. I do not agree, however, that it is necessary either to redefine the [***672] meaning of "deprive" in the *Fourteenth Amendment*,¹ or to repudiate [*337] the reasoning of *Parratt v. Taylor*, 451 U.S. 527 (1981), to support this conclusion.

1 "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const., Amdt. 14.

We should begin by identifying the precise constitutional claims that petitioners have advanced. It is not enough to note that they rely on the *Due Process Clause of the Fourteenth Amendment*, for that Clause is the source of three different kinds of constitutional protection. First, it incorporates specific protections defined in the *Bill of Rights*. Thus, the State, as well as

the Federal Government, must comply with the commands in the *First*² and *Eighth*³ *Amendments*; so too, the State must respect the guarantees in the *Fourth*,⁴ *Fifth*,⁵ and *Sixth*⁶ *Amendments*. Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." *Ante*, at 331.⁷ Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process": the State may not execute, imprison, or fine a defendant without giving him a fair trial,⁸ nor may it take property without providing appropriate procedural safeguards.⁹

2 See, e. g., *Douglas v. Jeannette*, 319 U.S. 157 (1943).

3 See, e. g., *Robinson v. California*, 370 U.S. 660 (1962).

4 See, e. g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

5 See, e. g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (right to protection from compelled self-incrimination applies to States); *Benton v. Maryland*, 395 U.S. 784 (1969) (right to protection from double jeopardy applies to States).

6 See, e. g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial applies to States).

7 See also *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Youngberg v. Romeo*, 457 U.S. 307 (1982).

8 See, e. g., *Groppi v. Leslie*, 404 U.S. 496 (1972); *In re Oliver*, 333 U.S. 257 (1948).

9 See, e. g., *Fuentes v. Shevin*, 407 U.S. 67 (1972).

The type of *Fourteenth Amendment* interest that is implicated has important effects on the nature of the constitutional claim and the availability of § 1983 relief. If the claim is in [*338] the first category (a violation of one of the specific constitutional guarantees of the *Bill of Rights*), a plaintiff may invoke § 1983 regardless of the availability of a state remedy.¹⁰ As explained in *Monroe v. Pape*, 365 U.S. 167 (1961), this conclusion derives from the fact that the statute -- the Ku Klux Act of 1871 -- was intended to provide a federal remedy for the violation of a federal constitutional right. Thus, when the *Fourth Amendment* is violated, as in *Pape*, the provision of an independent federal remedy under [***673] § 1983 is necessary to satisfy the purpose of the statute.

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10 See, e. g., *Monroe v. Pape*, 365 U.S. 167 (1961) (§ 1983 action for *Fourth Amendment* violation); *Smith v. Wade*, 461 U.S. 30 (1983) (§ 1983 action for *Eighth Amendment* violation). See generally *McNeese v. Board of Education*, 373 U.S. 668, 672 (1963) (§ 1983 is "supplementary to any remedy any State might have").

Similarly, if the claim is in the second category (a violation of the substantive component of the Due Process Clause), a plaintiff may also invoke § 1983 regardless of the availability of a state remedy.¹¹ For, in that category, no less than with the provisions of the *Bill of Rights*, if the Federal Constitution prohibits a State from taking certain actions "regardless of the fairness of the procedures used to implement them," the constitutional violation is complete as soon as the prohibited action is taken; the independent federal remedy is then authorized by the language and legislative history of § 1983.

11 Cf. *Parratt v. Taylor*, 451 U.S. 527, 545 (1981) (BLACKMUN, J., concurring); *Roe v. Wade*, 410 U.S. 113 (1973).

A claim in the third category -- a procedural due process claim -- is fundamentally different. In such a case, the deprivation may be entirely legitimate -- a State may have every right to discharge a teacher or punish a student -- but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards. The constitutional duty to provide fair procedures gives the citizen the opportunity to try to prevent the deprivation from happening, but the deprivation itself does not necessarily reflect any [*339] "abuse" of state power. Similarly, a deprivation may be the consequence of a mistake or a negligent act, and the State may violate the Constitution by failing to provide an appropriate procedural response. In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty *without due process of law* -- without adequate procedures.

Thus, even though the State may have every right to deprive a person of his property or his liberty, the individual may nevertheless be able to allege a valid § 1983 due process claim, perhaps because a predeprivation hearing must be held,¹² or because the state procedure itself is fundamentally flawed.¹³ So too, even though a

deprivation may be unauthorized, a procedural due process claim may be raised if it challenges the State's procedures for preventing or redressing the deprivation. However, a complaint does not state a valid procedural due process objection -- and a valid § 1983 claim -- if it does not include a challenge to the fundamental fairness of the State's procedures. In consequence, when a predeprivation hearing is clearly not feasible,¹⁴ when the regime of state tort law provides a constitutionally [***674] unobjectionable system of recovery for the deprivation of property or liberty, and when there is no other challenge to the State's procedures, a valid § 1983 claim is not stated. For, unlike cases in the other two categories -- those in which the alleged [*340] deprivation violates a substantive federal right -- if a procedural due process claim lacks a colorable objection to the validity of the State's procedures, no constitutional violation has been alleged.¹⁵

12 See, e. g., *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985); *Carey v. Piphus*, 435 U.S. 247 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975). Cf. *Groppi*, *supra*.

13 Cf. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (postdeprivation state remedy is inadequate when challenge is to "the state system itself"); *Baker v. McCollan*, 443 U.S. 137, 156 (1979) (STEVENS, J., dissenting).

14 See *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) ("[When] deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur"); *Parratt v. Taylor*, *supra*.

15 See *id.*, at 543-544.

Petitioners' claims are not of the first kind. Neither Daniels nor Davidson argues in this Court that the prison authorities' actions violated specific constitutional guarantees incorporated by the *Fourteenth Amendment*. Neither now claims, for instance, that his rights under the *Eighth Amendment* were violated. Similarly, I do not believe petitioners have raised a colorable violation of "substantive due process."¹⁶ Rather, their claims are of the third kind: Daniels and Davidson attack the validity of the procedures that Virginia and New Jersey, respectively, provide for prisoners who seek redress for physical injury caused by the negligence of corrections officers.

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16 Davidson explicitly disavows a substantive due process claim. See Brief for Petitioner in No. 84-6470, p. 7 ("[Petitioner] frames his claim here purely in terms of procedural due process"). At oral argument, counsel for Daniels did suggest that he was pursuing a substantive due process claim. Tr. of Oral Arg. in No. 84-5872, p. 22. However, the Court of Appeals viewed Daniels' claim as a procedural due process argument, see *748 F.2d 229, 230, n. 1 (CA4 1984)* ("There is no claim of any substantive due process violation"), and Daniels did not dispute this characterization in his petition for certiorari or in his brief on the merits.

In any event, to the extent that petitioners' arguments about the special obligations of prison officials may be read as a substantive due process claim, I agree with the Court, *ante*, at 335-336, that the sheriff's "special duty of care" recognized in *South v. Maryland, 18 How. 396 (1856)*, does not have its source in the Federal Constitution. In these circumstances, it seems to me, the substantive constitutional duties of prison officials to prisoners are defined by the *Eighth Amendment*, not by substantive due process. Cf. *United States ex rel. Miller v. Twomey, 479 F.2d 701, 719-721 (CA7 1973)* (analyzing prison officials' responsibilities to prevent inmate assaults under the *Eighth Amendment*), cert. denied *sub nom. Gutierrez v. Department of Public Safety of Illinois, 414 U.S. 1146 (1974)*.

I would not reject these claims, as the Court does, by attempting to fashion a new definition of the term "deprivation" [*341] and excluding negligence from its scope. No serious question has been raised about the presence of "state action" in the allegations of negligence, 17 and the interest in freedom from bodily harm surely qualifies as an interest in "liberty." Thus, the only question is whether negligence by state actors can result in a deprivation. "Deprivation," it seems to me, identifies, not the actor's state of mind, but the victim's infringement or loss. The harm to a prisoner is the same whether a pillow is left on a stair negligently, recklessly, or intentionally; so too, the harm resulting to a prisoner from an attack is the same whether his request for protection is ignored negligently, recklessly, or deliberately. In each instance, the prisoner is losing -- being "deprived" [***675] of -- an aspect of liberty as

the result, in part, of a form of state action.

17 Respondents in *Davidson* do raise a state-action objection in one sentence, Brief for Respondents in No. 84-6470, p. 13, n., but that bare reference is inadequate to mount a challenge to the undisturbed District Court finding of state action.

Thus, I would characterize each loss as a "deprivation" of liberty. Because the cases raise only procedural due process claims, however, it is also necessary to examine the nature of petitioners' challenges to the state procedures. To prevail, petitioners must demonstrate that the state procedures for redressing injuries of this kind are constitutionally inadequate. Petitioners must show that they contain a defect so serious that we can characterize the procedures as fundamentally unfair, a defect so basic that we are forced to conclude that the deprivation occurred without due process.

Daniels' claim is essentially the same as the claim we rejected in *Parratt*. The Court of Appeals for the Fourth Circuit determined that Daniels had a remedy for the claimed negligence under Virginia law. Although Daniels vigorously argues that sovereign immunity would have defeated his claim, the Fourth Circuit found to the contrary, and it is our settled practice to defer to the Courts of Appeals on questions [*342] of state law.¹⁸ It is true that *Parratt* involved an injury to "property" and that Daniels' case involves an injury to "liberty," but, in both cases, the plaintiff claimed nothing more than a "procedural due process" violation. In both cases, a predeprivation hearing was definitionally impossible.¹⁹ And, in both cases, the plaintiff had state remedies that permitted recovery if state negligence was established. Thus, a straightforward application of *Parratt* defeats Daniels' claim.

18 See *Haring v. Prosise, 462 U.S. 306, 314, n. 8 (1983)*; *Leroy v. Great Western United Corp., 443 U.S. 173, 181, n. 11 (1979)*; *Bishop v. Wood, 426 U.S. 341, 345-347 (1976)*; *Propper v. Clark, 337 U.S. 472, 486-487 (1949)*.

19 It borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.

Davidson's claim raises a question not specifically

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addressed in *Parratt*. According to the Third Circuit, no state remedy was available because a New Jersey statute prohibits prisoner recovery from state employees for injuries inflicted by other prisoners. Thus, *Davidson* puts the question whether a state policy of noncompensability for certain types of harm, in which state action may play a role, renders a state procedure constitutionally defective. In my judgment, a state policy that defeats recovery does not, in itself, carry that consequence. Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation. Thus, defenses such as contributory negligence or statutes of limitations may defeat recovery in particular cases without raising any question about the constitutionality of a State's procedures for disposing of tort litigation. Similarly, in my judgment, the mere fact that a State elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate. There is no reason to believe that the *Due Process Clause of the Fourteenth Amendment* [*343] and the legislation enacted pursuant to § 5 of that Amendment [***676] should be construed to suggest that the doctrine of sovereign immunity renders a state procedure fundamentally unfair.²⁰ *Davidson's* challenge has been only to the fact of sovereign immunity; he has not challenged the difference in treatment of a prisoner assaulted by a prisoner and a nonprisoner assaulted by a prisoner, and I express no comment on the fairness of that differentiation.

²⁰ In *Martinez v. California*, 444 U.S. 277 (1980), we held that California's immunity statute did not violate the Due Process Clause simply because it operated to defeat a tort claim arising under state law. The fact that an immunity statute does not give rise to a procedural due process claim does not, of course, mean that a State's doctrine of sovereign immunity can protect

conduct that violates a federal constitutional guarantee; obviously it cannot, see *Martinez, supra*, at 284, n. 8, quoting *Hampton v. Chicago*, 484 F.2d 602, 607 (CA7 1973), cert. denied, 415 U.S. 917 (1974).

Thus, although I believe that the harms alleged by Daniels and proved by *Davidson* qualify as deprivations of liberty, I am not persuaded that either has raised a violation of the *Due Process Clause of the Fourteenth Amendment*. I therefore concur in the judgments.

REFERENCES

15 *Am Jur 2d*, *Civil Rights* 16, 19, 20; 16A *Am Jur 2d*, *Constitutional Law* 812, 822, 825, 839; 60 *Am Jur 2d*, *Penal and Correctional Institutions* 17 et seq.

5 Federal Procedural Forms, L Ed, *Civil Rights* 10:151 et seq.

22 *Am Jur Trials* 1, *Prisoners' Rights Litigation*

USCS *Constitution, 14th Amendment*; 42 USCS 1983

US L Ed Digest, *Civil Rights* 29, 46; *Constitutional Law* 513, 528.5

L Ed Index to Annos, *Civil Rights; Due Process of Law; Prisons and Prisoners*

ALR Quick Index, *Discrimination; Due Process of Law; Prisons and Convicts*

Federal Quick Index, *Civil Rights; Due Process of Law; Prisons and Prisoners*

Annotation References:

Supreme Court's construction of Civil Rights Act of 1871 (42 USCS 1983) providing private right of action for violation of federal rights. 43 L Ed 2d 833.

APPENDIX 22



DUNN, GOVERNOR OF TENNESSEE, ET AL. v. BLUMSTEIN

No. 70-13

SUPREME COURT OF THE UNITED STATES

405 U.S. 330; 92 S. Ct. 995; 31 L. Ed. 2d 274; 1972 U.S. LEXIS 75

November 16, 1971, Argued

March 21, 1972, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

DISPOSITION: 337 F.Supp. 323, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner State sought review from a judgment of a three-judge panel of the United States District Court for the Middle District of Tennessee, which held that petitioner's durational residence requirements for state voters were unconstitutional, because they impermissibly interfered with the right to vote and penalized some residents because of recent interstate movement.

OVERVIEW: Petitioner challenged the decision of a three-judge district court panel, striking down a durational residence requirement for Tennessee voters as unconstitutionally restricting the fundamental rights to vote and to travel. In order to register to vote, Tennessee residents were required by statute to have lived in the State for 12 months, and in the county for three months,

preceding the election. The court held that petitioner failed to show a substantial and compelling state interest for imposing durational residence requirements that impinged upon the unconditional fundamental personal rights to vote and to travel. Applying a strict equal protection test, the court rejected petitioner's arguments that its interest in deterring election fraud and in ensuring intelligent voter participation justified durational voting restrictions. Petitioner's statutory oath-swearing system adequately ensured that voters were bona fide state residents and operated to deter fraud. In enacting durational voting requirements, petitioner failed to use the least drastic means to achieve its purpose.

OUTCOME: The court affirmed the judgment.

LexisNexis(R) Headnotes

Governments > Local Governments > Elections
Governments > State & Territorial Governments > Elections

[HN1] See *Tenn. Const. art. IV, § 1.*

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Governments > Local Governments > Elections
Governments > State & Territorial Governments > Elections

[HN2] See Tenn. Code Ann. § 2-201 (Supp. 1970).

Governments > Local Governments > Elections
Governments > State & Territorial Governments > Elections

[HN3] See Tenn. Code Ann. § 2-304 (Supp. 1970).

Constitutional Law > Equal Protection > Level of Review

Constitutional Law > Equal Protection > Scope of Protection

[HN4] To decide whether a law violates the *Equal Protection Clause*, the court looks, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Constitutional Law > Equal Protection > Scope of Protection

Education Law > Administration & Operation > Student Admissions > Residency Requirements

[HN5] The State must show a substantial and compelling reason for imposing durational residence requirements on the voting franchise.

Constitutional Law > Elections, Terms & Voting > General Overview

[HN6] Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of a fundamental political right, preservative of all rights.

Constitutional Law > Elections, Terms & Voting > General Overview

Constitutional Law > Equal Protection > Scope of Protection

[HN7] A citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. This equal right to vote, is not absolute; the states have the power to impose voter

qualifications, and to regulate access to the franchise in other ways. But, as a general matter, before that right to vote can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.

Constitutional Law > Equal Protection > Level of Review

Governments > Local Governments > Elections
Governments > State & Territorial Governments > Elections

[HN8] If a challenged statute grants the right to vote to some citizens and denies the franchise to others, the court must determine whether the exclusions are necessary to promote a compelling state interest.

Constitutional Law > Bill of Rights > General Overview
Transportation Law > Right to Travel

[HN9] Freedom to travel throughout the United States has long been recognized as a basic right under the United States Constitution. And it is clear that the freedom to travel includes the freedom to enter and abide in any state in the union.

Constitutional Law > Bill of Rights > General Overview
Transportation Law > Right to Travel

[HN10] Since the right to travel is a constitutionally protected right, any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

Constitutional Law > Bill of Rights > General Overview

[HN11] A state may not impose a penalty upon those who exercise a right guaranteed by the United States Constitution. Constitutional rights would be of little value if they could be indirectly denied.

Constitutional Law > Bill of Rights > General Overview
Governments > Local Governments > Elections
Governments > State & Territorial Governments > Elections

[HN12] The right to travel is an unconditional personal right, a right whose exercise may not be conditioned. Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that

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right.

Constitutional Law > Equal Protection > Level of Review

Constitutional Law > Equal Protection > Scope of Protection

Governments > Local Governments > Elections

[HN13] Durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.

Constitutional Law > Equal Protection > Level of Review

Governments > Local Governments > Elections

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

[HN14] It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose less drastic means.

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

[HN15] The States have the power to require that voters be bona fide residents of the relevant political subdivision. An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny. But durational residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent substantial state interest standard.

Governments > Local Governments > Elections

Governments > State & Territorial Governments >

Elections

[HN16] The qualifications of the would-be voter in Tennessee are determined when he registers to vote, which he may do until 30 days before the election. Tenn. Code Ann. § 2-304. His qualifications, including bona fide residence, are established then by oath. Tenn. Code Ann. § 2-309.

Constitutional Law > Equal Protection > Scope of Protection

[HN17] States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

[HN18] Tennessee's basic test for bona fide residence is (1) an intention to stay indefinitely in a place without a present intention of removing therefrom, joined with (2) some objective indication consistent with that intent.

Constitutional Law > Elections, Terms & Voting > Race-Based Voting Restrictions

Constitutional Law > Elections, Terms & Voting > Gender & Sex Voting Restrictions

Constitutional Law > Equal Protection > Scope of Protection

[HN19] Differences of opinion may not be the basis for excluding any group or person from the franchise. The fact that newly arrived citizens may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home state.

SUMMARY:

A Tennessee resident sued in the United States District Court for the Middle District of Tennessee, challenging Tennessee constitutional and statutory provisions which precluded him from voting in state elections because he would not have been, at the time of the next election, a Tennessee resident for 1 year, although he would have met the requirement of 3 months' county residency by that time. A three-judge court concluded that both durational residence requirements

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were unconstitutional. (337 F Supp 323.)

On direct appeal, the United States Supreme Court affirmed. In an opinion by Marshall, J., expressing the views of five members of the court, it was held that the state's durational residency requirements violated the *equal protection clause* because they were unnecessary to promote a compelling interest, either to prevent fraudulent voting by non-residents or to further the goal of having knowledgeable voters.

Blackmun, J., concurred in the result because he did not wish to take a position broader than that necessary to decide the case.

Burger, Ch. J., dissented on the ground that the requirements were reasonable.

Powell and Rehnquist, JJ., did not participate.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

COURTS §763

moot questions --

Headnote:[1A][1B]

In a state resident's federal court suit challenging the validity under the Federal Constitution of state law authorizing the registration of voters of only those persons who, at the time of the next election, will have been state residents for 1 year and county residents for 3 months, the plaintiff's meeting the 3-month part of the durational residency requirements does not render moot the alleged invalidity of the 3-month requirement.

[***LEdHN2]

APPEAL AND ERROR §1662

moot questions --

Headnote:[2A][2B]

On appeal from a three-judge Federal District Court's judgment invalidating state durational residence voting requirements of 3 months' county residence and 1 year's state residence, the plaintiff's having met both residence requirements after the entry of the judgment appealed from does not preclude review of the residence

requirements.

[***LEdHN3]

CONSTITUTIONAL LAW §317

equal protection -- classification --

Headnote:[3]

To decide whether a law violates the *equal protection clause*, the court looks, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.

[***LEdHN4]

CONSTITUTIONAL LAW §313

equal protection -- standard of review --

Headnote:[4]

Since there is more than one test for evaluating laws challenged under the *equal protection clause*, depending on the interests affected and the classification involved, the court must first determine what standard of review is appropriate.

[***LEdHN5]

CONSTITUTIONAL LAW §334

equal protection -- voting residence requirements --

Headnote:[5A][5B][5C]

To justify its action against challenge under the *equal protection clause*, a state must show a compelling reason for imposing durational residence requirements for voting; that the requirements further a very substantial state interest is insufficient, because, in pursuing that interest, the state cannot choose means which unnecessarily burden or restrict constitutionally protected activity.

[***LEdHN6]

CONSTITUTIONAL LAW §334

equal protection -- voting rights --

Headnote:[6]

A citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction; while this equal right to vote is not absolute, and the states have the power to impose voter qualifications and to regulate access to the franchise in other ways, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny before the right to vote can be restricted.

[***LEdHN7]

CONSTITUTIONAL LAW §334

equal protection -- voting --

Headnote:[7]

If a statute challenged under the *equal protection clause* grants the right to vote to some citizens and denies the franchise to others, the court must determine whether the exclusions are necessary to promote a compelling state interest.

[***LEdHN8]

CONSTITUTIONAL LAW §101

freedom to travel --

Headnote:[8]

Freedom to travel throughout the United States, which includes the freedom to enter and abide in any state in the Union, is a basic right under the Constitution.

[***LEdHN9]

CONSTITUTIONAL LAW §326

equal protection -- freedom to travel --

Headnote:[9]

Since the right to travel is a constitutionally protected right, any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

[***LEdHN10]

STATES §18

penalizing constitutional rights --

Headnote:[10]

A state may not impose a penalty on those who exercise a right guaranteed by the Federal Constitution, since constitutional rights would be of little value if they could be indirectly denied.

[***LEdHN11]

CONSTITUTIONAL LAW §101

right to travel --

Headnote:[11]

The right to travel is an unconditional personal right whose exercise may not be conditioned.

[***LEdHN12]

CONSTITUTIONAL LAW §318

equal protection -- strict test --

Headnote:[12]

Under the strict equal protection test, which invalidates a statute unless the state can demonstrate that such statute is necessary to promote a compelling government interest, the state bears a heavy burden of justification, and the statute will be closely scrutinized in light of its asserted purposes.

[***LEdHN13]

CONSTITUTIONAL LAW §319

CONSTITUTIONAL LAW §525

protected activity --

Headnote:[13]

Statutes affecting constitutional rights must be drawn with precision and must be tailored to serve their legitimate objectives; if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state must not choose the way of greater interference, but must choose less drastic means.

[***LEdHN14]

ELECTIONS §4

voter residence --

Headnote:[14]

States have the power to require that voters be bona fide residents of the relevant political subdivision.

[***LEdHN15]

ELECTIONS §18

fraudulent voting --

Headnote:[15]

A state has a legitimate and compelling interest in preventing election fraud by nonresidents who temporarily invade the state or county, falsely swear that they are residents to become eligible to vote, and, by voting, allow a candidate to win by fraud.

[***LEdHN16]

CIVIL RIGHTS §5

voting rights --

Headnote:[16]

States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the state.

[***LEdHN17]

CONSTITUTIONAL LAW §317

equal protection -- classification --

Headnote:[17]

The *equal protection clause* places a limit on government by classification.

[***LEdHN18]

CIVIL RIGHTS §5

right to vote --

Headnote:[18]

Differences of opinion may not be the basis for excluding any group or person from the voting franchise.

[***LEdHN19]

CONSTITUTIONAL LAW §334

durational residence voting requirements --

Headnote:[19]

Durational residence voting requirements are not necessary to further a compelling state interest, and thus are unconstitutional under the *equal protection clause*.

[***LEdHN20]

CONSTITUTIONAL LAW §334

equal protection -- voter residence laws --

Headnote:[20]

State constitutional and statutory provisions authorizing the registration as voters of only those persons who, at the time of the next election, will have been residents of the state for a year and residents of the county for 3 months, are unconstitutional under the *equal protection clause*.

SYLLABUS

Tennessee closes its registration books 30 days before an election, but requires residence in the State for one year and in the county for three months as prerequisites for registration to vote. Appellee challenged the constitutionality of the durational residence requirements, and a three-judge District Court held them unconstitutional on the grounds that they impermissibly interfered with the right to vote and created a "suspect" classification penalizing some Tennessee residents because of recent interstate movement. Tennessee asserts that the requirements are needed to insure the purity of the ballot box and to have knowledgeable voters. *Held:* The durational residence requirements are violative of the *Equal Protection Clause of the Fourteenth Amendment*, as they are not necessary to further a compelling state interest. Pp. 335-360.

(a) Since the requirements deny some citizens the

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right to vote, "the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest." *Kramer v. Union Free School District*, 395 U.S. 621, 627 (emphasis added). Pp. 336-337.

(b) Absent a compelling state interest, Tennessee may not burden the right to travel by penalizing those bona fide residents who have recently traveled from one jurisdiction to another. Pp. 338-342.

(c) A period of 30 days appears to be ample to complete whatever administrative tasks are needed to prevent fraud and insure the purity of the ballot box. Pp. 345-349.

(d) Since there are adequate means of ascertaining bona fide residence on an individualized basis, the State may not conclusively presume nonresidence from failure to satisfy the waiting-period requirements of durational residence laws. Pp. 349-354.

(e) Tennessee has not established a sufficient relationship between its interest in an informed electorate and the fixed durational residence requirements. Pp. 354-360.

COUNSEL: Robert H. Roberts, Assistant Attorney General of Tennessee, argued the cause for appellants. With him on the brief were David M. Pack, Attorney General, and Thomas E. Fox, Deputy Attorney General.

James F. Blumstein, pro se, argued the cause for appellee. With him on the brief were Charles Morgan, Jr., and Norman Siegel.

Henry P. Sailer and William A. Dobrovir filed a brief for Common Cause as amicus curiae urging affirmance.

JUDGES: Marshall, J., delivered the opinion of the Court, in which Douglas, Brennan, Stewart, and White, JJ., joined. Blackmun, J., filed an opinion concurring in the result, post, p. 360. Burger, C. J., filed a dissenting opinion, post, p. 363. Powell and Rehnquist, JJ., took no part in the consideration or decision of the case.

OPINION BY: MARSHALL

OPINION

[*331] [***278] [**997] MR. JUSTICE MARSHALL delivered the opinion of the Court.

Various Tennessee public officials (hereinafter Tennessee) appeal from a decision by a three-judge federal court holding that Tennessee's durational residence requirements for voting violate the *Equal Protection Clause of the United States Constitution*. The issue arises in a class action for declaratory and injunctive relief brought by appellee James Blumstein. Blumstein moved to Tennessee on June 12, 1970, to begin employment as an assistant professor of law at Vanderbilt University in Nashville. With an eye toward voting in the upcoming August and November elections, he attempted to register to vote on July 1, 1970. The county registrar refused to register him, on the ground that Tennessee law authorizes the registration of only those persons who, at the time of the next election, will have been residents of the State for a year and residents of the county for three months.

[***LEdHR1A] [1A] [***LEdHR2A] [2A] After exhausting state administrative remedies, Blumstein brought this action challenging these residence requirements [*332] on federal constitutional grounds.¹ A [**998] three-judge [***279] court, convened pursuant to 28 U. S. C. §§ 2281, 2284, concluded that Tennessee's durational residence [*333] requirements were unconstitutional (1) because they impermissibly interfered with the right to vote and (2) because they created a "suspect" classification penalizing some Tennessee residents because of recent interstate movement.² 337 F.Supp. 323 (MD Tenn. 1970). We noted probable jurisdiction, 401 U.S. 934 (1971). For the reasons that follow, we affirm the decision below.³

[***LEdHR1B] [1B] [***LEdHR2B] [2B]

1 Involved here are provisions of the Tennessee Constitution, as well as portions of the Tennessee Code. [HN1] *Article IV, § 1, of the Tennessee Constitution*, provides in pertinent part:

"Right to vote -- Election precincts -- Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person

resides; and there shall be no other qualification attached to the right of suffrage.

"The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box."

[HN2] Section 2-201, Tenn. Code Ann. (Supp. 1970) provides:

"Qualifications of voters. -- Every person of the age of twenty-one (21) years, being a citizen of the United States and a resident of this state for twelve (12) months, and of the county wherein he may offer his vote for three (3) months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he may reside."

[HN3] Section 2-304, Tenn. Code Ann. (Supp. 1970) provides:

"Persons entitled to permanently register -- Required time for registration to be in effect prior to election. -- All persons qualified to vote under existing laws at the date of application for registration, including those who will arrive at the legal voting age by the date of the next succeeding primary or general election established by statute following the date of their application to register (those who become of legal voting age before the date of a general election shall be entitled to register and vote in a legal primary election selecting nominees for such general election), who will have lived in the state for twelve (12) months and in the county for which they applied for registration for three (3) months by the date of the next succeeding election shall be entitled to permanently register as voters under the provisions of this chapter provided, however, that registration or re-registration shall not be permitted within thirty (30) days of any primary or general election provided for by statute. If a registered voter in any county shall have changed his residence to another county, or to another ward, precinct, or district within the same county, or changed his name by marriage or otherwise, within ninety (90) days prior to the

date of an election, he shall be entitled to vote in his former ward, precinct or district of registration."

2 On July 30, the District Court refused to grant a preliminary injunction permitting Blumstein and members of the class he represented to vote in the August 6 election; the court noted that to do so would be "so obviously disruptive as to constitute an example of judicial improvidence." The District Court also denied a motion that Blumstein be allowed to cast a sealed provisional ballot for the election.

At the time the opinion below was filed, the next election was to be held in November 1970, at which time Blumstein would have met the three-month part of Tennessee's durational residency requirements. The District Court properly rejected the State's position that the alleged invalidity of the three-month requirement had been rendered moot, and the State does not pursue any mootness argument here. Although appellee now can vote, the problem to voters posed by the Tennessee residence requirements is "capable of repetition, yet evading review." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). In this case, unlike *Hall v. Beals*, 396 U.S. 45 (1969) the laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class of people affected by the presently written statute.

3 The important question in this case has divided the lower courts. Durational residence requirements ranging from three months to one year have been struck down in *Burg v. Canniffe*, 315 F.Supp. 380 (Mass. 1970); *Affeldt v. Whitcomb*, 319 F.Supp. 69 (ND Ind. 1970); *Lester v. Board of Elections for District of Columbia*, 319 F.Supp. 505 (DC 1970); *Bufford v. Holton*, 319 F.Supp. 843 (ED Va. 1970); *Hadnott v. Amos*, 320 F.Supp. 107 (MD Ala. 1970); *Kohn v. Davis*, 320 F.Supp. 246 (Vt. 1070); *Keppel v. Donovan*, 326 F.Supp. 15 (Minn. 1970); *Andrews v. Cody*, 327 F.Supp. 793 (MDNC 1971), as well as this case. Other district courts have upheld durational residence requirements of a similar variety. *Howe v. Brown*, 319 F.Supp. 862 (ND Ohio 1970); *Ferguson v. Williams*, 330 F.Supp. 1012 (ND Miss. 1971); *Cocanower v. Marston*, 318 F.Supp.

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402 (Ariz. 1970); *Fitzpatrick v. Board of Election Commissioners*, (ND Ill. 1970); *Piliavin v. Hoel*, 320 F.Supp. 66 (WD Wis. 1970); *Epps v. Logan* (No. 9137, WD Wash. 1970); *Fontham v. McKeithen*, 336 F.Supp. 153 (ED La. 1971). In *Sirak v. Brown* (Civ. No. 70-164, SD Ohio 1970), the District Judge refused to convene a three-judge court and summarily dismissed the complaint.

[*334] I

[**999] The subject of this lawsuit is the durational residence requirement. Appellee does not challenge Tennessee's power to restrict the vote to bona fide Tennessee residents. Nor has Tennessee ever disputed that appellee was a bona fide resident of the State and county when he attempted to register.⁴ But Tennessee insists that, in addition to *being* a resident, a would-be voter must *have been* a resident for a year in the State and three months in the county. It is this additional *durational* residence requirement that appellee challenges.

4 Noting the lack of dispute on this point, the court below specifically found that Blumstein had no intention of leaving Nashville and was a bona fide resident of Tennessee. 337 F.Supp. 323, 324.

Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate [***280] against the latter to the extent [*335] of totally denying them the opportunity to vote.⁵ The constitutional question presented is whether the *Equal Protection Clause of the Fourteenth Amendment* permits a State to discriminate in this way among its citizens.

5 While it would be difficult to determine precisely how many would-be voters throughout the country cannot vote because of durational residence requirements, but see Cocanower & Rich, *Residency Requirements for Voting*, 12 Ariz. L. Rev. 477, 478 and n. 8 (1970), it is worth noting that during the period 1947-1970 an average of approximately 3.3% of the total national population moved interstate each year. (An additional 3.2% of the population moved from one county to another *intrastate* each year.)

U.S. Dept. of Commerce, Bureau of the Census, *Current Population Reports, Population Characteristics, Series P-20, No. 210, Jan. 15, 1971, Table 1, pp. 7-8.*

[***LEdHR3] [3] [***LEdHR4] [4]

[***LEdHR5A] [5A][HN4] To decide whether a law violates the *Equal Protection Clause*, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. Cf. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). In considering laws challenged under the *Equal Protection Clause*, this Court has evolved more than one test, depending upon the interest affected or the classification involved.⁶ First, then, we must determine what standard of review is appropriate. In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that [HN5] the State must show a substantial and compelling reason for imposing durational residence requirements.

6 Compare *Kramer v. Union Free School District*, 395 U.S. 621 (1969), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942), with *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); compare *McLaughlin v. Florida*, 379 U.S. 184 (1964), *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), and *Graham v. Richardson*, 403 U.S. 365 (1971), with *Morey v. Doud*, 354 U.S. 457 (1957), and *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959).

[*336] A

[***LEdHR6] [6][HN6] Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of "a fundamental political right, . . . preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). There is no [**1000] need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes that selectively distribute the franchise. In decision after decision, this Court has made clear that

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[HN7] a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See, e. g., *Evans v. Cornman*, 398 U.S. 419, 421-422, 426 (1970); *Kramer v. Union Free School District*, 395 U.S. 621, 626-628 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667 (1966); *Carrington v. Rash*, 380 U.S. 89, 93-94 [***281] (1965); *Reynolds v. Sims*, *supra*. This "equal right to vote," *Evans v. Cornman*, *supra*, at 426, is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. See, e. g., *Carrington v. Rash*, *supra*, at 91; *Oregon v. Mitchell*, 400 U.S. 112, 144 (opinion of Douglas, J.), 241 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.), 294 (opinion of STEWART, J., concurring and dissenting, with whom BURGER, C. J., and BLACKMUN, J., joined). But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Evans v. Cornman*, *supra*, at 422; see *Bullock v. Carter*, *ante*, p. 134, at 143.

[*337] [***LEdHR7] [7] Tennessee urges that this case is controlled by *Drueding v. Devlin*, 380 U.S. 125 (1965). *Drueding* was a decision upholding Maryland's durational residence requirements. The District Court tested those requirements by the equal protection standard applied to ordinary state regulations: whether the exclusions are reasonably related to a permissible state interest. 234 F.Supp. 721, 724-725 (Md. 1964). We summarily affirmed *per curiam* without the benefit of argument. But if it was not clear then, it is certainly clear now that a more exacting test is required for any statute that "place[s] a condition on the exercise of the right to vote." *Bullock v. Carter*, *supra*, at 143. This development in the law culminated in *Kramer v. Union Free School District*, *supra*. There we canvassed in detail the reasons for strict review of statutes distributing the franchise, 395 U.S., at 626-630, noting *inter alia* that such statutes "constitute the foundation of our representative society." We concluded that [HN8] if a challenged statute grants the right to vote to some citizens and denies the franchise to others, "the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Id.*, at 627 (emphasis added); *Cipriano v. City of Houma*, *supra*, at

704; *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 205, 209 (1970). Cf. *Harper v. Virginia Board of Elections*, *supra*, at 670. This is the test we apply here.⁷

7 Appellants also rely on *Pope v. Williams*, 193 U.S. 621 (1904). Carefully read, that case simply holds that federal constitutional rights are not violated by a state provision requiring a person who enters the State to make a "declaration of his intention to become a citizen before he can have the right to be registered as a voter and to vote in the State." *Id.*, at 634. In other words, the case simply stands for the proposition that a State may require voters to be bona fide residents. See *infra*, at 343-344. To the extent that dicta in that opinion are inconsistent with the test we apply or the result we reach today, those dicta are rejected.

[*338] B

[**1001] This exacting test is appropriate for another reason, never considered in *Drueding*: Tennessee's durational residence laws classify bona fide residents on the basis of recent [***282] travel, penalizing those persons, and only those persons, who have gone from one jurisdiction to another during the qualifying period. Thus, the durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel.

"[HN9] Freedom

[***LEdHR8] [8] [***LEdHR9] [9]to travel throughout the United States has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 758 (1966). See *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J.); *Crandall v. Nevada*, 6 Wall. 35, 43-44 (1868); *Paul v. Virginia*, 8 Wall. 168, 180 (1869); *Edwards v. California*, 314 U.S. 160 (1941); *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Shapiro v. Thompson*, 394 U.S. 618, 629-631, 634 (1969); *Oregon v. Mitchell*, 400 U.S., at 237 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.), 285-286 (STEWART, J., concurring and dissenting, with whom BURGER, C. J., and BLACKMUN, J., joined). And it is clear that the freedom to travel includes the "freedom to enter and abide in any State in the Union," *id.*, at 285. Obviously, durational residence laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly. We considered such a

durational residence requirement in *Shapiro v. Thompson*, *supra*, where the pertinent statutes imposed a one-year waiting period for interstate migrants as a condition to receiving welfare benefits. Although in *Shapiro* we specifically did not decide whether durational residence requirements could be used to determine voting eligibility, [*339] *id.*, at 638 n. 21, we concluded that [HN10] since the right to travel was a constitutionally protected right, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Id.*, at 634. This compelling-state-interest test was also adopted in the separate concurrence of MR. JUSTICE STEWART. Preceded by a long line of cases recognizing the constitutional right to travel, and repeatedly reaffirmed in the face of attempts to disregard it, see *Wyman v. Bowens*, 397 U.S. 49 (1970), and *Wyman v. Lopez*, 404 U.S. 1055 (1972), *Shapiro* and the compelling-state-interest test it articulates control this case.

Tennessee attempts to distinguish *Shapiro* by urging that "the vice of the welfare statute in *Shapiro* . . . was its objective to deter interstate travel." Brief for Appellants 13. In Tennessee's view, the compelling-state-interest test is appropriate only where there is "some evidence to indicate a deterrence of or infringement on the right to travel. . . ." *Ibid.* Thus, Tennessee seeks to avoid the clear command of *Shapiro* by arguing that durational residence requirements for voting neither seek to nor actually do deter such travel. In essence, Tennessee argues that the right to travel is not abridged here in any constitutionally relevant sense.

[***283] This view represents a fundamental misunderstanding of the law.⁸ It is irrelevant whether disenfranchisement or [**1002] denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" [*340] cases in this Court always relied on the presence of actual deterrence.⁹ In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to penalize the exercise of that right [to travel]. . . ." *Id.*, at 634 (emphasis added); see *id.*, at 638 n. 21.¹⁰ While noting the frank legislative purpose to deter migration by the poor, and speculating that "an indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk" the loss

of benefits, *id.*, at 629, the majority found no need to dispute the "evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements." *Id.*, at 650 (Warren, C. J., dissenting); see also *id.*, at 671-672 (Harlan, J., dissenting). Indeed, none of the litigants had themselves been deterred. Only last Term, it was specifically noted that because a durational [*341] residence requirement for voting "operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration . . . , [it] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest." *Oregon v. Mitchell*, 400 U.S., at 238 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.) (emphasis added).

8 We note that in the Voting Rights Act of 1965, as amended, Congress specifically found that a durational residence requirement "denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines. . . ." 84 Stat. 316, 42 U. S. C. § 1973aa-1 (a)(2).

9 For example, in *Crandall v. Nevada*, 6 Wall. 35 (1868), the tax imposed on persons leaving the State by commercial carrier was only \$ 1, certainly a minimal deterrent to travel. But in declaring the tax unconstitutional, the Court reasoned that "if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars," *id.*, at 46. In *Ward v. Maryland*, 12 Wall. 418 (1871), the tax on nonresident traders was more substantial, but the Court focused on its discriminatory aspects, without anywhere considering the law's effect, if any, on trade or tradesmen's choice of residence. Cf. *Chalker v. Birmingham & N. W. R. Co.*, 249 U.S. 522, 527 (1919); but see *Williams v. Fears*, 179 U.S. 270 (1900). In *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 79-80 (1920), the Court held that New York could not deny nonresidents certain small personal exemptions from the state income tax allowed residents. The amounts were certainly insufficient to influence any employee's choice of residence. Compare *Toomer v. Witsell*, 334 U.S. 385 (1948), with *Mullaney v. Anderson*, 342 U.S. 415 (1952).

10 Separately concurring, MR. JUSTICE STEWART concluded that quite apart from any

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purpose to deter, "a law that so clearly *impinges* upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest." *Id.*, at 643-644 (first emphasis added). See also *Graham v. Richardson*, 403 U.S., at 375.

[**LEdHR10] [10] [**LEdHR11] [11]Of course, it is true that the two individual interests affected by Tennessee's durational residence requirements are affected in different ways. Travel is permitted, but only at a price; voting is prohibited. The right to travel is merely penalized, [***284] while the right to vote is absolutely denied. But these differences are irrelevant for present purposes. *Shapiro* implicitly realized what this Court has made explicit elsewhere:

"It has long been established that [HN11] a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied'. . . ." *Harman v. Forssenius*, 380 U.S. 528, 540 (1965).¹¹

[**1003] See also *Garrity v. New Jersey*, 385 U.S. 493 (1967), and cases cited therein; *Spevack v. Klein*, 385 U.S. 511, 515 (1967). [HN12] The right to travel is an "unconditional personal right," a right whose exercise may not be conditioned. *Shapiro v. Thompson*, 394 U.S., at 643 (STEWART, J., concurring) (emphasis added); *Oregon v. Mitchell*, *supra*, at 292 (STEWART, J., concurring and dissenting, [*342] with whom BURGER, C. J., and BLACKMUN, J., joined). Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right.¹² In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Cf. *United States v. Jackson*, 390 U.S. 570, 582-583 (1968). Absent a compelling state interest, a State may not burden the right to travel in this way.¹³

¹¹ In *Harman*, the Court held that a Virginia law which allowed federal voters to qualify either by paying a poll tax or by filing a certificate of residence six months before the election "handicap[ped] exercise" of the right to participate in federal elections free of poll taxes, guaranteed by the *Twenty-fourth Amendment*. *Id.*,

at 541.

¹² Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive. See *Shapiro v. Thompson*, 394 U.S. 618, 638 n. 21 (1969).

¹³ As noted *infra*, at 343-344, States may show an overriding interest in imposing an appropriate bona fide residence requirement on would-be voters. One who travels out of a State may no longer be a bona fide resident, and may not be allowed to vote in the old State. Similarly, one who travels to a new State may, in some cases, not establish bona fide residence and may be ineligible to vote in the new State. Nothing said today is meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements.

C

[**LEdHR5B] [5B] [**LEdHR12] [12] In sum, [HN13] durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "necessary to promote a *compelling* governmental interest." *Shapiro v. Thompson*, *supra*, at 634 (first emphasis added); *Kramer v. Union Free School District*, 395 U.S., at 627. Thus phrased, the constitutional question may sound like a mathematical formula. But legal "tests" do not have the precision of mathematical [*343] formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.

[***285] [**LEdHR5C] [5C] [**LEdHR13] [13][HN14] It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," *NAACP v. Button*, 371 U.S. 415, 438

(1963); *United States v. Robel*, 389 U.S. 258, 265 (1967), and must be "tailored" to serve their legitimate objectives. *Shapiro v. Thompson*, *supra*, at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

II

[***LEdHR14] [14]We turn, then, to the question of whether the State has shown that durational residence requirements are needed to further a sufficiently substantial state interest. We emphasize again the difference between bona fide residence requirements and durational residence requirements. [**1004] We have in the past noted approvingly that [HN15] the States have the power to require that voters be bona fide residents of the relevant political subdivision. *E. g.*, *Evans v. Cornman*, 398 U.S., at 422; *Kramer v. Union Free School District*, *supra*, at 625; *Carrington v. Rash*, 380 U.S., at 91; *Pope v. Williams*, 193 U.S. 621 (1904).¹⁴ An appropriately defined and uniformly applied requirement [*344] of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.¹⁵ But *durational* residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent standard. *Cf. Shapiro v. Thompson*, *supra*, at 636.

¹⁴ See n. 7, *supra*.

¹⁵ See *Fontham v. McKeithen*, 336 F.Supp., at 167-168 (Wisdom, J., dissenting); *Pope v. Williams*, 193 U.S. 621 (1904); and n. 7, *supra*.

It is worth noting at the outset that Congress has, in a somewhat different context, addressed the question whether durational residence laws further compelling state interests. In § 202 of the Voting Rights Act of 1965, added by the Voting Rights Act Amendments of 1970, Congress outlawed state durational residence requirements for presidential and vice-presidential elections, and prohibited the States from closing registration more than 30 days before such elections. 42 U. S. C. § 1973aa-1. In doing so, it made a specific finding that durational residence requirements and more restrictive registration practices do "not bear a reasonable relationship to any compelling State interest in the

conduct of presidential elections." 42 U. S. C. § 1973aa-1 (a)(6). We upheld this portion of the Voting Rights Act in *Oregon v. Mitchell*, *supra*. In our present case, of course, we deal with congressional, state, and local elections, in which [***286] the State's interests are arguably somewhat different; and, in addition, our function is not merely to determine whether there was a reasonable basis for Congress' findings. However, the congressional finding which forms the basis for the Federal Act is a useful background for the discussion that follows.

[*345] Tennessee tenders "two basic purposes" served by its durational residence requirements:

"(1) INSURE PURITY OF BALLOT BOX -- Protection against fraud through colonization and inability to identify persons offering to vote, and

"(2) KNOWLEDGEABLE VOTER -- Afford some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his right more intelligently." Brief for Appellants 15, citing 18 Am. Jur., Elections, § 56, p. 217.

We consider each in turn.

A

[***LEdHR15] [15]Preservation of the "purity of the ballot box" is a formidable-sounding state interest. The impurities feared, variously called "dual voting" and "colonization," all involve voting by nonresidents, either singly or in groups. The main concern is that nonresidents will temporarily invade the State or county, falsely swear that they are residents to become eligible to vote, and, by voting, allow a candidate to win by fraud. Surely the prevention of such fraud is a legitimate and compelling government goal. But it is impossible to view durational residence requirements as necessary to achieve that state interest.

Preventing fraud, the asserted evil that justifies state lawmaking, means keeping nonresidents from voting. But, by definition, a durational residence law [**1005] bars *newly arrived* residents from the franchise along with nonresidents. The State argues that such sweeping laws are necessary to prevent fraud because they are needed to identify bona fide residents. This contention is

particularly [*346] unconvincing in light of Tennessee's total statutory scheme for regulating the franchise.

Durational residence laws may once have been necessary to prevent a fraudulent evasion of state voter standards, but today in Tennessee, as in most other States, this purpose is served by a system of voter registration. Tenn. Code Ann. § 2-301 *et seq.* (1955 and Supp. 1970); see *State v. Weaver*, 122 Tenn. 198, 122 S. W. 465 (1909). Given this system, the record is totally devoid of any evidence that durational residence requirements are in fact necessary to identify bona fide residents. [HN16] The qualifications of the would-be voter in Tennessee are determined when he registers to vote, which he may do until 30 days before the election. Tenn. Code Ann. § 2-304. His qualifications -- including bona fide residence -- are established then by oath. Tenn. Code Ann. § 2-309. There is no indication in the record that Tennessee routinely goes behind the would-be voter's oath to determine his qualifications. Since false [***287] swearing is no obstacle to one intent on fraud, the existence of burdensome voting qualifications like durational residence requirements cannot prevent corrupt nonresidents from fraudulently registering and voting. As long as the State relies on the oath-swearing system to establish qualifications, a durational residence requirement adds nothing to a simple residence requirement in the effort to stop fraud. The nonresident intent on committing election fraud will as quickly and effectively swear that he has been a resident for the requisite period of time as he would swear that he was simply a resident. Indeed, the durational residence requirement becomes an effective voting obstacle [*347] only to residents who tell the truth and have no fraudulent purposes.

16 See, e. g., Cocanower & Rich, 12 Ariz. L. Rev., at 499; MacLeod & Wilberding, *State Voting Residency Requirements and Civil Rights*, 38 Geo. Wash. L. Rev. 93, 113 (1969).

Moreover, to the extent that the State makes an enforcement effort after the oath is sworn, it is not clear what role the durational residence requirement could play in protecting against fraud. The State closes the registration books 30 days before an election to give officials an opportunity to prepare for the election. Before the books close, anyone may register who claims that he will meet the durational residence requirement at the time of the next election. Although Tennessee argues that this

30-day period between registration and election does not give the State enough time to verify this claim of bona fide residence, we do not see the relevance of that position to this case. As long as the State permits registration up to 30 days before an election, a lengthy durational residence requirement does not increase the amount of time the State has in which to carry out an investigation into the sworn claim by the would-be voter that he is in fact a resident.

Even if durational residence requirements imposed, in practice, a pre-election waiting period that gave voting officials three months or a year in which to confirm the bona fides of residence, Tennessee would not have demonstrated that these waiting periods were necessary. At the outset, the State is faced with the fact that it must defend two separate waiting periods of different lengths. It is impossible to see how both could be "necessary" to fulfill the pertinent state objective. If the State itself has determined that a three-month period is enough time in which to confirm bona fide residence in the State and county, obviously a one-year period cannot also be justified as "necessary" to achieve the same purpose. ¹⁷ [*348] Beyond [**1006] that, the job of detecting nonresidents from among persons who have registered is a relatively simple one. It hardly justifies prohibiting all newcomers from voting for even three months. To prevent dual voting, state voting officials simply have to cross-check lists of new registrants with their former jurisdictions. See Comment, *Residence Requirements for Voting in Presidential Elections*, 37 U. Chi. L. Rev. 359, 364 and n. 34, 374 (1970); cf. *Shapiro v. Thompson*, 394 U.S., at 637. Objective information tendered as relevant to the question of bona fide residence under Tennessee law -- places of [***288] dwelling, occupation, car registration, driver's license, property owned, etc. ¹⁸ -- is easy to doublecheck, especially in light of modern communications. Tennessee itself concedes that "it might well be that these purposes can be achieved under requirements of shorter duration than that imposed by the State of Tennessee. . . ." Brief for Appellants 10. Fixing a constitutionally acceptable period is surely a matter of degree. It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud -- and a year, or three months, too much. This was the judgment of Congress in the context of presidential elections. ¹⁹ And, on the basis of the statutory [*349] scheme before us, it is almost surely the judgment of the Tennessee lawmakers as well. As the court below

concluded, the cutoff point for registration 30 days before an election

"reflects the judgment of the Tennessee Legislature that thirty days is an adequate period in which Tennessee's election officials can effect whatever measures may be necessary, in each particular case confronting them, to insure purity of the ballot and prevent dual registration and dual voting." 337 F.Supp., at 330.

17 Obviously, it could not be argued that the three-month waiting period is necessary to confirm residence in the county, and the one-year period necessary to confirm residence in the State. Quite apart from the total implausibility of any suggestion that one task should take four times as long as the other, it is sufficient to note that if a person is found to be a bona fide resident of a county within the State, he is by definition a bona fide resident of the State as well.

18 See, e. g., *Brown v. Hows*, 163 Tenn. 178, 42 S. W. 2d 210 (1930); *Sparks v. Sparks*, 114 Tenn. 666, 88 S. W. 173 (1905). See generally Tennessee Law Revision Commission, Title 2 -- Election Laws, Tentative Draft of October 1971, § 222 and Comment. See n. 22, *infra*.

19 In the Voting Rights Act Amendments of 1970, Congress abolished durational residence requirements as a precondition to voting in presidential and vice-presidential elections, and prohibited the States from cutting off registration more than 30 days prior to those elections. These limits on the waiting period a State may impose prior to an election were made "with full cognizance of the possibility of fraud and administrative difficulty." *Oregon v. Mitchell*, 400 U.S. 112, 238 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.). With that awareness, Congress concluded that a waiting-period requirement beyond 30 days "does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections." 42 U. S. C. § 1973aa-1 (a)(6). And in sustaining § 202 of the Voting Rights Act of 1965, we found "no explanation why the 30-day period between the closing of new registrations and the date of election would not provide, in light of modern communications,

adequate time to insure against . . . frauds." *Oregon v. Mitchell*, *supra*, at 239 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.). There is no reason to think that what Congress thought was unnecessary to prevent fraud in presidential elections should not also be unnecessary in the context of other elections. See *infra*, at 354.

It has been argued that durational residence requirements are permissible because a person who has satisfied the waiting-period requirements is conclusively presumed to be a bona fide resident. In other words, durational residence requirements are justified because they create an administratively useful conclusive presumption that recent arrivals are not residents and are [**1007] therefore properly [*350] barred from the franchise. ²⁰ [***289] This presumption, so the argument runs, also prevents fraud, for few candidates will be able to induce migration for the purpose of voting if fraudulent voters are required to remain in the false locale for three months or a year in order to vote on election day. ²¹

20 As a technical matter, it makes no sense to say that one who has been a resident for a fixed duration is presumed to be a resident. In order to meet the durational residence requirement, one must, by definition, *first* establish that he is a *resident*. A durational residence requirement is not simply a waiting period after arrival in the State; it is a waiting period after *residence* is established. Thus it is conceptually impossible to say that a durational residence requirement is an administratively useful device to determine residence. The State's argument must be that residence would be presumed from simple *presence* in the State or county for the fixed waiting period.

21 It should be clear that this argument assumes that the State will reliably determine whether the sworn claims of duration in the jurisdiction are themselves accurate. We have already noted that this is unlikely. See *supra*, at 346. Another recurrent problem for the State's position is the existence of *differential* durational residence requirements. If the State presumes residence in the county after three months in the county, there is no rational explanation for requiring a full 12 months' presence in the State to presume

residence in the State.

[***LEdHR16] [16]In *Carrington v. Rash*, 380 U.S. 89, this Court considered and rejected a similar kind of argument in support of a similar kind of conclusive presumption. There, the State argued that it was difficult to tell whether persons moving to Texas while in the military service were in fact bona fide residents. Thus, the State said, the administrative convenience of avoiding difficult factual determinations justified a blanket exclusion of all servicemen stationed in Texas. The presumption created there was conclusive -- "incapable of being overcome by proof of the most positive character." *Id.*, at 96, citing *Heiner v. Donnan*, 285 U.S. 312, 324 (1932). The [*351] Court rejected this "conclusive presumption" approach as violative of the *Equal Protection Clause*. While many servicemen in Texas were not bona fide residents, and therefore properly ineligible to vote, many servicemen clearly were bona fide residents. Since "more precise tests" were available "to winnow successfully from the ranks . . . those whose residence in the State is bona fide," conclusive presumptions were impermissible in light of the individual interests affected. *Id.*, at 95. "[HN17] States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Id.*, at 96.

[***LEdHR17] [17]*Carrington* sufficiently disposes of this defense of durational residence requirements. The State's legitimate purpose is to determine whether certain persons in the community are bona fide residents. A durational residence requirement creates a classification that may, in a crude way, exclude nonresidents from that group. But it also excludes many residents. Given the State's legitimate purpose and the individual interests that are affected, the classification is all too imprecise. See *supra*, at 343. In general, it is not very difficult for Tennessee to determine on an individualized basis whether one recently arrived in the community is in fact a resident, although of course there will always be difficult cases. Tennessee has defined a test for bona fide residence, and appears prepared to apply it on an individualized basis in various legal contexts.²² That test [*352] could easily be [***290] [**1008] applied to new arrivals. Furthermore, if it is unlikely that would-be fraudulent voters would remain in a false locale for the lengthy period imposed by

durational residence requirements, it is just as unlikely that they would collect such objective indicia of bona fide residence as a dwelling, car registration, or driver's license. In spite of these things, the question of bona fide residence is settled for new arrivals by conclusive presumption, not by individualized inquiry. Cf. *Carrington v. Rash*, *supra*, at 95-96. Thus, it has always been undisputed that appellee Blumstein is himself a bona fide resident of Tennessee within the ordinary state definition of residence. But since Tennessee's presumption from failure to meet the durational residence requirements is conclusive, a showing of actual bona fide residence is irrelevant, even though such a showing would fully serve the State's purposes embodied in the presumption and would achieve those purposes with far less drastic impact on constitutionally protected interests.²³ The *Equal Protection Clause* places a limit on government by classification, and that limit has been exceeded here. Cf. *Shapiro v. Thompson*, 394 U.S., at 636; *Harman v. Forssenius*, 380 U.S., at 542-543; *Carrington v. Rash*, *supra*, at 95-96; *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

22 [HN18] Tennessee's basic test for bona fide residence is (1) an intention to stay indefinitely in a place (in other words, "without a present intention of removing therefrom," *Brown v. Hows*, 163 Tenn., at 182, 42 S. W. 2d, at 211), joined with (2) some objective indication consistent with that intent, see n. 18, *supra*. This basic test has been applied in divorce cases, see, e. g., *Sturdavant v. Sturdavant*, 28 Tenn. App. 273, 189 S. W. 2d 410 (1944); *Brown v. Brown*, 150 Tenn. 89, 261 S. W. 959 (1924); *Sparks v. Sparks*, 114 Tenn. 666, 88 S. W. 173 (1905); in tax cases, see, e. g., *Denny v. Sumner County*, 134 Tenn. 468, 184 S. W. 14 (1916); in estate cases, see, e. g., *Caldwell v. Shelton*, 32 Tenn. App. 45, 221 S. W. 2d 815 (1948); *Hascall v. Hafford*, 107 Tenn. 355, 65 S. W. 423 (1901); and in voting cases, see, e. g., *Brown v. Hows*, *supra*; Tennessee Law Revision Commission, Title 2 -- *Election Laws*, *supra*, n. 18.

23 Indeed, in Blumstein's case, the County Election Commission explicitly rejected his offer to treat the waiting-period requirement as "a waivable guide to commission action, but rebuttable upon a proper showing of competence to vote intelligently in the primary and general election." Complaint at App. 8. Cf. *Skinner v.*

Oklahoma, 316 U.S., at 544-545 (Stone, C. J., concurring).

[*353] Our conclusion that the waiting period is not the least restrictive means necessary for preventing fraud is bolstered by the recognition that Tennessee has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared.²⁴ At least six separate sections of the Tennessee Code define offenses to deal with voter fraud. For example, Tenn. Code Ann. § 2-324 makes it a crime "for any person to register or to have his name registered as a qualified voter . . . when he is not entitled to be so registered . . . or to procure or induce any other person to register or be registered . . . when such person is not legally qualified to be registered as such. . . ." ²⁵ In [***291] addition to the various [**1009] criminal penalties, Tennessee permits the bona fides of a voter to be challenged on election day. Tenn. Code Ann. § 2-1309 *et seq.* (1955 and Supp. 1970). Where a State has available such remedial action [*354] to supplement its voter registration system, it can hardly argue that broadly imposed political disabilities such as durational residence requirements are needed to deal with the evils of fraud. Now that the Federal Voting Rights Act abolishes those residence requirements as a precondition for voting in presidential and vice-presidential elections, 42 U. S. C. § 1973aa-1, it is clear that the States will have to resort to other devices available to prevent nonresidents from voting. Especially since every State must live with this new federal statute, it is impossible to believe that durational residence requirements are necessary to meet the State's goal of stopping fraud.²⁶

²⁴ See *Harman v. Forsenius*, 380 U.S., at 543 (1965) (filing of residence certificate six months before election in lieu of poll tax unnecessary to insure that the election is limited to bona fide residents in light of "numerous devices to enforce valid residence requirements"); cf. *Schneider v. State*, 308 U.S. 147, 164 (1939) (fear of fraudulent solicitations cannot justify permit requests since "frauds may be denounced as offenses and punished by law").

²⁵ Tenn. Code Ann. § 2-1614 (Supp. 1970) makes it a felony for any person who "is not legally entitled to vote at the time and place where he votes or attempts to vote . . . , to vote or offer to do so," or to aid and abet such illegality. Tenn. Code Ann. § 2-2207 (1955) makes it a

misdemeanor "for any person knowingly to vote in any political convention or any election held under the Constitution or laws of this state, not being legally qualified to vote . . . ," and Tenn. Code Ann. § 2-2208 (1955) makes it a misdemeanor to aid in such an offense. Tenn. Code Ann. § 2-202 (Supp. 1970) makes it an offense to vote outside the ward or precinct where one resides and is registered. Finally, Tenn. Code Ann. § 2-2209 (1955) makes it unlawful to "bring or aid in bringing any fraudulent voters into this state for the purpose of practising a fraud upon or in any primary or final election" See, e. g., *State v. Weaver*, 122 Tenn. 198, 112 S. W. 465 (1909).

²⁶ We note that in the period since the decision below, several elections have been held in Tennessee. We have been presented with no specific evidence of increased colonization or other fraud.

B

The argument that durational residence requirements further the goal of having "knowledgeable voters" appears to involve three separate claims. The first is that such requirements "afford some surety that the voter has, in fact, become a member of the community." But here the State appears to confuse a bona fide residence requirement with a durational residence requirement. As already noted, a State does have an interest in limiting the franchise to bona fide members of the community. But this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residence is questioned, but because they are recent rather than longtime residents.

The second branch of the "knowledgeable voters" justification is that durational residence requirements assure that the voter "has a common interest in all matters pertaining to [the community's] government. . . ." By this, presumably, the State means that it may require a period of residence sufficiently lengthy to impress upon [*355] its voters the local viewpoint. This is precisely the sort of argument this Court has repeatedly rejected. In *Carrington v. Rash*, for example, the State argued that military men newly moved into Texas might not have local interests sufficiently in mind, and therefore could be excluded from voting in state elections. This Court replied:

"But if they are in fact residents, . . . they, as all other qualified residents, have a right to an equal opportunity for political representation. . . . 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U.S., at 94.

See 42 U. S. C. § 1973aa-1 (a)(4).

[***292] [***LEdHR18] [18]Similarly here, Tennessee's hopes for voters with a "common interest in all matters pertaining to [the community's] government" is impermissible.²⁷ To paraphrase what we said elsewhere, "All too often, lack of a ['common interest'] might mean no more than a different interest." *Evans v. Cornman*, 398 U.S., at 423. "[HN19] Differences of opinion" may not be the basis for excluding any group or person from the franchise. *Cipriano v. City of Houma*, 395 U.S., at 705-706. "The fact [**1010] that newly arrived [Tennesseans] may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the [*356] electoral vote of their new home State." *Hall v. Beals*, 396 U.S. 45, 53-54 (1969) (dissenting opinion).²⁸

27 It has been noted elsewhere, and with specific reference to Tennessee law, that "the historical purpose of [durational] residency requirements seems to have been to deny the vote to undesirables, immigrants and outsiders with different ideas." Cocanower & Rich, 12 Ariz. L. Rev., at 484 and nn. 44, 45, and 46. We do not rely on this alleged original purpose of durational residence requirements in striking them down today.

28 Tennessee may be revealing this impermissible purpose when it observes:

"The fact that the voting privilege has been extended to 18 year old persons . . . increases, rather than diminishes, the need for durational residency requirements. . . . It is so generally known, as to be judicially accepted, that there are many political subdivisions in this state, and other

states, wherein there are colleges, universities and military installations with sufficient student body or military personnel over eighteen years of age, as would completely dominate elections in the district, county or municipality so located. This would offer the maximum of opportunity for fraud through colonization, and permit domination by those not knowledgeable or having a common interest in matters of government, as opposed to the interest and the knowledge of permanent members of the community. Upon completion of their schooling, or service tour, they move on, leaving the community bound to a course of political expediency not of its choice and, in fact, one over which its more permanent citizens, who will continue to be affected, had no control." Brief for Appellants 15-16.

Finally, the State urges that a longtime resident is "more likely to exercise his right [to vote] more intelligently." To the extent that this is different from the previous argument, the State is apparently asserting an interest in limiting the franchise to voters who are knowledgeable about the issues. In this case, Tennessee argues that people who have been in the State less than a year and the county less than three months are likely to be unaware of the issues involved in the congressional, state, and local elections, and therefore can be barred from the franchise. We note that the criterion of "intelligent" voting is an elusive one, and susceptible of abuse. But without deciding as a general matter the extent to which a State can bar less knowledgeable or intelligent citizens from the franchise, cf. *Evans v. Cornman*, 398 U.S., at 422; *Kramer v. Union Free School District*, 395 U.S., at 632; *Cipriano v. City of Houma*, 395 U.S., at 705,²⁹ we conclude that durational [***293] residence requirements cannot be justified on this basis.

29 In the 1970 Voting Rights Act, which added § 201, 42 U. S. C. § 1973aa, Congress provided that "no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election" The term "test or device" was defined to include, in part, "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his

405 U.S. 330, *357; 92 S. Ct. 995, **1010;
31 L. Ed. 2d 274, ***293; 1972 U.S. LEXIS 75

knowledge of any particular subject" By prohibiting various "test[s]" and "device[s]" that would clearly assure knowledgeability on the part of voters in local elections, Congress declared federal policy that people should be allowed to vote even if they were not well informed about the issues. We upheld § 201 in *Oregon v. Mitchell*, *supra*.

In *Kramer v. Union Free School District*, *supra*, we held that the *Equal Protection Clause* prohibited New York State from limiting the vote in school-district elections to parents of school children and to property owners. The State claimed that since nonparents would be "less informed" about school affairs than parents, *id.*, at 631, the State could properly exclude the class of nonparents in order to limit the franchise to the more "interested" group of residents. We rejected that position, concluding that a "close scrutiny of [the classification] demonstrates that [it does] not accomplish this purpose with sufficient precision" *Id.*, at 632. That scrutiny revealed that the classification excluding nonparents from the franchise kept many persons from voting who were [**1011] as substantially interested as those allowed to vote; given this, the classification was insufficiently "tailored" to achieve the articulated state goal. *Ibid.* See also *Cipriano v. City of Houma*, *supra*, at 706.

Similarly, the durational residence requirements in this case founder because of their crudeness as a device for [*358] achieving the articulated state goal of assuring the knowledgeable exercise of the franchise. The classifications created by durational residence requirements obviously permit any longtime resident to vote regardless of his knowledge of the issues -- and obviously many longtime residents do not have any. On the other hand, the classifications bar from the franchise many other, admittedly new, residents who have become at least minimally, and often fully, informed about the issues. Indeed, recent migrants who take the time to register and vote shortly after moving are likely to be those citizens, such as appellee, who make it a point to be informed and knowledgeable about the issues. Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election,³⁰ the State cannot seriously maintain that it is "necessary" to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections. There is simply nothing in the

record to support the conclusive presumption that residents who have lived in the State for less than a year and their county for less than three months are uninformed about elections. Cf. *Shapiro v. Thompson*, 394 U.S., at 631. These durational residence requirements crudely exclude large numbers of fully qualified people. Especially since Tennessee creates a waiting period by closing registration books 30 days before an election, there can be no basis for [***294] arguing that any durational residence requirement is also needed to assure knowledgeability.

30 H. Alexander, *Financing the 1968 Election* 106-113 (1971); *Affeldt v. Whitcomb*, 319 F.Supp., at 77; Cocanower & Rich, 12 Ariz. L. Rev., at 498.

It is pertinent to note that Tennessee has never made an attempt to further its alleged interest in an informed electorate in a universally applicable way. Knowledge [*359] or competence has never been a criterion for participation in Tennessee's electoral process for longtime residents. Indeed, the State specifically provides for voting by various types of absentee persons.³¹ These provisions permit many longtime residents who leave the county or State to participate in a constituency in which they have only the slightest political interest, and from whose political debates they are likely to be cut off. That the State specifically permits such voting is not consistent with its claimed compelling interest in intelligent, informed use of the ballot. If the State seeks to assure intelligent [**1012] use of the ballot, it may not try to serve this interest only with respect to new arrivals. Cf. *Shapiro v. Thompson*, *supra*, at 637-638.

31 The general provisions for absentee voting apply in part to "any registered voter otherwise qualified to vote in any election to be held in this state or any county, municipality, or other political subdivision thereof, who by reason of business, occupation, health, education, or travel, is required to be absent from the county of his fixed residence on the day of the election" Tenn. Code Ann. § 2-1602 (Supp. 1970). See generally Tenn. Code Ann. § 2-1601 *et seq.* (Supp. 1970). An alternative method of absentee voting for armed forces members and federal personnel is detailed in Tenn. Code Ann. § 2-1701 *et seq.* (Supp. 1970). Both those provisions allow persons who are still technically "residents" of the

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State or county to vote even though they are not physically present, and even though they are likely to be uninformed about the issues. In addition, Tennessee has an unusual provision that permits persons to vote in their *prior* residence for a period after residence has been changed. This section provides, in pertinent part: "If a registered voter in any county shall have changed his residence to another county . . . within ninety (90) days prior to the date of an election, he shall be entitled to vote in his former ward, precinct or district of registration." Tenn. Code Ann. § 2-304 (Supp. 1970). See also Tenn. Code Ann. § 2-204 (1955).

[***LEdHR19] [19]It may well be true that new residents as a group know less about state and local issues than older residents; and it is surely true that durational residence requirements will exclude some people from voting who are totally uninformed [*360] about election matters. But as devices to limit the franchise to knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some citizens. We are aware that classifications are always imprecise. By requiring classifications to be tailored to their purpose, we do not secretly require the impossible. Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest.

III

[***LEdHR20] [20]Concluding that Tennessee has not offered an adequate justification [***295] for its durational residence laws, we affirm the judgment of the court below.

Affirmed.

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

CONCUR BY: BLACKMUN

CONCUR

MR. JUSTICE BLACKMUN, concurring in the result.

Professor Blumstein obviously could hardly wait to register to vote in his new home State of Tennessee. He arrived in Nashville on June 12, 1970. He moved into his apartment on June 19. He presented himself to the registrar on July 1. He instituted his lawsuit on July 17. Thus, his litigation was begun 35 days after his arrival on Tennessee soil, and less than 30 days after he moved into his apartment. But a primary was coming up on August 6. Usually, such zeal to exercise [*361] the franchise is commendable. The professor, however, encountered -- and, I assume, knowingly so -- the barrier of the Tennessee durational residence requirement and, because he did, he instituted his test suit.

I have little quarrel with much of the content of the Court's long opinion. I concur in the result, with these few added comments, because I do not wish to be described on a later day as having taken a position broader than I think necessary for the disposition of this case.

1. In *Pope v. Williams*, 193 U.S. 621 (1904), Mr. Justice Peckham, in speaking for a unanimous Court that included the first Mr. Justice Harlan and Mr. Justice Holmes, said:

"The simple matter to be herein determined is whether, with reference to the exercise of the privilege of voting in Maryland, the legislature of that State had the legal right to provide that a person coming into the State to reside should make the declaration of intent a year before he should have the right to be registered as a voter of the State.

....

". . . The right of a State to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

"The reasons which may have impelled the state legislature to enact the statute in question were matters

405 U.S. 330, *361; 92 S. Ct. 995, **1012;
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entirely for its consideration, and this court has no concern with them." 193 U.S., at 632, 633-634.

I cannot so blithely explain *Pope v. Williams* away, as does the Court, *ante*, [**1013] at 337 n. 7, by asserting that if that [*362] opinion is "carefully read," one sees that the case was concerned simply with a requirement that the new arrival declare his intention. The requirement was that he make the declaration *a year* before he registered to vote; time as well as intent was involved. For me, therefore, the Court today really overrules the holding in *Pope v. Williams* and does not restrict itself, as footnote 7 says, to rejecting what it says are mere dicta.

2. The compelling-state-interest test, as applied to a State's denial of the vote, seems to have come into full flower with *Kramer v. Union Free School District*, 395 U.S. 621, 627 [***296] (1969). The only supporting authority cited is in the "See" context to *Carrington v. Rash*, 380 U.S. 89, 96 (1965). But as I read *Carrington*, the standard there employed was that the voting requirements be reasonable. Indeed, in that opinion MR. JUSTICE STEWART observed, at 91, that the State has "unquestioned power to impose reasonable residence restrictions on the availability of the ballot." A like approach was taken in *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969), where the Court referred to the necessity of "some rational relationship to a legitimate state end" and to a statute's being set aside "only if based on reasons totally unrelated to the pursuit of that goal." I mention this only to emphasize that *Kramer* appears to have elevated the standard. And this was only three years ago. Whether *Carrington* and *McDonald* are now frowned upon, at least in part, the Court does not say. Cf. *Bullock v. Carter*, *ante*, p. 134.

3. Clearly, for me, the State does have a profound interest in the purity of the ballot box and in an informed electorate and is entitled to take appropriate steps to assure those ends. Except where federal intervention [*363] properly prescribes otherwise, see *Oregon v. Mitchell*, 400 U.S. 112 (1970), I see no constitutional imperative that voting requirements be the same in each State, or even that a State's time requirement relate to the 30-day measure imposed by Congress by 42 U. S. C. § 1973aa-1 (d) for presidential elections. I assume that the Court by its decision today does not depart from either of these propositions. I cannot be sure of this, however, for

much of the opinion seems to be couched in absolute terms.

4. The Tennessee plan, based both in statute and in the State's constitution, is not ideal. I am content that the one-year and three-month requirements be struck down for want of something more closely related to the State's interest. It is, of course, a matter of line drawing, as the Court concedes, *ante*, at 348. But if 30 days pass constitutional muster, what of 35 or 45 or 75? The resolution of these longer measures, less than those today struck down, the Court leaves, I suspect, to the future.

DISSENT BY: BURGER

DISSENT

MR. CHIEF JUSTICE BURGER, dissenting.

The holding of the Court in *Pope v. Williams*, 193 U.S. 621 (1904), is as valid today as it was at the turn of the century. It is no more a denial of equal protection for a State to require newcomers to be exposed to state and local problems for a reasonable period such as one year before voting, than it is to require children to wait 18 years before voting. Cf. *Oregon v. Mitchell*, 400 U.S. 112 (1970). In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly [*364] insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

[**1014] The existence of a constitutional "right to travel" does not persuade [***297] me to the contrary. If the imposition of a durational residency requirement for voting abridges the right to travel, surely the imposition of an age qualification penalizes the young for being young, a status I assume the Constitution also protects.

REFERENCES

Validity, under Federal Constitution, of state residency requirements for voting in elections

25 Am Jur 2d, Elections 66-78

405 U.S. 330, *364; 92 S. Ct. 995, **1014;
31 L. Ed. 2d 274, ***297; 1972 U.S. LEXIS 75

9 Am Jur Pl & Pr Forms (Rev ed), Elections, Form 21

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Annotation References:

Validity, under Federal Constitution, of state residency requirements in elections. *31 L Ed 2d 861*.

Federal constitutional right of interstate travel. *27 L Ed 2d 862*.

Constitutionality of statutes in relation to registration before voting at election or primary. 91 ALR 349.

APPENDIX 23



**FROST, DOING BUSINESS UNDER THE NAME OF MITCHELL GIN
COMPANY, v. CORPORATION COMMISSION OF OKLAHOMA ET AL.**

No. 60

SUPREME COURT OF THE UNITED STATES

278 U.S. 515; 49 S. Ct. 235; 73 L. Ed. 483; 1929 U.S. LEXIS 338

**November 26, 1928, Argued
February 18, 1929, Decided**

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

APPEAL from a final decree of the District court, of three judges, dismissing a bill to enjoin the Corporation Commission of Oklahoma from issuing to a corporation a license to operate a cotton gin, and to enjoin the corporation from establishing and operating one. At an earlier stage there was an order denying a preliminary injunction, which was affirmed by this Court, *274 U.S. 719*.

DISPOSITION: *26 F.2d 508*, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant gin company challenged a decree from the United States District Court for the Western District of Oklahoma, which dismissed a bill to enjoin appellee Corporation Commission of Oklahoma from issuing a license to operate a new cotton gin company. The Commission rejected an offer to show

that there was no public necessity for the establishment of an additional gin company, which was challenged under the *Fourteenth Amendment*.

OVERVIEW: The Court concluded that state law had declared cotton gins to be public utilities and that their operation was to be regulated by permits, which were to be issued on the basis of public necessity. Appellant gin company had the only valid permit, and the Court found that the Commission attempted to issue a permit for the establishment of a new gin company without a showing of public necessity. The Court found that the proviso which would have allowed the permit was unconstitutional and was severable from the original statute. The Court asserted that the amendment was a nullity because there had been no express repeal before it was enacted. In fact, the Court found that the proviso had been inserted into the original statute and the whole was reenacted, but that such a process did not make it constitutional. The decree of the district court was reversed.

OUTCOME: The Court reversed the judgment,

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concluding that the proviso contravened the *Equal Protection Clause of the Fourteenth Amendment* and that the rest of the statute was severable. The Commission was without power to issue permits for cotton gin operations to corporations without a showing of public necessity and cotton gin companies were without authority to do business without such a permit.

LexisNexis(R) Headnotes

***Governments > Local Governments > Licenses
Governments > State & Territorial Governments > Licenses***

[HN1] Cotton gins are declared to be public utilities and their operation for the purpose of ginning seed cotton to be a public business. The State Corporation Commission is empowered to fix their charges and to regulate and control them in other respects. No gin can be operated without a license from the Commission, and in order to secure such license there must be a satisfactory showing of public necessity.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Constitutional Law > Substantive Due Process > Scope of Protection

Governments > State & Territorial Governments > Licenses

[HN2] The right to operate a gin and to collect tolls therefor, as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the *Fourteenth Amendment*.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Transportation Law > Water Transportation > Ferries > Franchises

[HN3] A franchise is defined as a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents,

acting under such conditions and regulations as the government may impose in the public interest, and for the public security. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises.

Constitutional Law > Substantive Due Process > Scope of Protection

Governments > Local Governments > Licenses

Governments > State & Territorial Governments > Licenses

[HN4] The right to operate a gin is exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law.

Constitutional Law > Equal Protection > Scope of Protection

[HN5] The purpose of the *Equal Protection Clause* in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. A corporation is as much entitled to the equal protection of the laws as an individual. The converse is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Mere difference is not enough; the attempted classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

Governments > Legislation > Effect & Operation > Amendments

Governments > Legislation > Expirations, Repeals & Suspensions

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[HN6] An existing statute cannot be recalled or restricted by anything short of a constitutional enactment.

Governments > Legislation > Expirations, Repeals & Suspensions

[HN7] No law can be changed or repealed by a subsequent act which is void because unconstitutional. An act which violates the Constitution has no power and can neither build up nor tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW, §530

franchise as property. --

Headnote:[1]

The right to operate a cotton gin and collect tolls therefor under a statute declaring such business to be a public utility, to be permitted only in case of public necessity, is not a mere license, but is a franchise granted in consideration of the performance of public service, and constitutes property within the protection of the *14th Amendment to the Federal Constitution*.

[***LEdHN2]

PUBLIC UTILITY, §2

franchise to operate cotton gin -- exclusiveness. --

Headnote:[2]

A franchise to operate a public cotton gin is exclusive against one who attempts to do so without obtaining a permit, or under a void permit.

[***LEdHN3]

INJUNCTION, §18

against illegal operation of cotton gin -- who entitled to. --

Headnote:[3]

One having a franchise to operate a cotton gin may

resort to a court of equity to restrain the illegal operation of a competing gin under a void permit, upon the ground that it is an injurious invasion of his property rights.

[***LEdHN4]

CONSTITUTIONAL LAW, §314

equal protection -- inequality -- validity. --

Headnote:[4]

The inequality prohibited by the Federal Constitution is only such as is actually and palpably unreasonable and arbitrary.

[***LEdHN5]

CONSTITUTIONAL LAW, §314

purpose of equal protection clause. --

Headnote:[5]

The purpose of the clause in the Federal Constitution in respect to equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances.

[***LEdHN6]

CONSTITUTIONAL LAW, §370

rights of corporation. --

Headnote:[6]

A corporation is as much entitled to the equal protection of the laws as an individual.

[***LEdHN7]

CONSTITUTIONAL LAW, §370

equal protection -- favoring corporation as against individual. --

Headnote:[7]

A classification which arbitrarily favors a corporation as against an individual is invalid under the Federal Constitution.

[***LEdHN8]

CONSTITUTIONAL LAW, §370

equal protection -- franchise to corporation without necessity -- effect. --

Headnote:[8]

An individual owner of a cotton gin who cannot do business without a franchise based on public necessity is unconstitutionally deprived of the equal protection of the laws by a statute permitting the securing of a franchise, without such necessity, by a corporation organized with capital stock which may be subscribed by anyone, and which can do business for anyone, make profits, and declare dividends, although it is required to divide the profits above a certain amount among its members and others who do business with it.

[***LEdHN9]

STATUTES, §38

invalid proviso -- effect. --

Headnote:[9]

Where an excepting proviso in a statute is found to be unconstitutional, the substantive provisions which it qualifies cannot stand.

[***LEdHN10]

STATUTES, §39

separable proviso -- subsequent amendment. --

Headnote:[10]

A proviso to a statute requiring a license to operate a cotton gin, which may be granted only in case of public necessity, which proviso is added by amendment some time after the statute is passed, and excepts certain classes of corporations from the operation of the statute, is separable from the statute itself so that its unconstitutionality will not render the whole act unconstitutional.

[***LEdHN11]

ESTOPPEL, §71

to attack validity of statute. --

Headnote:[11]

One who has acquired property rights necessarily based upon a statute may not attack the statute as unconstitutional.

[***LEdHN12]

ESTOPPEL, §71

right to attack unconstitutional proviso to statute. --

Headnote:[12]

One claiming property rights under a statute is not precluded from attacking as unconstitutional a subsequent proviso inserted into the statute by amendment.

[***LEdHN13]

INJUNCTION, §18

against operation of cotton gin. --

Headnote:[13]

Injunction lies at the suit of one having a franchise to operate a cotton gin, which can be granted only upon a showing of public necessity, to prevent the granting of such franchise to a corporation without the showing of such necessity, and the corporation from operating a gin without such showing.

SYLLABUS

1. By the statutes of Oklahoma, cotton gins operated for the ginning of seed cotton for the public for profit are declared to be public utilities in a public business, and no one may engage in the business without first securing a permit from a public commission, which is empowered to regulate the business and its rates and charges, as in the case of transportation and transmission companies. *Held*: That the right of one who has complied with the statutes and secured his permit is not a mere license, but a franchise granted by the State in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the *Fourteenth Amendment*. P. 519.

2. While the franchise thus acquired does not preclude the State from making similar valid grants to others, it is exclusive against attempts to operate a

278 U.S. 515, *; 49 S. Ct. 235, **;
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competing gin without a permit or under a void permit, in either of which events the owner may resort to a court of equity to restrain the illegal operation as an invasion of his property rights, if it threaten an impairment of his business. P. 521.

3. An individual who obtained his permit to operate a cotton gin upon showing a public necessity therefor as required by the statute, *held* entitled to an injunction restraining the state commission from granting a permit to a corporation without such a showing under a separable provision of the statute violating the *equal protection clause of the Fourteenth Amendment. Id.*

4. A state statute regulating the business of ginning cotton for the general public for profit, which permits an individual to engage in such business only upon his first showing a public necessity therefor, but allows a corporation to engage in the same business, in the same locality, without such showing, discriminates against the individual in violation of the *equal protection clause*. The classification attempted is essentially arbitrary because based upon no real or substantial differences reasonably related to the subject of the legislation. P. 521.

5. A cooperative ginning corporation formed under Oklahoma Comp. Stats. 1921, § 5637, *et seq.*, having a capital stock, which, up to a certain amount, may be subscribed for by anyone; which is allowed to do business for others than its members, and to make profits and declare dividends, not exceeding 8% per annum, and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation, is not a mutual association. P. 523.

6. A proviso added to an existing statutory provision by a subsequent legislature, and the effect of which if it were part of the original enactment would be to render the whole unconstitutional, may be treated as a separate nullity, allowing the original to stand. P. 525.

7. In such case, one who sought and obtained property rights under the original and valid part of the statute, is not estopped from attacking the proviso. P. 527.

COUNSEL: Messrs. Robert M. Rainey and Streeter B. Flynn, with whom Mr. Calvin Jones was on the brief, for appellant.

Mr. E. S. Ratliff, with whom Messrs. Edwin B. Dabney, Attorney General of Oklahoma, and J. D. Holland were on the brief, for appellees.

JUDGES: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone

OPINION BY: SUTHERLAND

OPINION

[*517] [**236] [***486] Mr. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant owns a cotton ginning business in the city of Durant, Oklahoma, which he operates under a permit from the State Corporation Commission. By a statute of Oklahoma, originally passed in 1915 and amended from time to time thereafter, [HN1] cotton gins are declared to be public utilities and their operation for the purpose of ginning seed cotton to be a public business. Comp. Stats. 1921, § 3712. The commission is empowered to fix their charges and to regulate and control them in other respects. § 3715. No gin can be operated without a license from the commission, and in order to secure such license there must be a satisfactory showing of public necessity. § 3714 as amended by c. 109, Session Laws, 1925. The only substantial amendment to this section made by the act of 1925 is to add the proviso: "provided, that on the presentation of a petition for the establishment of a gin to be run co-operatively signed by one hundred (100) citizens and tax payers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin."

By an act of the State Legislature passed in 1917 (Comp. Stats. 1921, § 5599) co-operative agricultural or [*518] horticultural associations not having capital stock or being conducted for profit, may be formed for the purpose of mutual help by persons engaged in agriculture or horticulture. Under a statute passed in 1919 (Comp. Stats. 1921, § 5637, *et seq.*) ten or more persons may form a corporation for the purpose of conducting, among others, an agricultural or horticultural business upon a co-operative plan. A corporation thus formed [***487] is authorized to issue capital stock to be sold at not less than its par value. The number of shares which may be held by one person, firm or corporation is limited. Dividends may be declared by the directors at a rate not to exceed eight per cent. per annum. Provision is made

278 U.S. 515, *518; 49 S. Ct. 235, **236;
73 L. Ed. 483, ***487; 1929 U.S. LEXIS 338

for setting aside a surplus or reserve fund; and five per cent. may be set aside for educational purposes. The remainder of the profits of the corporation must be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members and the amounts of the purchases of members from the corporation; but the corporation may adopt by-laws providing for the apportionment of such profits in part to non-members upon the amounts of their purchases and sales from or to the corporation.

The Durant Co-operative Gin Company, one of the appellees, was organized in 1926 under the act of 1919. After its incorporation, the company made an application to the commission for a permit to establish a cotton gin at Durant, accompanying its application with a petition signed by 100 citizens and taxpayers, as required by the statutory proviso above quoted. Appellant protested in writing against the granting of such permit and there was a hearing. The commission, at the hearing, rejected an offer to show that there was no public necessity for the establishment of an additional gin at Durant, and held that the proviso made it mandatory to grant the permit applied for without regard to necessity. Thereupon appellant [*519] brought this suit to enjoin the commission from issuing the permit prayed for and to enjoin the Durant company from the establishment of a cotton gin at Durant, upon the ground that the proviso, as construed and applied by the commission (see *Mont. Bank v. Yellowstone County*, 276 U.S. 499, 504), was invalid as contravening the due process and equal protection of the law clauses of the [*237] *Fourteenth Amendment*. The court below, consisting of three judges under § 266 Judicial Code, denied the prayer for an injunction and entered a final decree dismissing the bill. 26 F.2d 508.

[**LEdHR1] [1]1. We first consider the preliminary contention made on behalf of appellees that appellant has no property right to be affected by operations of the Durant company and, therefore, no standing to invoke the provisions of the *Fourteenth Amendment* or to appeal to a court of equity.

It already appears that cotton gins are declared by the Oklahoma statute to be public utilities and their operation for the purpose of ginning seed cotton to be public business. No one can operate a cotton gin for such purpose without securing a permit from the commission. In their regulation and control, the commission is given the same authority which it has in respect of

transportation and transmission companies, and the same power to fix rates, charges and regulations. Comp. Stats. 1921, §§ 3712, 3713, 3715. Under § 3714 as amended, *supra* (laying the proviso out of consideration for the moment) the commission may deny a permit for the operation of a gin where there is no public necessity for it, and may authorize a new ginning plant only after a showing is made that such plant is a needed utility. Both parties definitely concede the validity of these provisions, and, for present purposes at least, we accept that view.

It follows that [HN2] the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma statute, is not [*520] a mere license, but a franchise, granted by the state in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the *Fourteenth Amendment*. See *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 9; *California v. Pacific Railroad Co.*, 127 U.S. 1, 40-41; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 328, 329; *Owensboro v. Cumberland Telephone Co.*, 230 U.S. 58, 64-66; *Boise Water Co. v. Boise City*, 230 U.S. 84, 90-91; *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, 10-11.

In *California v. Pacific Railroad Co.*, *supra*, pp. 40-41, [HN3] a franchise is defined as "a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public [***488] interest, and for the public security. . . . No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. . . . The list might be continued indefinitely."

Specifically, the foregoing authorities establish that the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city water works or gas works, to build a bridge, operate a ferry, and to collect tolls therefor, are franchises. And these are but illustrations of a more comprehensive list, from which it is difficult, upon any conceivable ground, to exclude a cotton gin, declared by statute to be a public utility engaged in a public business, the operation of

278 U.S. 515, *520; 49 S. Ct. 235, **237;
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which is precluded without a permit from a state governmental agency, and which is subject to the same authority as that exercised over transportation and transmission companies in respect [*521] of rates, charges and regulations. Under these conditions, to engage in the business is not a matter of common right, but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the state's power. Such a privilege, by every legitimate test, is a franchise.

[**LEdHR2] [2] [**LEdHR3] [3]Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it [HN4] is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. 6 Pomeroy's Equity Jurisprudence, 3d ed., (2 Equitable Remedies) §§ 583, 584; *People's Transit Co. v. Henshaw*, 20 F.2d 87, 90; *Bartlesville El. L. & P. Co. v. Bartlesville I. R. Co.*, 26 Okla. 453; *Patterson v. Wollmann*, 5 N. D. 608, 611; *Millville Gas Co. v. Vineland L. & P. Co.*, 72 N. J. Eq. 305, 307. The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law.

If the proviso dispensing with a showing of public necessity on the part of the Durant and similar companies is invalid as claimed, the foregoing principles afford a sufficient basis for the maintenance of the present suit, against not only the Durant company, but the [**238] members of the commission who threaten to issue a permit for the establishment of a new gin by that company without a showing of public necessity.

[**LEdHR4] [4]2. Is, then, the effect of the proviso to deny appellant the equal protection of the laws within the meaning of the *Fourteenth Amendment*? As the proviso was construed [*522] and applied by the commission and by the court below, its effect is to relieve all corporations organized under the act of 1919 from an onerous restriction upon the right to engage in a public business which is imposed by the statute upon appellant

and other individuals, as well as corporations organized under general law, engaging in such business. That a greater burden thereby is laid upon the latter than upon the former is clear. Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. *Arkansas Gas Co. v. Railroad Comm.*, 261 U.S. 379, 384, and cases cited.

[**LEdHR5] [5] [**LEdHR6] [6] [**LEdHR7] [7][HN5] The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 37. This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co. v. Penna.*, 277 U.S. 389, 400; *Kentucky Corp'n v. Paramount Exchange*, 262 U.S. 544, 550; *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 154. The converse, of course, is [**489] equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Air-way Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240. That is to say, mere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable [*523] and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155." *Louisville Gas Co. v. Coleman*, *supra*, p. 37.

[**LEdHR8] [8]By the terms of the statute here under consideration, appellant, an individual, is forbidden to engage in business unless he can first show a public necessity in the locality for it; while corporations organized under the act of 1919, however numerous, may engage in the same business in the same locality no matter how extensively the public necessity may be exceeded. That the immunity thus granted to the corporation is one which bears injuriously against the

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individual does not admit of doubt, since by multiplying plants without regard to necessity the effect well may be to deprive him of business which he would otherwise obtain if the substantive provision of the statute were enforced.

It is important to bear in mind that the Durant company was not organized under the act of 1917, but under that of 1919. The former authorizes the formation of an association for mutual help, without capital stock, not conducted for profit, and restricted to the business of its own members, except that it may act as agent to sell farm products and buy farm supplies for a non-member, but as a condition may impose upon him a liability, not exceeding that of a member, for the contracts, debts and engagements of the association, such services to be performed at the actual cost thereof including a pro rata part of the overhead expenses. Comp. Stats. 1921, § 5608. Under this exception, the difference between a non-member and a member is not of such significance or the authority conferred of such scope as to have any material effect upon the general purposes or character of the corporation as a mutual association. As applied to corporations organized under the 1917 act, we have no reason to doubt that the [*524] classification created by the proviso might properly be upheld. *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89; *Warehouse Co. v. Tobacco Growers*, 276 U.S. 71. A corporation organized under the act of 1919, however, has capital stock, which, up to a certain amount, may be subscribed for by any person, firm or corporation; is allowed to do business for others; to make profits and declare dividends, not exceeding eight per cent. per annum; and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation. Such a corporation is in no sense a mutual association. Like its individual competitor, it does business with the general public for the sole purpose of making money. Its members need not even be cotton growers. They may be -- all or any of them -- bankers or merchants or capitalists having no interest in the business differing in any respect from that of the members of an ordinary corporation. The differences relied upon to justify the classification [**239] are, for that purpose, without substance. The provision for paying a portion of the profits to members or, if so determined, to non-members, based upon the amounts of their sales to or purchases from the corporation, is a device which, without special statutory authority, may be and often is resorted to by ordinary

corporations for the purpose of securing business. As a basis for the classification attempted, it lacks both relevancy and substance. Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, baldly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects [***490] one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, [*525] because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. *Power Co. v. Saunders*, 274 U.S. 490, 493; *Louisville Gas Co. v. Coleman*, *supra*, p. 39; *Quaker City Cab Co. v. Penna.*, *supra*, p. 402.

[***LEdHR9] [9] [***LEdHR10] [10]3. The further question must be answered: Are the proviso and the substantive provisions which it qualifies separable, so that the latter may stand although the former has fallen? If the answer be in the negative, that is to say, if the parts of the statute be held to be inseparable, the decree below should be affirmed, since, in that event, although the proviso be bad, the inequality created by it would disappear with the fall of the entire statute and no basis for equitable relief would remain. But for reasons now to be stated we are of opinion that the substantive provisions of the statute are severable and may stand independently of the proviso.

If § 3714 as originally passed had contained the proviso, the effect would be to render the entire section invalid, because then the result of upholding the substantive part of the section notwithstanding the invalidity of the proviso would have been to make applicable to the Durant company and others similarly organized, the requirement in respect of a showing of public necessity, although the legislative will contemporaneously expressed as part of the same act was to the contrary. In this state of the matter, to hold otherwise would be to extend the scope of the law in that regard so as to embrace corporations which the legislature passing the statute had, by its very terms, expressly excluded, and thus to go in the face of the rule that where the excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand. *Davis v. Wallace*, 257 U.S. 478,

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484. "For all the purposes of construction it [the proviso] is to be regarded as part of the act. The *meaning* of the legislature must be gathered from all they have said, as well from that which [*526] is ineffective for want of power, as from that which is authorized by law." *State ex rel. McNeal v. Dombaugh*, 20 Ohio St. 167, 174-175.

But the proviso here in question was not in the original section. It was added by way of amendment many years after the original section was enacted. If valid, its practical effect would be to repeal by implication the requirement of the existing statute in respect of public necessity insofar as the Durant and similar corporations are concerned. But since the amendment is void for unconstitutionality, it cannot be given that effect, "because [HN6] an existing statute cannot be recalled or restricted by anything short of a constitutional enactment." *Davis v. Wallace*, *supra*, p. 485.

To this effect also is *Truax v. Corrigan*, 257 U.S. 312, 341-342. In that case there had been in force in Arizona, both as a state and a territory, for many years, a general statute granting authority to judges of the courts of first instance to issue writs of injunction. The statute was amended so as to except from its operation certain cases between employers and employees. The amendment was declared invalid as denying the equal protection of the laws; but the general provision of the statute as it originally stood was upheld upon the ground that it had been in force for many years and that an exception in the form of an unconstitutional amendment could not be given the effect of repealing it. And see *Waters-Pierce Oil Company v. Texas*, 177 U.S. 28, 47.

Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in [*527] the existing statute, that statute must stand as the only valid expression of the legislative intent.

In passing upon a similar situation, the Supreme Court of Michigan, speaking through Judge Cooley, in *Campau v. Detroit*, 14 Mich. 276, 286, said: "But nothing can come in conflict with a nullity, and nothing is therefore repealed by this act on the ground solely of its

being inconsistent with a section of this law which is entirely unconstitutional and void." In *Carr, Auditor, v. State ex rel. Coetlosquet*, 127 Ind. 204, 215, [***491] the state supreme court disposed of the same point in these words: "We suppose it clear [**240] that [HN7] no law can be changed or repealed by a subsequent act which is void because unconstitutional. . . . An act which violates the Constitution has no power and can, of course, neither build up nor tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality." See also *People v. Butler Street Foundry*, 201 Ill. 236, 257-259; *People v. Fox*, 294 Ill. 263, 269; *McAllister v. Hamlin*, 83 Cal. 361, 365; *State ex rel. Crouse v. Mills*, 231 Mo. 493, 498-499; *Ex parte Davis*, 21 Fed. 396, 397. The question is not affected by the fact that the amendment was accomplished by inserting the proviso in the body of the original section and reenacting the whole at length. *Truax v. Corrigan*, *supra*; *People v. Butler Street Foundry*, *supra*, pp. 258-259; *State ex rel. Crouse v. Mills*, *supra*, p. 499.

[***LEdHR11] [11] [***LEdHR12] [12]4. It is true that appellant applied for and obtained a permit to do business under the statute to which it was sought to attach the proviso in question. Is he, thereby, precluded from assailing the proviso upon the ground that one who claims the benefit of a statute may not assert its invalidity? It is not open to question that one who has acquired rights of property necessarily based upon a statute may not attack that statute as unconstitutional, for he cannot both assail it and rely upon it in the same proceeding. *Hurley [*528] v. Commission of Fisheries*, 257 U.S. 223, 225. But here the proviso under attack, having been adopted by a subsequent act and being invalid, had no effect, as we have already said, upon the provisions of the statute. As applied to this case, it began and ended as a futile attempt by the legislature to bring about a change in the law which a previous legislature had enacted. For this purpose, and as construed and applied below, it was a nullity, wholly "without force or vitality," leaving the provisions of the existing statute unchanged. It necessarily results that appellant's rights came into being and owed their continued existence wholly to that statute, disconnected from the ineffective proviso, and it is that statute, so disconnected, which measures the extent to which he may enjoy and defend such rights. In seeking and obtaining the benefits of the statute, appellant proceeded without regard to the proviso, neither affirming nor denying nor in

contemplation of law acquiescing in its validity; and his action cannot be made a basis upon which to rest a successful claim of an estoppel *in pais* or of a waiver of the right to maintain the constitutional challenge here made.

[***LEdHR13] [13]We conclude: That the proviso is unconstitutional as contravening the *equal protection clause of the Fourteenth Amendment*; that the remainder of the statute is separable and affords the sole rule in respect of the questions here to be determined; that the corporation commission is without power to issue permits to corporations organized under the act of 1919 without a showing of public necessity; that the Durant company is without authority to do business in the absence of a permit thus issued; and that appellant is entitled to the relief for which he prays.

Decree reversed.

DISSENT BY: BRANDEIS; STONE

DISSENT

Mr. JUSTICE BRANDEIS, dissenting.

Under § 3714 of Oklahoma Compiled Statutes 1921, as amended by c. 109 of the Laws of 1925, Frost secured [*529] from the Corporation Commission a license to operate a cotton gin in the City of Durant. * Later, the Durant Co-operative Gin Company applied to the Commission under that statute for a license to operate a gin in the same city. In support of its application, it presented a certificate of organization under Chapter 147 of the laws of 1919 entitled "An Act providing for the organization and regulation of cooperative corporations" (Oklahoma Compiled Statutes 1921, Secs. 5637-5652), and a petition signed by one hundred citizens and taxpayers of that community requesting that the license be issued. Frost objected to the granting of a license, on the ground that there was no necessity for an additional gin in that city. The Commission ruled that, upon [***492] the showing made, it was obliged by § 3714 as so amended to issue a license, without hearing evidence as to necessity; and indicated its purpose to issue the license. Thereupon, Frost brought this suit under § 266 of the Judicial Code against the Commission, the Attorney General and the Durant Company to enjoin granting the license. A restraining order issued upon the filing of the bill.

* The stipulation of facts states: "That W. A. Frost is engaged in the cotton ginning business under the name of Mitchell Gin Company and owns and operates a cotton gin in the City of Durant, Oklahoma; that said gin is operated under and by virtue of license duly issued by the Corporation Commission of the State of Oklahoma under and by virtue of Article 40, Chapter 7, Compiled Oklahoma Statutes, 1921, as amended by Chapter 191, Session Laws of Oklahoma of 1923 and by Chapter 109 of the Session Laws of Oklahoma of 1925."

The case was first heard by three judges upon application for an interlocutory injunction and upon defendants' motion to dismiss. Frost contended that his license had conferred a franchise; that from it there arose in him the property right to be protected against further local competition, unless existing ginning facilities were inadequate; that in the absence of a showing of necessity competition [*530] by the Durant Company would be illegal; and that to issue a license which authorized such competition would take Frost's property without due process of law and deny to him the equal protection of the law. The District Court denied both the injunction [**241] and the motion to dismiss; and it dissolved the restraining order. Upon direct appeal by Frost, this Court affirmed the interlocutory decree *per curiam* in *Frost v. Corporation Commission*, 274 U.S. 719, on the authority of *Chicago Great Western Ry. Co. v. Kendall*, 266 U.S. 94, 100. Thereupon, the facts being stipulated, the case was submitted in the District Court on final hearing to the same judges; and a decree was entered dismissing the bill, 26 F.2d 508. This appeal presents the same questions which were argued on the appeal from the interlocutory decree.

Under the Oklahoma Act of 1907 cotton gins were held subject to regulation by the Corporation Commission. ¹ In 1915, the Legislature declared them public utilities and restriction of competition was introduced by prohibiting operation of a gin without a license from the Commission. That statute required that a license issue for proper gins already established, but directed that none should issue for a new gin in any community already adequately supplied, except upon "the presentation of a petition signed by not less than fifty farmer petitioners of the immediate vicinity." Session Laws 1915, c. 176 (Oklahoma Compiled Statutes 1921, §§ 3712-3718). Chapter 191 of the Session Laws of 1923

struck out of § 3714 the provision referring to farmers. But in 1925 there was inserted in lieu thereof the proviso "that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred (100) [*531] citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin." Session Laws 1925, c. 109. In 1926, the Supreme Court of Oklahoma held in *Choctaw Cotton Oil Co. v. Corporation Commission*, 121 Okla. 51, 52, that a corporation organized under Chapter 147 of the Laws of 1919 was run co-operatively within the meaning of § 3714 as so amended.

1 Session Laws 1907-08, p. 756 (Comp. Stat. 1921, § 11032). See *Oklahoma Gin Co. v. State*, 158 Pac. 629; *Mascho v. Chandler Cotton Oil Co.*, 7 Annual Corp. Comm. Report 370. Compare *Harriss-Irby Cotton Co. v. State*, 31 Okla. 603.

The attack upon the statute is rested mainly upon the contention that by requiring issuance of a license to so-called co-operative corporations organized under the law of 1919, the statute as amended in 1925 creates an arbitrary classification. The classification is said to be arbitrary, because the differences between such concerns and commercial corporations or individuals engaged in the same business are in this connection not material. The contention rests, I think, upon misapprehensions of fact. The differences are vital; and the classification is a reasonable one. Before stating why I think so, other grounds for affirming the judgment should be mentioned.

First. The bill alleges, and the parties have stipulated, that Frost was licensed under § 3714 of the Compiled Statutes as amended by the Act of 1925. The stipulation does not show that prior to the amendment he held any license. His alleged property right to conditional immunity from competition rests wholly on the statute now challenged. It is settled that one cannot in the same proceeding both rely upon a statute and assail it. *Hurley v. Commission of Fisheries*, 257 U.S. 223, 225. Compare *Great Falls Mfg. Co. v. Atty. General*, 124 U.S. 581, 598-599; *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 411-412; *St. Louis Co. v. Prendergast Co.*, 260 U.S. 469, 472-473; *Buck v. Kuykendall*, 267 U.S. 307, 316; [***493] *Booth Fisheries Co. v. Industrial Commission*, 271 U.S. 208, 211; *United Fuel Gas Co. v. Railroad Commission*, decided January 2, 1929, *ante*, p. 300. This

established rule requires affirmance of the judgment below.

[*532] *Second.* Frost claims that to grant a license to the Durant Company without a showing of public necessity would involve taking his property without due process. The only property which he asserts would be so taken is the alleged right to be immune from the competition of persons operating without a valid license. But for the statute, he would obviously be subject to competition from anyone. Whether the license issued to him under § 3714 conferred upon him the property right claimed is a question of statutory construction -- and thus, ordinarily, a question of state law. "Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the State." *Hebert v. Louisiana*, 272 U.S. 312, 316. In the absence of a decision of the question by the highest court of the State, this Court would be obliged to construe the statute; and in doing so it might be aided by consideration of the decisions of courts of other States dealing with like statutes. But the Supreme Court of Oklahoma has decided the precise question in *Choctaw Cotton Oil Co. v. Corporation Commission*, 121 Okla. 51, 52. It held that a license under § 3714 does not confer the property right claimed, saying: "What property rights are taken from petitioners by licensing another gin, under the foregoing proviso? What rights of any kind could the licensing of another gin affect? It does not disturb the property of petitioners, nor prevent the free [**242] operation of their gins. The only right which could be affected by such license is the right of petitioners to operate their gin without competition, a right which is not secured to them either by the state or federal Constitution, hence the contention as to taking their property without due process of law cannot be sustained." As no property right of Frost is invaded -- his suit must fail, however objectionable the statute may be.

Third. Frost claims that to issue a license to the Durant Company without a showing of necessity would [*533] violate the equality clause. Whether the license was issued to Frost upon a showing of necessity does not appear. The mere granting of a license to the Durant Company later on different, and perhaps easier, terms would not violate Frost's constitutional right to equality, since he has already secured his license under the statute as written. The fact that someone else similarly situated may hereafter be refused a license, and would be thereby discriminated against, is obviously not of legal

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significance here. *Southern Railway Co. v. King*, 217 U.S. 524; *Standard Stock Food Co. v. Wright*, 225 U.S. 540; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571; *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U.S. 134, 149; *Liberty Warehouse Co. v. Tobacco Growers*, 276 U.S. 71.

Fourth. Frost claims on another ground that his constitutional rights have been violated. He says that what the statute and the Supreme Court of Oklahoma call a license is in law a franchise; that a franchise is a contract; that where a constitutional question is raised this Court must determine for itself what the terms of a contract are; and that this franchise should be construed as conferring the right to the conditional immunity from competition which he claims. None of the cases cited lend support to the contention that the license here issued is a franchise.² They hold merely that subordinate political [*534] [***494] bodies, as well as a legislature, may grant franchises; and that violations of franchise rights are remediable, whoever the transgressor. Moreover, the limited immunity from competition claimed as an incident of the license was obviously terminable at any moment. Compare *Louisville Bridge Co. v. United States*, 242 U.S. 409. It was within the power of the legislature, at any time after the granting of Frost's license, to abrogate the requirement of a certificate of necessity, thus opening the business to the competition of all comers. It is difficult to see how the lesser enlargement of the possibilities of competition by a license granted under the 1925 proviso could operate as a denial of constitutional rights.

² *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 9; *California v. Pacific Railroad Co.*, 127 U.S. 1, 40-41; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 328-329; *Owensboro v. Cumberland Telephone Co.*, 230 U.S. 58, 64-66; *Boise Water Co. v. Boise City*, 230 U.S. 84, 90-91; *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, 10-11. *California v. Pacific Railroad Co.*, 127 U.S. 1, 40-41, merely describes the types of enterprises which may be made the subject of a franchise. The enterprises mentioned are all of the type which require the use of public property so that the permission of the State is required to condone what would otherwise be a trespass. Further, it is not maintained that the State is restricted to the issuance of franchises for the carrying on of such

callings.

It must also be borne in mind that a franchise to operate a public utility is not like the general right to engage in a lawful business, part of the liberty of the citizen; that it is a special privilege which does not belong to citizens generally; that the State may, in the exercise of its police power, make that a franchise or special privilege which at common law was a business open to all;³ that a special privilege is conferred by the State upon selected persons; that it is of the essence of a special privilege that the franchise may be granted or withheld at the pleasure of the State; that it may be granted to corporations only, thus excluding all individuals;⁴ and that the Federal Constitution imposes no limits upon the State's discretion in this respect.⁵ In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, the plaintiff, [*535] claiming an exclusive franchise, sought to enjoin the competition of the defendant. The Court said (p. 659), "The right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to . . . carry on the business of lighting the streets . . . without special authority from the sovereign. It is a franchise belonging to the State, and, in the exercise of the police power, the State could carry on the business itself or select one or several agents to do so." The demurrer to the bill was dismissed. In *New Orleans Water-Works Co. v. Rivers*, 115 U.S. 674, on similar [**243] facts in deciding for the plaintiff, the Court said (p. 682), "The restriction, imposed by the contract upon the use by others than plaintiff of the public streets and ways, for such purposes, is not one of which the appellee can complain. He was not thereby restrained of any freedom or liberty he had before . . ." One who would strike down a statute must show not only that he is affected by it, but that as applied to him, the statute exceeds the power of the State. This rule, acted upon as early as *Austin v. The Aldermen*, 7 Wall. 694, and definitely stated in *Supervisors v. Stanley*, 105 U.S. 305, 314, has been consistently followed since that time.

³ *Noble State Bank v. Haskell*, 219 U.S. 104, 112-113.

⁴ *Shallenberger v. First State Bank*, 219 U.S. 114; *Dillingham v. McLaughlin*, 264 U.S. 370. Compare *Assaria State Bank v. Dolley*, 219 U.S. 121; *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389, 416.

⁵ *Bank of Augusta v. Earle*, 13 Pet. 519, 595;

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People's Railroad v. Memphis Railroad, 10 Wall. 38, 51; *California v. Pacific Railroad Co.*, 127 U.S. 1, 40-41; *Denver v. New York Trust Co.*, 229 U.S. 123, 141-142.

Fifth. Frost's claim that the Act of 1925 discriminates unjustifiably is not sound. The claim rests wholly on the fact that individuals and ordinary corporations must show inadequacy of existing facilities, while co-operatives organized under the Act of 1919 may secure a license without making such a showing, if the application is supported by a petition of one hundred persons who are citizens and taxpayers in the community. It is settled that to provide specifically for peculiar needs of farmers or producers is a reasonable basis of classification, *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89; *Liberty Warehouse Co. v. Tobacco Growers*, 276 U.S. 71. And it is conceded that the classification made by the Act of [*536] 1925 would be reasonable if it had been limited to co-operatives organized under Chapter 22 of the Laws of 1917. Thus the contention that the classification is arbitrary is directed only to co-operatives organized under the law of 1919. It rests upon two erroneous assumptions: (1) That co-operatives organized [***495] under the law of 1919 are substantially unlike those organized under Chapter 22 of the Laws of 1917; and (2) that there are between co-operative corporations under the law of 1919 and commercial corporations no substantial differences having reasonable relation to the subject dealt with by the gin legislation.

The assertion is that co-operatives organized under the law of 1919, being stock companies, do business with the general public for the sole purpose of making money, as do individual or other corporate competitors; whereas cooperatives organized under the law of 1917 are "for mutual help, without capital stock, not conducted for profit, and restricted to the business of their own members." The fact is that these two types of co-operative corporations -- the stock and the nonstock -- differ from one another only in a few details, which are without significance in this connection; that both are instrumentalities commonly employed to promote and effect co-operation among farmers; that the two serve the same purpose; and that both differ vitally from commercial corporations. The farmers seek through both to secure a more efficient system of production and distribution and a more equitable allocation of benefits. But this is not their only purpose. Besides promoting the financial advantage of the participating farmers, they seek

through co-operation to socialize their interests -- to require an equitable assumption of responsibilities while assuring an equitable distribution of benefits. Their aim is economic democracy on lines of liberty, equality and fraternity. To accomplish these objectives, both types of co-operative corporations provide for excluding capitalist control. As means to this [*537] end, both provide for restriction of voting privileges, for curtailment of return on capital and for distribution of gains or savings through patronage dividends or equivalent devices.

In order to ensure economic democracy, the Oklahoma Act of 1919 prevents any person from becoming a shareholder without the consent of the board of directors. It limits the amount of stock which one person may hold to \$ 500. And it limits the voting power of a shareholder to one vote. Thus, in the Durant Company, the holder of a single share of the par value of \$ 10 has as much voting power as the holder of 50 shares. The Act further discourages entrance of mere capitalists into the co-operative by provisions which permit five per cent of the profits to be set aside for educational purposes; which require ten per cent of the profits to be set aside as a reserve fund, until such fund shall equal at least fifty per cent of the capital stock; which limit the annual dividends on stock to eight per cent; and which require that the rest of the year's profits be distributed as patronage dividends to members, except so far as the directors may apportion them to non-members.

The provisions for the exclusion of capitalist control of the nonstock type of co-operative organized under the Oklahoma Act of 1917 do not differ materially in character from those in the 1919 Act. The nonstock co-operative also may reject applicants for membership; and no member may have more than one vote. This type of co-operative is called a non-profit organization; but the term is merely one of art, indicating the manner in which the financial advantage is distributed. This type also is organized and conducted for the financial benefit of its members and requires capital with which to conduct its business. In the stock type the capital is obtained by the issue of capital stock, and members are not subjected to personal liability for the corporation's business obligations. [*538] In the nonstock type the capital is obtained partly from membership fees, partly through dues or assessments and partly through loans from members or others. And for fixed capital it substitutes in part personal liability of members [**244] for the corporation's obligations. ⁶ In the stock type there are *eo*

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nomine dividends on capital and patronage dividends. In the nonstock type the financial benefit is distributed by way of interest on loans and refunds of fees, dues and assessments. And all funds acquired through the co-operative's operations, which are in excess of the amount desirable for a "working fund," are to be distributed as refunds of fees, dues and assessments. Both acts allow business to be done for non-members; and though the nonstock association may, it is not required, to impose obligations on the non-member for the liability of the association. Thus, for the purposes here relevant, there is [***496] no essential difference between the two types of co-operatives.

6 Section 10 makes each member assume "original liability, for his per capita share of all contracts, debts, and engagements of the association existing at the time he becomes a member and created during his membership"; and "additional liability" for his pro rata share of the liability of any other member, whose liability may become uncollectible.

The Oklahoma law of 1919 follows closely in its provisions the legislation enacted earlier in other States with a view to furthering farmers' co-operation. The first emergence of any settled policy as to the means to be employed for effecting co-operation among farmers in the United States came in 1875 when, at the annual convention of the National Grange of the Patrons of Husbandry, recommendations were formally adopted endorsing "Rochdale principles"; and a form of rules for the guidance of prospective organizers was promulgated. These provided for stock companies with shares of \$ 5 each; that no member be allowed to hold more than 100 shares; that ownership [*539] of a single share shall constitute the holder a member of the association; that only 8 per cent "interest" shall be paid on the capital; that the balance of the profits shall go "either to increase the capital or business of the association, or for any educational or provident purposes authorized by the association," or be distributed as patronage dividends; and that the patronage dividends be distributed among customers, except that non-members should receive only one-half the proportion of members.⁷

7 Nourse, *The Legal Status of Agricultural Co-operation* (1927), *passim*, particularly pp. 11, 21, 35-36.

The need of laws framed specifically for

incorporating farmers' co-operatives being recognized, Massachusetts enacted in 1866 the necessary legislation by a general law which differed materially from that under which commercial organizations were formed. The statute provided for co-operatives having capital stock.⁸ Before 1900, ten other States had enacted laws of like character.⁹ After [*540] 1900 many such statutes were passed. Now, only two States lack laws making specific provision for the incorporation of farmers' co-operatives.¹⁰ Thirty-three States, at least, have enacted laws providing for the formation of co-operative associations of the stock type. All of them permit a fixed dividend on capital stock, the doing of business for non-members, and the distribution of patronage dividends.¹¹ Some of them, recognizing the need for elasticity, impose the single requirement that earnings be apportioned in part on a patronage basis, and leave all other provisions for organization and distribution of profits to the by-laws.¹²

8 Mass. St., 1866, c. 290. The type was called Rochdale because it was this type of organization which the pioneers of the present co-operation among English speaking peoples used there. This law which served as a pattern for most of the co-operative incorporation laws passed by other States prior to 1900 contained fewer of the safeguards to assure preservation of co-operative principles than does the Oklahoma Act of 1919. No limitation was placed on the quantum of stock per member or on the voting privileges; and no restriction was placed on the amount of dividends to be paid on stock, the distribution of profits being left entirely to the by-laws and to the directors, save for the requirement that a portion of the earnings go into a reserve fund.

9 Pennsylvania, Public Laws 1868, Act 62; Minnesota, Laws 1870, c. 29; Michigan, Acts 1875, No. 75, amending Act 288 of 1865 so as to include agricultural co-operatives; Connecticut, Laws 1875, c. 62; California, Laws 1878, p. 883; New Jersey, Laws 1884, p. 63; Ohio, Laws 1884, p. 54; Kansas, Laws 1887, c. 116; Wisconsin, Laws 1887, c. 126; Montana, 1895, Code (1921), §§ 6375-6385. Tennessee, Laws 1882, c. 8, fails to specify whether the co-operatives to be incorporated thereunder shall be organized with or without capital stock.

10 Delaware and Vermont. Vermont, however, has a section in her general corporation law which makes provision for co-operative associations.

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11 Arkansas, Acts 1921, p. 702; California, Laws 1878, p. 883; Colorado, Laws 1913, p. 220; Connecticut, Laws 1875, c. 62; Florida, Acts 1917, c. 7384; Georgia, Acts 1920, p. 125; Illinois, Laws 1915, p. 325; Indiana, Laws 1913, c. 164; Iowa, Code (1924) c. 389, §§ 8459-8485; Kansas, Laws 1913, c. 137; Kentucky, Laws 1918, c. 159; Maryland, Laws 1922, c. 197; Massachusetts, Laws 1920, c. 349; Michigan, Acts 1921, No. 84, c. 4; Minnesota, Mason's Stats. (1927) § 7822-7847; Missouri, Laws 1919, p. 116; Montana, Code (1921), §§ 6375-6396; Nebraska, Comp. Stats. (1922) § 642-648; New Jersey, Laws 1884, p. 63; New York, Laws 1913, c. 454; North Carolina, Laws 1915, c. 144; North Dakota, Laws 1921, c. 43; Oklahoma, Laws 1919, c. 147; Ohio, Laws 1884, p. 54; Oregon, Oregon Laws Supp. (1927), §§ 6954-6976; Pennsylvania, Public Laws, 1887, Act 365; Rhode Island, Laws 1916, c. 1400; South Carolina, Acts, 1915, No. 152; South Dakota, Laws 1913, c. 145; Tennessee, Laws 1917, c. 142; Virginia, Laws 1914, c. 329; Washington, Laws 1913, p. 50; Wisconsin, Laws 1911, c. 368.

12 See, for example, Nebraska, Laws 1911, c. 32; Indiana, Laws 1913, c. 164; Colorado, Laws 1913, p. 220; North Dakota, Laws 1915, c. 92; Florida, Acts 1917, c. 7384.

[***497] Farmers' co-operative incorporation laws of the nonstock type are of much more recent origin; and are fewer [*541] in number. ¹³ The earliest law of this character was the crude [**245] measure enacted in California in 1895. ¹⁴ Statutes of that type have been passed in about sixteen States; ¹⁵ but ten of these have also laws of the stock type. ¹⁶ The enactment of state laws for the incorporation of nonstock co-operatives and their extensive use in the co-operative marketing of commodities, are due largely to the fact that, prior to 1922, the Clayton Act, October 15, 1914, c. 323, § 6, (38 Stat. 731), limited to nonstock co-operatives the right to make a class of agreements with members which prior thereto would have been void as in restraint of [*542] trade. ¹⁷ See *Liberty Warehouse Co. v. Tobacco Growers*, 276 U.S. 71. Nearly one-half of the existing laws of the nonstock type were enacted between 1914 and 1922. ¹⁸ This limitation in the Clayton Act proved to be unwise. By the Capper-Volstead Act of February 18, 1922, c. 57, § 1, (42 Stat. 388), Congress recognizing the substantial identity of the two classes of co-operatives

extended the same right to stock co-operatives. The terms of this legislation are significant:

"That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

"First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

"Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

13 Nourse, *The Legal Status of Agricultural Co-operation* (1927), pp. 51-72.

14 Laws 1895, c. 183. That this Act did not provide satisfactorily for all types of co-operative endeavor is evidenced by the fact that prior to the passage of the Clayton Act (which offered substantial advantages to non-stock corporations) several of California's largest cooperatives did not incorporate under this or the similar act of 1909 (chap. 26), but were organized on a capital stock basis, e. g., California Fruit Growers' Exchange, California raisin growers. See Nourse, *The Legal Status of Agricultural Co-operation*, p. 64, note.

15 Nevada, Stat. 1901, c. 60; Michigan, Public Acts 1903, No. 171; Washington, Laws 1907, p. 255; Alabama, Acts 1909, No. 145, p. 168; California, Laws 1909, c. 26; Florida, Laws 1909, c. 5958; Oregon, Laws 1909, c. 190; Idaho, Laws 1913, c. 54; Colorado, Laws 1915, c. 57; New Mexico, Laws 1915, c. 64; Oklahoma, Laws 1917, c. 22; Texas, Laws 1917, c. 193; Louisiana, Acts 1918, No. 98; New York, Laws 1918, c. 655; Pennsylvania, Laws 1919, Act 238; Iowa, Laws 1921, c. 122. In only two of the States is the doing of business for non-members expressly

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prohibited. Iowa, Laws, 1921, c. 122; Texas, Laws 1917, c. 193. The rest of the statutes, though some are perhaps ambiguous in their terminology, apparently do not impose any restraint in this regard. See Nourse, *The Legal Status of Agricultural Co-operation*, p. 62.

16 Michigan; Washington; California; Florida; Oregon; Colorado; Oklahoma; Pennsylvania; Iowa; New York. For the citations of these stock type laws see note 9.

17 Nourse, *The Legal Status of Agricultural Co-operation* (1927), pp. 73-92.

18 Colorado, Laws 1915, c. 57; New Mexico, Laws 1915, c. 64; Oklahoma, Laws 1917, c. 22; Texas, Laws 1917, c. 193; Louisiana, Acts 1918, No. 98; New York, Laws 1918, c. 655; Pennsylvania, Laws 1919, Act 238; Iowa, Laws 1921, c. 122.

[*543] "And in any case to the following:

"Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

Congress recognized the identity of the two classes of co-operatives and the distinction between agricultural stock co-operative corporations and ordinary business corporations, also, by providing in the Revenue Act of 1926, c. 27, Part III, § 231 (44 Stat. 9), that exemption from the income tax was not to be denied "any such [co-operative] association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or [***498] 8 per centum per annum, whichever is greater, . . . , and if substantially all such stock is owned by producers . . . ; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve . . . Such an association may market the products of non-members in an amount the value of which does not exceed the value of the products marketed for members." This exemption was continued in the Revenue Act of 1928, c. 852, sec. 103 (45 Stat. 812).

More than two-thirds of all farmers' co-operatives in the United States are organized under the stock type laws. In 1925 there were 10,147 reporting organizations. Of these 68.7 per cent were stock associations. In leading States the percentage was larger. In Wisconsin the percentage was 80.0; in North Dakota, 87.0; in Nebraska, 91.3; and in Kansas, 92.0. Of the farmers' co-operatives

existing in Oklahoma in 1925, 87.6 per cent were stock associations.¹⁹ The great co-operative systems of England, [*544] Scotland and Canada were developed and are now operated by organizations of the stock type.²⁰ The nonstock type [**246] of co-operative is not adapted to enterprises, which like gins require large investment in plant, and hence considerable fixed capital.²¹ For this reason it was a common practice for marketing co-operatives which had been organized as nonstock co-operatives in order to comply with the requirements of the Clayton Act above described, to form a subsidiary co-operative corporation with capital stock to carry on the incidental business of warehousing or processing which requires a large investment in plant.²² And the fact that even the marketing of some products may be better served by the stock type of co-operative organizations is so widely recognized that most of the marketing acts provide that associations formed thereunder may organize either with or without capital stock.²³

19 U.S. Dept. of Agriculture, Technical Bulletin No. 40 (1928), *Agricultural Co-operative Associations*, p. 88. The figures for Oklahoma are obtained from the worksheets from which the table on page 88 was compiled.

20 See Fay, *Co-operation At Home and Abroad* (3rd ed. 1925), pp. 279-284, 356, 362-363; *Year-Book of Agricultural Co-operation in the British Empire* (1927), pp. 131-204; *First Annual Report on Co-operative Associations in Canada* (1928), pp. 65-78.

21 The average investment of a plant in Texas is about \$ 40,000. Hathcock, *Possible Services of Co-operative Cotton Gins* (1928), p. 5.

22 Nourse, *The Legal Status of Agricultural Co-operation*, p. 54, note 3.

23 Alabama, Laws 1921, No. 31, § 2; Arizona, Laws 1921, c. 156, § 2; Arkansas, Acts 1921, No. 116, § 3; California, Laws 1923, c. 103, § 653cc; Colorado, Laws 1923, c. 142, § 3; Florida, Acts 1923, c. 9300, § 3; Georgia, Acts 1921, No. 279, § 2; Idaho, Laws 1921, c. 124, § 3; Illinois, Laws 1923, p. 286, § 3; Indiana, Laws 1925, c. 20, § 3; Kansas, Laws 1921, c. 148, § 3; Louisiana, Acts 1922, No. 57, § 3; Maine, Laws 1923, c. 88, § 3; Minnesota, Laws 1923, c. 264, § 3; Mississippi, Laws 1922, c. 179, § 3; Montana, Laws 1921, c. 233, § 3; New Hampshire, Laws 1925, c. 33, § 2; New Jersey, Laws 1924, c. 12, § 2; New Mexico, Laws 1925, c. 99, § 3; New York, Laws 1924, c.

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616, § 3; North Carolina, Laws 1921, c. 87, § 3; North Dakota, Laws 1921, c. 44, § 3; Ohio, Laws 1923, p. 91, § 2; South Carolina, Acts 1921, No. 203, § 3; South Dakota, Laws 1923, c. 15, § 2; Tennessee, Laws 1923, c. 100, § 3; Texas, Laws 1921, c. 22, § 3; Utah, Laws 1923, c. 6, § 3; Virginia, Laws 1922, c. 48, § 3; Washington, Laws 1921, c. 115, § 2; West Virginia, Acts 1923, c. 53, § 3; Wyoming, Laws 1923, c. 83, § 3.

[*545] Experience has demonstrated, also, that doing business for non-members is usually deemed essential to the success of a co-operative.²⁴ More than five-sixths of all the farmers' co-operative associations in the United States do business for non-members. In 1925, 86.3 per cent of the reporting organizations did so. In leading States the percentage was even larger. In Wisconsin the percentage was 89.0; in Missouri 93.2; in Minnesota [***499] 94.1; in Nebraska 95.8; in Kansas 96.5; in North Dakota 97.0. In Oklahoma 92 per cent of all co-operatives did business for non-members.²⁵ Of the cotton co-operatives in the United States 93.9 per cent did business for non-members. In Texas, where co-operative ginning has received successful trial,²⁶ all the cotton co-operatives perform service for non-members. [*546] In Oklahoma, also, all of the cotton co-operatives reporting do business for non-members.²⁷

24 It is to be noted that statutes like the Bingham Cooperative Marketing Act (Acts of Kentucky, 1922, c. 1) which provide solely for the formation of marketing associations restrict the service of the association (with the exception of storage) to the products of members. But such statutes do not purport to repeal earlier laws authorizing agricultural cooperation for other purposes which allow business for non-members. That the legislatures recognize that the problems of co-operative marketing and of other types of agricultural cooperation require different treatment is demonstrated by the retention of general laws providing for agricultural cooperation after passage of the standard marketing act. In Oklahoma, for example, in the same year that the Act of 1917 was amended so as to embody some of the features of the Bingham Act, the 1919 Act was amended in unimportant particulars, thus receiving express legislative recognition of its continued usefulness. Laws of Oklahoma, 1923, c. 167, 181.

25 U.S. Dept. of Agriculture, Technical Bulletin No. 40 (1928), Agricultural Co-operative Associations, p. 88. The figures for Oklahoma are obtained from the worksheets from which the table on page 88 was compiled.

26 Hathcock, Development of Co-operative Gins in Northwest Texas, p. 4.

27 U.S. Dept. of Agriculture, Technical Bulletin No. 40 (1928), Agricultural Co-operative Associations, p. 89. The figures for Oklahoma are obtained from the worksheets from which the table on page 89 was compiled.

That no one plan of organization is to be labeled as truly co-operative to the exclusion of others was recognized by Congress in connection with co-operative banks and building and loan associations. See *United States v. Cambridge Loan & Building Company*, 278 U.S. 55. With the expansion of agricultural cooperation it has been recognized repeatedly. Congress gave its sanction to the stock type of co-operative by the Capper-Volstead Act and also by specifically exempting stock as well as nonstock co-operatives from income taxes. State legislatures recognized the fundamental similarity of the two types of cooperation by unifying their laws so as to have a single statute under which either type of co-operative might organize.²⁸ And experts in the Department of Agriculture, charged with disseminating information to farmers and legislatures, have warned against any crystallization of the co-operative plan so as to exclude any type of cooperation.²⁹

28 See e. g., Maryland, Laws 1922, c. 197; New York, Laws 1926, c. 231; Oregon, Supp. 1927, §§ 6954-6976. The New York Law is known as the Co-operatives Corporations Law, and consolidates all prior acts for the formation of co-operative associations. Thus, marketing co-operatives, with or without capital stock, and other agricultural co-operatives, with or without capital stock, and with or without restrictions as to business for non-members, are all organized under the same act.

29 Chris L. Christensen, chief of the Department of Agriculture's Division of Co-operative Marketing, in Department Circular No. 403 (1926), says (p. 2), ". . . the various forms which co-operative organizations have taken demonstrate the adaptability and extensive usefulness of this form of business organization."

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And at page 3, "A discussion of organization types is of value only when the conditions that make certain types necessary or valuable are taken into consideration. Attempts to build co-operative associations according to any special plan have met with failure in the past, and it is possible that in the future we shall see more rather than fewer types of co-operative organizations."

[*547] That in Oklahoma a law authorizing incorporation on the stock plan was essential to the development of cooperation among farmers [**247] has been demonstrated by the history of the movement in that State. Prior to 1917 there was no statute which specifically authorized the incorporation of co-operatives. In that year the nonstock law above referred to was enacted.³⁰ Two years passed and only three co-operatives availed themselves of the provisions of that Act. Then persons familiar with the farmers' problems in Oklahoma secured the passage of the law of 1919, providing for the incorporation of co-operatives with capital stock.³¹ Within the next five years [*548] 202 co-operatives were formed under it; and since [***500] then 139 more. In the twelve years since 1917 only 60 nonstock co-operatives have been organized; most of them since 1923, when through an amendatory statute, this type was made to offer special advantages for co-operative marketing.³² Thus over 82 per cent of all co-operatives in Oklahoma are organized under the 1919 stock act. One hundred and one Oklahoma co-operative cotton gins have been organized under the 1919 stock law; not a single one under the 1917 nonstock law.³³ To deny the co-operative character of the 1919 Act is to deny the co-operative character not only of the gins in Oklahoma which farmers have organized and operated for their mutual benefit, but also that of most other co-operatives within the State, which have been organized under its statutes in harmony with legislation of Congress and pursuant to instructions from the United States Department of Agriculture. A denial of co-operative character to the stock co-operatives is inconsistent also with the history of the movement in other States and countries. For the stock type of co-operative is not only the older form, but is the type more widely used among English speaking peoples.

30 That the draftsmen of this law were influenced by the restrictions of the Clayton Act is evidenced by the fact that some of the language of § 2 of the 1917 Act is taken *verbatim* from § 6 of

the Clayton Act.

31 The Oklahoma State Market Commission, Carl Williams, editor of the Oklahoma Farmer-Stockman, and various farm organizations lent their assistance to the legislature in drafting this law. See Second Biennial Report of Oklahoma State Market Commission (1919-1920), p. 5; Carl Williams, Letter to Division of Co-operative Marketing, Department of Agriculture, dated January 21, 1929. The Oklahoma State Market Commission says of the 1919 Act (Marketing Bulletin, April 20, 1920, p. 5), "In organizing these new corporations, the farmers had a real basis on which to organize . . . The law was written by men who understood the farmers condition and had some practical knowledge of real co-operative marketing on a business basis. The laws of Minnesota, Nebraska and other states were studied. Conditions under which co-operative associations had failed in the northern states and those which had succeeded were taken into careful consideration. The best points from the laws of the several states, which would be suitable for Oklahoma conditions were incorporated and the features of these laws which were not suitable were eliminated."

32 Laws 1923, c. 181.

33 All figures here given are obtained from the files of the Department of Agriculture, Division of Co-operative Marketing.

There remains to be considered other circumstances leading to the passage of the statute here challenged. As was said in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Here that presumption is reinforced by facts which have been called to our attention. That evils exist in cotton ginning which are subject to drastic legislative regulation [*549] has recently been recognized by this Court. *Crescent Oil Co. v. Mississippi*, 257 U.S. 129. The specific evils existing in Oklahoma which the statute here assailed was enacted to correct was the charging of extortionate prices to the farmer for inferior ginning service and the control secured of the cotton seed.³⁴ These conditions are partly attributable to the fact that a large percentage of the ordinary commercial gins in Oklahoma are controlled by cotton seed oil mills; which

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make their service as ginners incidental to that as crushers of seed; and are thereby enabled to secure the seed at less than its value.³⁵ That [*550] such control of gins may lead [**248] to [***501] excessive prices for the ginning service was recognized in the *Crescent Oil* case. The fact that, despite the regulatory provisions of the Public Service law, a public utility is permitted to earn huge profits indicates that something more than rate regulation may be needed for the protection of farmers. Certainly, it cannot be said that the legislature could not reasonably believe that co-operative ginning might afford a corrective for rates believed to be extortionate.

34 Two of the leading farm newspapers in Oklahoma are the Oklahoma Cotton Grower and the Oklahoma Farmer-Stockman, the latter edited by Carl Williams. In an editorial on February 10, 1926, the Cotton Grower urges farmers to form co-operative gins as the only way to obtain economy in ginning service. On March 1, 1927, the Farmer-Stockman contains an editorial urging, as a partial solution of the ginning problem, the placing of members on the Corporation Commission who are interested in the farmer as well as in the commercial gin. On May 15, 1927, the same paper notes the great increase in co-operative ginning in the State, and says that it is due to the extortionate prices charged by private ginners. On August 15, 1927, the Farmer-Stockman speaks of the meeting of the Corporation Commission to fix rates for ginning as the "annual farce." It is stated that the meeting is called a farce because the rate is always set high enough so as to allow grossly excessive returns to the ginners at the expense of the farmers. The editor states that the only solution for the farmer is cooperation in ginning. On September 15, 1927, the same paper states that some privately owned gins have averaged a profit of over 100 per cent on invested capital over a period of three years. On October 15, 1927, the Farmer-Stockman notes that poor ginning can cost the farmer at least four cents on each pound of cotton.

35 The District Court said (*26 F.2d 508, 519-520*): "The ordinary commercial ginner within the State of Oklahoma may gin either as an individual, a copartnership, or a corporation; no statute, rule, or provision of law restricts him in any wise in the enjoyment of the full proceeds of

the earnings under the rate fixed. He usually is engaged, not only in ginning cotton, but also in the purchase of seed cotton, cotton seed after he has ginned the cotton, and frequently in the purchase of the cotton after it is ginned for profit. A ginner has a greater facility to purchase the seed than anyone else. As he gins the cotton, he catches the seed as they fall from the stand, and has the immediate means for storage and housing same. The patron, if he does not elect to sell to the ginner, must receive them and haul them away, when as a rule he has no place for storage for accumulating as much as a carload, so as to sell them to advantage. A great per cent. of the gins so operated are owned and controlled by cotton seed crushers, operating cotton seed oil mills within the state of Oklahoma; such operation of gins not being entirely for the purpose of rendering a public service, but also for collecting cotton seed at a central point. Their gin business as ginners is incidental to that as crushers of seed, to the end that they may be enabled to purchase the seed under favorable conditions. See *Choctaw Cotton Oil Co. v. Corporation Commission*, 121 Okl. 51, 247 P. 390; *Planters' Cotton & Ginning Co. v. West*, 82 Okla. 145, 198 P. 855."

Mr. JUSTICE HOLMES and Mr. JUSTICE STONE join in this opinion.

Dissenting opinion of Mr. JUSTICE STONE.

I agree with what Mr. JUSTICE BRANDEIS has said. But there is one aspect of the decision now rendered to which I would especially direct attention. To me it would seem that there are such differences in organization, management, financial structure and practical operation between the business conducted by appellant, a single individual, and that conducted by a corporation organized [*551] as is appellee, as to justify the classification and discrimination made by the statute. But, assuming there were no such differences, I fail to perceive any constitutional ground on which appellant can complain of a discrimination from which he has not suffered. His real and only complaint is not that he has been discriminated against either in the grant or enjoyment of his license, but that in the exercise of his non-exclusive privilege of carrying on the cotton ginning business he will suffer from competition by the corporate

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appellee which, under local law, may secure a like privilege with possibly less difficulty than did appellant.

The proviso of the 1925 Act is held unconstitutional solely on the ground that "an onerous restriction upon the right to engage in a public business" was "imposed by the statute upon appellant" and others similarly situated, which was not imposed on appellee. Appellant, if he had been denied a license, or if his exercise of the privilege, when granted, were more limited by the statute than that of appellee, might invoke the *equal protection clause*. But he now requires no such protection for he has received his license and is in full and unrestricted enjoyment of the same privilege as that which the appellee seeks. This is not less the case even if the statute be assumed to have made it more difficult for him than for appellee to secure a license.

Whether the grant appellant has received be called a franchise or a license would seem to be unimportant, for in any case it is not an exclusive privilege. Under the Constitution and laws of Oklahoma the legislature has power to amend or repeal the franchise, *Constitution of Oklahoma, Art. IX, § 47*; *Choctaw Cotton Oil Co. v. Corporation Comm.*, 121 Okla. 51, and injury suffered through an indefinite increase in the number of appellant's competitors by non-discriminatory legislation, would clearly be *damnum absque injuria*. A similar increase [*552] under the present alleged discriminatory statute would seem likewise to afford appellant no legal cause for complaint, for, a license not having been withheld from him, his position is precisely the same as though the statute authorized the grant of a license to him and to appellee on equal terms. He is suffering, not from any application of the discriminatory feature of the statute, with which alone the Constitution is concerned, see *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576; *Arkadelphia Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 149, but merely from the increase in the number of his competitors, an injury which would similarly have resulted from a non-discriminatory statute granting the privilege to all on terms more lenient than those formerly accorded appellant. Of such a statute, appellant could not complain and I can find no more basis for saying that constitutional rights are impaired where

the discrimination which the statute authorizes has no effect, than where the statute itself does not discriminate.

Nor would appellant seem to be placed in any better position to challenge the constitutionality of the statute by recourse to the rule that the possessor of a non-exclusive franchise may enjoin competition unauthorized by the state. Appellee's business is not unauthorized. It is carried on under the sanction of a statute to which appellant himself can offer no constitutional objection, for even [***502] unconstitutional statutes may not be treated as though they had never been written. They are not void for all purposes and as to all persons. See *Hatch v. Reardon*, 204 U.S. 152, 160. For appellant to say that appellee's permit is void, and that its business may be enjoined, because conceivably someone else may challenge the constitutionality of the Act, would seem to be a departure from the salutary rule consistently applied that only those [**249] who suffer from the unconstitutional application of a statute may challenge its validity. See *Roberts & Schaefer Co. v. Emmerson*, 271 U.S. 50, 55; [*553] *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 544; *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 410; *Cusack Co. v. Chicago*, 242 U.S. 526, 530; *Standard Stock Food Co. v. Wright*, 225 U.S. 540, 550; *Mallinckrodt Chemical Works v. Missouri*, 238 U.S. 41, 54; *Darnell v. Indiana*, 226 U.S. 390, 398.

It seems to me that a fallacy, productive of unfortunate consequences, lurks in the suggestion that one may maintain a suit to enjoin competition of a business solely because hereafter someone else might suffer from an unconstitutional discrimination and enjoin it. But, more than that, even if the license had been withheld from appellant because he could not support the burden placed upon him by the statute, I should have thought it doubtful whether he would have been entitled to have had appellee's permit cancelled -- the relief now granted. He certainly could not have asked more than the very privilege which he now enjoys.

Mr. JUSTICE HOLMES and Mr. JUSTICE BRANDEIS concur in this opinion.

APPENDIX 24



**GRAHAM, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF
ARIZONA v. RICHARDSON ET AL.**

No. 609

SUPREME COURT OF THE UNITED STATES

403 U.S. 365; 91 S. Ct. 1848; 29 L. Ed. 2d 534; 1971 U.S. LEXIS 28

March 22, 1971, Argued

June 14, 1971, Decided *

* Together with No. 727, Sailer et al. v. Leger et al., on appeal from the United States District Court for the Eastern District of Pennsylvania.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

DISPOSITION: 313 *F.Supp.* 34 and 321 *F.Supp.* 250, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant states sought review of judgments from the United States District Court for the District of Arizona and the United States District Court for the Eastern District of Pennsylvania that the *Equal Protection Clause* of *U.S. Const. amend. XIV* prevented a state from conditioning welfare benefits either upon possession of United States citizenship or, if an alien, upon a beneficiary residing in this country for a specified number of years.

OVERVIEW: Appellants, the States of Arizona and Pennsylvania, had statutes which conditioned welfare

benefits either upon the beneficiary's possession of United States citizenship or, if the beneficiary was an alien, upon his having resided in this country for a specified number of years. Appellees were aliens denied benefits under these statutes. Appellees instituted actions against the states. The district courts found that the statutes were violative of the *Equal Protection Clause* of *U.S. Const. amend. XIV*. Appellants sought review. The Court found that classifications based on alien status were inherently suspect and subject to close judicial scrutiny. A state statute that denied welfare benefits to resident aliens, and one that denied them to aliens who had not resided in the United States for a specified number of years, violated the *Equal Protection Clause*. Appellants' desires to preserve limited welfare benefits for its own citizens were inadequate to justify appellants making noncitizens ineligible for public assistance and restricting benefits to citizens and longtime resident aliens.

OUTCOME: The Court affirmed the district courts' judgments. The *Equal Protection Clause* of the

403 U.S. 365, *; 91 S. Ct. 1848, **;
29 L. Ed. 2d 534, ***; 1971 U.S. LEXIS 28

Fourteenth Amendment prevented a state from conditioning welfare benefits on possession of United States citizenship or, if an alien, upon a beneficiary residing in the U.S. for a certain number of years.

LexisNexis(R) Headnotes

Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > General Overview

[HN1] See *Ariz. Rev. Stat. Ann.* § 46-233.

Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > General Overview

[HN2] See *Pa. Stat. Ann.*, tit. 62, § 432 (1968).

Constitutional Law > Equal Protection > Scope of Protection

Immigration Law > Duties & Rights of Aliens > Discrimination

Immigration Law > Duties & Rights of Aliens > Public Benefits

[HN3] See *U.S. Const. amend. XIV*.

Constitutional Law > Equal Protection > Scope of Protection

Immigration Law > Constitutional Foundations > Equal Protection

Immigration Law > Duties & Rights of Aliens > General Overview

[HN4] The term "person" in the context of *U.S. Const. amend. XIV* encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the state in which they reside.

Constitutional Law > Equal Protection > Scope of Protection

Immigration Law > Constitutional Foundations > Equal Protection

Immigration Law > Duties & Rights of Aliens > Public Benefits

[HN5] A State retains broad discretion to classify as long as its classification has a reasonable basis. This is so in

the area of economics and social welfare. But the United States Supreme Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a discrete and insular minority for whom such heightened judicial solicitude is appropriate. Accordingly, the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.

Constitutional Law > Equal Protection > Scope of Protection

[HN6] The United States Supreme Court has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."

Constitutional Law > Equal Protection > Scope of Protection

Immigration Law > Constitutional Foundations > Equal Protection

[HN7] A State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. The saving of welfare costs cannot justify an otherwise invidious classification.

Immigration Law > Naturalization > Administrative Proceedings > General Overview

Immigration Law > Naturalization > Eligibility > General Overview

[HN8] The national government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > Loitering, Panhandling & Vagrancy > General Overview

Criminal Law & Procedure > Sentencing > Deportation & Removal

Real Property Law > Zoning & Land Use >

403 U.S. 365, *; 91 S. Ct. 1848, **;
29 L. Ed. 2d 534, ***; 1971 U.S. LEXIS 28

Comprehensive Plans

[HN9] Congress has provided, as part of a comprehensive plan for the regulation of immigration and naturalization, that aliens who are paupers, professional beggars, or vagrants or aliens who are likely at any time to become public charges shall be excluded from admission into the United States, 8 U.S.C.S. §§ 1182(a)(8) and 1182(a)(15), and that any alien lawfully admitted shall be deported who has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry. 8 U.S.C.S. § 1251(a)(8). Admission of aliens likely to become public charges may be conditioned upon the posting of a bond or cash deposit. 8 U.S.C.S. § 1183. But Congress has not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States.

Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Protected Parties

Constitutional Law > Equal Protection > Full & Equal Benefit

Transportation Law > Right to Travel

[HN10] All persons within the jurisdiction of the United States shall have the same right in every state and territory to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. 42 U.S.C.S. § 1981. The protection of this statute has been held to extend to aliens as well as to citizens. Moreover, the United States Supreme Court has made it clear that, whatever may be the scope of the constitutional right of interstate travel, aliens lawfully within this country have a right to enter and abide in any State in the Union on an equality of legal privileges with all citizens under non-discriminatory laws.

Civil Procedure > Federal & State Interrelationships > Federal Common Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial Governments > Relations With Governments

[HN11] Where the federal government, in the exercise of its superior authority in a field, has enacted a complete scheme of regulation states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Civil Rights Law > Contractual Relations & Housing > Fair Housing Rights > General Overview

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial Governments > Relations With Governments

[HN12] The States can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.

Constitutional Law > Equal Protection > Scope of Protection

Immigration Law > Duties & Rights of Aliens > Public Benefits

[HN13] Lawfully admitted resident aliens who become public charges for causes arising after their entry are not subject to deportation, and that as long as they are here they are entitled to the full and equal benefit of all state laws for the security of persons and property.

Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > General Overview

[HN14] See 42 U.S.C.S. § 1352(b).

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview

Governments > State & Territorial Governments > Legislatures

[HN15] Statutes should be construed whenever possible so as to uphold their constitutionality.

SUMMARY:

These cases presented the question whether the *equal protection clause of the Fourteenth Amendment* prevents a state from conditioning welfare benefits either upon the beneficiary's possession of United States citizenship, or if the beneficiary is an alien, upon his having resided in the United States for a specified number of years. In No. 609, a lawfully admitted resident alien, who had resided

403 U.S. 365, *; 91 S. Ct. 1848, **;
29 L. Ed. 2d 534, ***; 1971 U.S. LEXIS 28

continuously in Arizona since 1956 and had become permanently and totally disabled, applied for welfare benefits under the state's federally assisted program, and met all the eligibility requirements, except that she had not, when she first applied for benefits in 1969, resided in the United States for a total of 15 years. She was denied relief solely because of an Arizona statute which conditioned eligibility either on being a United States citizen or on residing in the United States for a total of 15 years. In her class action in the United States District Court for the District of Arizona, a three-judge District Court upheld her motion for summary judgment on the ground that the state statute violated the *equal protection clause of the Fourteenth Amendment*. (313 F Supp 34.) In No. 727, the lawfully admitted aliens had resided and worked in Pennsylvania, but had been forced by illness to give up their employment. Thereafter the resident aliens, neither of whom was eligible for relief under federal programs, applied for but were denied general assistance under a Pennsylvania statute which limited general assistance to persons who qualified under the federal programs or to "those other needy persons who are citizens of the United States." In the aliens' class action in the United States District Court for the Eastern District of Pennsylvania, a three-judge District Court ruled that the statute violated the *equal protection clause of the Fourteenth Amendment* and enjoined its further enforcement (321 F Supp 250).

On appeal, the United States Supreme Court affirmed both judgments. In an opinion by Blackmun, J., it was held (1) expressing the view of eight members of the court, that both state statutes, which denied welfare benefits to resident aliens or to aliens who had not resided in the United States for a given number of years, were unconstitutional under the *equal protection clause of the Fourteenth Amendment*, which encompassed aliens as well as citizens residing in a state, (2) expressing the unanimous view of the court, that since aliens lawfully within the United States had a right to enter and abide in any state on an equality of legal privileges with all citizens, both state statutes, which would make indigent and disabled aliens unable to live where they could not obtain necessary public assistance, were also unconstitutional as interfering with overriding national policies in the areas of immigration and naturalization which had been constitutionally entrusted to the Federal Government, and (3) expressing the unanimous view of the court, that 1402(b) of the Social Security Act of 1935, as amended, providing for the Secretary of Health,

Education, and Welfare's approval of any state plan for the distribution of funds under federally assisted disability welfare programs, except those plans which imposed citizenship requirements which would exclude any citizen of the United States, did not authorize Arizona to deny general assistance, merely because of their alienage, to resident aliens who had not resided within the United States for a total of 15 years.

Harlan, J., joined in holdings (2) and (3) above, and in the judgment of the court.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §364

CONSTITUTIONAL LAW §524

meaning of person -- due process and equal protection -- inclusion of aliens --

Headnote:[1]

The term "person," in the context of the *Fourteenth Amendment*, which provides, "[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the state in which they reside.

[***LEdHN2]

CONSTITUTIONAL LAW §319

CONSTITUTIONAL LAW §348.5

equal protection -- reasonable classifications --

Headnote:[2]

Under traditional equal protection principles, a state retains broad discretion to classify as long as its classifications have a reasonable basis, and this principle is applicable in the areas of economics and social welfare.

[***LEdHN3]

ALIENS §1

CIVIL RIGHTS §1

CONSTITUTIONAL LAW §364

classifications based on alienage, nationality, or race

--

Headnote:[3]

Classifications based on alienage, nationality, or race are inherently suspect and subject to close judicial scrutiny; and aliens as a class are a prime example of a minority for whom heightened judicial solicitude is appropriate.

[***LEdHN4]

CONSTITUTIONAL LAW §364

special public interest -- welfare programs excluding noncitizens --

Headnote:[4]

Regardless of the contemporary vitality, in other contexts, of the "special public interest" doctrine, under which a state seeks to justify favoring its own citizens over aliens, nevertheless in the context of social welfare, a state's desire to preserve limited welfare benefits for its own citizens is inadequate to justify making noncitizens ineligible for public assistance or restricting benefits to citizens and longtime resident aliens.

[***LEdHN5]

CONSTITUTIONAL LAW §345

CONSTITUTIONAL LAW §348.5

limiting state expenditures -- discrimination --

Headnote:[5]

Although a state may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program, it may not accomplish such a purpose by invidious distinctions, in violation of the *equal protection clause of the Fourteenth Amendment*, between classes of its citizens; and the saving of welfare costs will not justify an otherwise invidious classification.

[***LEdHN6]

CONSTITUTIONAL LAW §364

equal protection -- classification excluding aliens --

Headnote:[6]

Since an alien as well as a citizen is a "person" in the context of the *equal protection clause of the Fourteenth Amendment*, a state's concern for fiscal integrity is not a compelling justification for denying public assistance to resident aliens or restricting benefits to citizens and longtime alien residents.

[***LEdHN7]

CONSTITUTIONAL LAW §364

classification based on alienage --

Headnote:[7]

State welfare statute classifications based on alienage, being inherently suspect, are subject to strict judicial scrutiny, whether or not a fundamental right is impaired.

[***LEdHN8]

CONSTITUTIONAL LAW §364

class discrimination -- aliens --

Headnote:[8]

A state may not justify discrimination against a class consisting of aliens on the basis of the state's need to limit expenses, for aliens, like citizens, pay taxes, may be called into the Armed Forces, may live within a state for many years, and may work in the state and contribute to its economic growth.

[***LEdHN9]

CONSTITUTIONAL LAW §364

welfare benefits -- aliens -- equal protection clause --

Headnote:[9]

State statutes that deny welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years violate the *equal protection clause of the Fourteenth Amendment*.

[***LEdHN10]

CONSTITUTIONAL LAW §101

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §364

right of interstate travel -- aliens --

Headnote:[10]

Whatever may be the scope of the constitutional right of interstate travel, aliens lawfully within the United States have a right to enter and abide in any state on an equality of legal privileges with all citizens under nondiscriminatory laws.

[***LEdHN11]

ALIENS §24

ALIENS §48

CONSTITUTIONAL LAW §364

STATES §45

denial of welfare benefits -- exclusive federal concern --

Headnote:[11]

State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage are invalid as conflicting with overriding national policies, including the right of an alien lawfully within the country to enter and abide in any state on an equality of legal privileges with all citizens under nondiscriminatory laws, in areas--immigration and naturalization--which have been constitutionally entrusted to the Federal Government.

[***LEdHN12]

ALIENS §24

STATES §45

alien's right to welfare benefits -- state regulation --

Headnote:[12]

State alien residency requirements that either deny

welfare benefits to noncitizens or condition them on longtime residency are constitutionally impermissible since such laws encroach upon exclusive federal power and are inconsistent with federal policy relating to entrance and abode of aliens.

[***LEdHN13]

ALIENS §23

ALIENS §48

CONSTITUTIONAL LAW §364

UNITED STATES §14

power to admit aliens -- equal protection -- congressional limitations --

Headnote:[13]

Although the Federal Government has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual states to violate the *equal protection clause of the Fourteenth Amendment*.

[***LEdHN14]

STATUTES §106

interpretation -- constitutionality --

Headnote:[14]

Statutes should be construed whenever possible so as to uphold their constitutionality.

[***LEdHN15]

SOCIAL SECURITY AND UNEMPLOYMENT
COMPENSATION §3

approval of state plans -- exclusion of aliens from benefits --

Headnote:[15]

Section 1402(b) of the Social Security Act of 1935, as amended (*42 USC 1352(b)*), which provides that the Secretary of Health, Education, and Welfare shall

403 U.S. 365, *; 91 S. Ct. 1848, **;
29 L. Ed. 2d 534, ***; 1971 U.S. LEXIS 28

approve any state plan for the distribution of funds under federally assisted disability welfare programs except, among others, plans which impose citizenship requirements which exclude any citizen of the United States, does not authorize a state statutory provision denying general disability assistance to resident aliens who have not resided within the United States for a total of at least 15 years.

SYLLABUS

State statutes, like the Arizona and Pennsylvania statutes here involved, that deny welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years are violative of the *Equal Protection Clause* and encroach upon the exclusive federal power over the entrance and residence of aliens; and there is no authorization for Arizona's 15-year durational residency requirement in § 1402 (b) of the Social Security Act. Pp. 370-383.

COUNSEL: Michael S. Flam, Assistant Attorney General of Arizona, argued the cause for appellant in No. 609. With him on the briefs were Gary K. Nelson, Attorney General, and James B. Feeley, Andrew W. Bettwy, Roger M. Horne, and Peter Sownie, Assistant Attorneys General. Joseph P. Work, Assistant Attorney General of Pennsylvania, argued the cause for appellants in No. 727. With him on the brief were Fred Speaker, Attorney General, Barry A. Roth, Assistant Deputy Attorney General, and Edward Friedman.

Anthony B. Ching argued the cause and filed a brief for appellees in No. 609. Jonathan M. Stein argued the cause for appellees in No. 727, pro hac vice. With him on the brief were Harvey N. Schmidt and Jonathan Weiss.

Mr. Weiss filed a brief for the Legal Services for the Elderly Poor Project of the Center on Social Welfare Policy and Law as amicus curiae urging affirmance in No. 609. Robert A. Sedler and Melvin L. Wulf filed a brief for the American Civil Liberties Union as amicus curiae urging affirmance in both cases. Briefs of amici curiae urging affirmance in No. 727 were filed by Edith Lowenstein for Migration and Refugee Services, U.S. Catholic Conference, Inc., et al., and by Jack Wasserman and Esther M. Kaufman for the Association of Immigration and Nationality Lawyers.

JUDGES: Blackmun, J., delivered the opinion of the Court, in which Burger, C. J., and Black, Douglas,

Brennan, Stewart, White, and Marshall, JJ., joined. Harlan, J., filed a statement joining in the judgment and in Parts III and IV of the Court's opinion, post, p. 383.

OPINION BY: BLACKMUN

OPINION

[*366] [***538] [**1849] MR. JUSTICE BLACKMUN delivered the opinion of the Court.

These are welfare cases. They provide yet another aspect of the widening litigation in this area.¹ The issue here is whether the *Equal Protection Clause of the Fourteenth Amendment* prevents a State from conditioning welfare benefits either (a) upon the beneficiary's possession of United States citizenship, or (b) if the beneficiary is an alien, upon his having resided in this country for a specified number of years. The facts are not in dispute.

¹ See, for example, *King v. Smith*, 392 U.S. 309 (1968); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Wyman v. James*, 400 U.S. 309 (1971).

I

No. 609. This case, from Arizona, concerns the State's participation in federal categorical assistance programs. These programs originate with the Social Security Act [*367] of 1935, 49 Stat. 620, as amended, 42 U. S. C., c. 7. They are supported in part by federal grants-in-aid and are administered by the States under federal guidelines. Arizona Rev. Stat. Ann., Tit. 46, Art. 2, as amended, provides for assistance to persons permanently and totally disabled (APTD). See 42 U. S. C. §§ 1351-1355. Arizona Rev. [***539] Stat. Ann. § 46-233 (Supp. 1970-1971), as amended in 1962, reads:

[HN1] "A. No person shall be entitled to general assistance who does not meet and maintain the following requirements:

"1. Is a citizen of the United States, or has resided in the United States a total of fifteen years. . . ."

A like eligibility provision conditioned upon citizenship or durational residence appears in § 46-252 (2), providing old-age assistance, and in § 46-272 (4),

403 U.S. 365, *367; 91 S. Ct. 1848, **1849;
29 L. Ed. 2d 534, ***539; 1971 U.S. LEXIS 28

providing assistance to the needy blind. See 42 U. S. C. §§ 1201-1206, 1381-1385.

Appellee Carmen Richardson, at the institution of this suit in July 1969, was 64 years of age. She is a lawfully admitted [*1850] resident alien. She emigrated from Mexico in 1956 and since then has resided continuously in Arizona. She became permanently and totally disabled. She also met all other requirements for eligibility for APTD benefits except the 15-year residency specified for aliens by § 46-233 (A)(1). She applied for benefits but was denied relief solely because of the residency provision.

Mrs. Richardson instituted her class action ² in the District of Arizona against the Commissioner of the State's Department of Public Welfare seeking declaratory relief, an injunction against the enforcement of §§ 46-233 (A)(1), [*368] 46-252 (2), and 46-272 (4), and the award of amounts allegedly due. She claimed that Arizona's alien residency requirements violate the *Equal Protection Clause* and the constitutional right to travel; that they conflict with the Social Security Act and are thus overborne by the *Supremacy Clause*; and that the regulation of aliens has been pre-empted by Congress.

2 The suit is brought on behalf of appellee and similarly situated Arizona resident aliens who, but for their inability to meet the Arizona residence requirement, are eligible to receive welfare benefits under state-administered federal categorical assistance programs for the permanently and totally disabled, the aged, and the blind.

The three-judge court upheld Mrs. Richardson's motion for summary judgment on equal protection grounds. *Richardson v. Graham*, 313 F.Supp. 34 (Ariz. 1970). It did so in reliance on this Court's opinions in *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), and *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Commissioner appealed. The judgment was stayed as to all parties plaintiff other than Mrs. Richardson. Probable jurisdiction was noted. 400 U.S. 956 (1970).

No. 727. This case, from Pennsylvania, concerns that portion of a general assistance program that is not federally supported. The relevant statute is § 432 (2) of the Pennsylvania Public Welfare Code, *Pa. Stat. Ann., Tit. 62, § 432 (2)* (1968), ³ originally enacted in 1939. It provides that those eligible for assistance shall be (1)

needy persons who qualify under the federally supported categorical assistance programs and (2) those other needy persons who are citizens of the United [***540] States. Assistance to the latter group is funded wholly by the Commonwealth.

3 "§ 432. Eligibility

[HN2] "Except as hereinafter otherwise provided . . . needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

"(1) Persons for whose assistance Federal financial participation is available to the Commonwealth

"(2) Other persons who are citizens of the United States, or who, during the period January 1, 1938 to December 31, 1939, filed their declaration of intention to become citizens. . . ."

[*369] Appellee Elsie Mary Jane Leger is a lawfully admitted resident alien. She was born in Scotland in 1937. She came to this country in 1965 at the age of 28 under contract for domestic service with a family in Havertown. She has resided continuously in Pennsylvania since then and has been a taxpaying resident of the Commonwealth. In 1967 she left her domestic employment to accept more remunerative work in Philadelphia. She entered into a common-law marriage with a United States citizen. In 1969 illness forced both Mrs. Leger and her husband to give up their employment. They applied for public assistance. Each was ineligible under the federal programs. Mr. Leger, however, qualified for aid under the state program. Aid to Mrs. Leger was denied because of her alienage. The monthly grant to Mr. Leger was less than the amount determined by both federal and Pennsylvania authorities as necessary for a minimum standard of living in Philadelphia for a family of two.

[**1851] Mrs. Leger instituted her class action ⁴ in the Eastern District of Pennsylvania against the Executive Director of the Philadelphia County Board of Assistance and the Secretary of the Commonwealth's Department of Public Welfare. She sought declaratory relief, an injunction against the enforcement of the restriction of § 432 (2), and the ordering of back payments wrongfully withheld. She obtained a temporary restraining order preventing the defendants from continuing to deny her

403 U.S. 365, *369; 91 S. Ct. 1848, **1851;
29 L. Ed. 2d 534, ***540; 1971 U.S. LEXIS 28

assistance. She then began to receive, and still receives, with her husband, a public assistance grant.

4 It was stipulated that the class of persons the appellees represent approximates 65 to 70 cases annually. This figure stands in striking contrast to the 585,000 persons in the Commonwealth on categorical assistance and 85,000 on general assistance. Department of Public Welfare Report of Public Assistance, Dec. 31, 1969.

Appellee Beryl Jervis was added as a party plaintiff to [*370] the Leger action. She was born in Panama in 1912 and is a citizen of that country. In March 1968, at the age of 55, she came to the United States to undertake domestic work under contract in Philadelphia. She has resided continuously in Pennsylvania since then and has been a taxpaying resident of the Commonwealth. After working as a domestic for approximately one year, she obtained other, more remunerative, work in the city. In February 1970 illness forced her to give up her employment. She applied for aid. However, she was ineligible for benefits under the federally assisted programs and she was denied general assistance solely because of her alienage. Her motion for immediate relief through a temporary restraining order was denied.

It was stipulated that "the denial of General Assistance to aliens otherwise eligible for such assistance causes undue hardship to them by depriving them of the means to secure the necessities of life, including food, clothing and shelter," and that "the citizenship bar to the receipt of General Assistance in Pennsylvania discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other States which will meet their needs."

The three-judge court, one judge dissenting, ruled that § 432 (2) was [***541] violative of the *Equal Protection Clause* and enjoined its further enforcement. *Leger v. Sailer*, 321 F.Supp. 250 (ED Pa. 1970). The defendants appealed. Probable jurisdiction was noted. 400 U.S. 956.

II

The appellants argue initially that the States, consistent with the *Equal Protection Clause*, may favor United States citizens over aliens in the distribution of welfare benefits. It is said that this distinction involves no "invidious discrimination" such as was condemned in

[*371] *King v. Smith*, 392 U.S. 309 (1968), for the State is not discriminating with respect to race or nationality.

[***LEdHR1] [1]The *Fourteenth Amendment* provides, [HN3] "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." It has long been settled, and it is not disputed here, that [HN4] the term "person" in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Truax v. Raich*, 239 U.S. 33, 39 (1915); *Takahashi v. Fish & Game Comm'n*, 334 U.S., at 420. Nor is it disputed that the Arizona and Pennsylvania statutes in question create two classes of needy persons, indistinguishable except with respect to whether they are or are not citizens of this country. Otherwise [**1852] qualified United States citizens living in Arizona are entitled to federally funded categorical assistance benefits without regard to length of national residency, but aliens must have lived in this country for 15 years in order to qualify for aid. United States citizens living in Pennsylvania, unable to meet the requirements for federally funded benefits, may be eligible for state-supported general assistance, but resident aliens as a class are precluded from that assistance.

[***LEdHR2] [2] [***LEdHR3] [3]Under traditional equal protection principles, [HN5] a State retains broad discretion to classify as long as its classification has a reasonable basis. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Morey v. Doud*, 354 U.S. 457, 465 (1957); *McGowan v. Maryland*, 366 U.S. 420, 425-427 (1961). This is so in "the area of economics and social welfare." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). But the Court's decisions [*372] have established that classifications based on alienage, like those based on nationality⁵ or race,⁶ are inherently suspect and subject to close judicial [***542] scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi*, 334 U.S., at 420, that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."

403 U.S. 365, *372; 91 S. Ct. 1848, **1852;
29 L. Ed. 2d 534, ***542; 1971 U.S. LEXIS 28

5 See *Oyama v. California*, 332 U.S. 633, 644-646 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

6 *McLaughlin v. Florida*, 379 U.S. 184, 191-192 (1964); *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Arizona and Pennsylvania seek to justify their restrictions on the eligibility of aliens for public assistance solely on the basis of a State's "special public interest" in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits. It is true that this Court on occasion has upheld state statutes that treat citizens and noncitizens differently, the ground for distinction having been that such laws were necessary to protect special interests of the State or its citizens. Thus, in *Truax v. Raich*, 239 U.S. 33 (1915), the Court, in striking down an Arizona statute restricting the employment of aliens, emphasized that "the discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." 239 U.S., at 39-40. And in *Crane v. New York*, 239 U.S. 195 [*373] (1915), the Court affirmed the judgment in *People v. Crane*, 214 N. Y. 154, 108 N. E. 427 (1915), upholding a New York statute prohibiting the employment of aliens on public works projects. The New York court's opinion contained Mr. Justice Cardozo's well-known observation:

"To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful. . . . The state in determining what use shall be made of its own moneys, may legitimately consult [**1853] the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike." 214 N. Y., at 161, 164, 108 N. E., at 429, 430.

See *Heim v. McCall*, 239 U.S. 175 (1915); *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927). On the same

theory, the Court has upheld statutes that, in the absence of overriding treaties, limit the right of noncitizens to engage in exploitation of a State's natural resources,⁷ restrict the devolution of real property to aliens,⁸ or deny to aliens the right to acquire and own land.⁹

7 *McCready v. Virginia*, 94 U.S. 391 (1877); *Patson v. Pennsylvania*, 232 U.S. 138 (1914).

8 *Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Blythe v. Hinckley*, 180 U.S. 333 (1901).

9 *Terrace v. Thompson*, 263 U.S. 197 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Frick v. Webb*, 263 U.S. 326 (1923); but see *Oyama v. California*, 332 U.S. 633 (1948).

[***543] [*374] *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), however, cast doubt on the continuing validity of the special public-interest doctrine in all contexts. There the Court held that California's purported ownership of fish in the ocean off its shores was not such a special public interest as would justify prohibiting aliens from making a living by fishing in those waters while permitting all others to do so. It was said:

"The *Fourteenth Amendment* and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." 334 U.S., at 420.

[***LEdHR4] [4] [***LEdHR5] [5] [***LEdHR6] [6] Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahashi*, we conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making noncitizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens. First, the special public interest doctrine was heavily grounded on the notion that "whatever is a privilege, rather than a right, may be made dependent upon citizenship." *People v. Crane*, 214 N. Y., at 164, 108 N. E., at 430. But this [HN6] Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v.*

403 U.S. 365, *374; 91 S. Ct. 1848, **1853;
29 L. Ed. 2d 534, ***LEdHR6; 1971 U.S. LEXIS 28

Thompson, 394 U.S., at 627 n. 6; *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Bell v. Burson*, 402 U.S. 535, 539 (1971). Second, as the Court recognized in *Shapiro*:

[HN7] "[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public [*375] assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." 394 U.S., at 633.

Since an alien as well as a citizen is a "person" for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in *Shapiro*.

[**1854] [***LEdHR7] [7] Appellants, however, would narrow the application of *Shapiro* to citizens by arguing that the right to travel, relied upon in that decision, extends only to citizens and not to aliens. While many of the Court's opinions do speak in terms of the right of "citizens" to travel,¹⁰ [***544] the source of the constitutional right to travel has never been ascribed to any particular constitutional provision. See *Shapiro v. Thompson*, 394 U.S., at 630 n. 8; *United States v. Guest*, 383 U.S. 745, 757-758 (1966). The Court has never decided whether the right applies specifically to aliens, and it is unnecessary to reach that question here. It is enough to say that the classification involved in *Shapiro* was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement. As was said there, "The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State [*376] to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." 394 U.S., at 634. The classifications involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired.

Appellants' attempted reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970), is also misplaced, since the classification involved in that case (family size) neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion.

10 E. g., *Passenger Cases*, 7 How. 283, 492 (1849); *Crandall v. Nevada*, 6 Wall. 35, 48-49 (1868); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Edwards v. California*, 314 U.S. 160, 178-181 (DOUGLAS, J., concurring), 183-185 (Jackson, J., concurring) (1941); *Shapiro v. Thompson*, 394 U.S., at 629; *Oregon v. Mitchell*, 400 U.S. 112, 285 (opinion of STEWART, J.) (1970).

[***LEdHR8] [8] We agree with the three-judge court in the Pennsylvania case that the "justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in *Shapiro*, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." 321 F.Supp., at 253. See also *Purdy & Fitzpatrick v. California*, 71 Cal. 2d 566, 581-582, 456 P. 2d 645, 656 (1969). There can be no "special public interest" in tax revenues to which aliens have contributed on an equal basis with the residents of the State.

[***LEdHR9] [9] Accordingly, we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the *Equal Protection Clause*.

III

[***LEdHR10] [10] An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny [*377] emerges from the area of federal-state relations. [HN8] The National Government has "broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi v. Fish & Game Comm'n*, 334 U.S., at 419; *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941); see also *Chinese Exclusion* [**1855] *Case*, 130 U.S. 581

(1889); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904); *Fong Yue Ting v. United States*, 149 U.S. 698 [***545] (1893); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). Pursuant to that power, [HN9] Congress has provided, as part of a comprehensive plan for the regulation of immigration and naturalization, that "aliens who are paupers, professional beggars, or vagrants" or aliens who "are likely at any time to become public charges" shall be excluded from admission into the United States, 8 U. S. C. §§ 1182 (a)(8) and 1182 (a)(15), and that any alien lawfully admitted shall be deported who "has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry . . ." 8 U. S. C. § 1251 (a)(8). Admission of aliens likely to become public charges may be conditioned upon the posting of a bond or cash deposit. 8 U. S. C. § 1183. But Congress has not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States. Rather, it has broadly declared: [HN10] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . ." 42 U. S. C. § 1981. The protection of this statute has been held to extend to aliens as well as to citizens. *Takahashi*, 334 U.S., at 419 n. 7. Moreover, this Court has made it clear that, whatever may be the [*378] scope of the constitutional right of interstate travel, aliens lawfully within this country have a right to enter and abide in any State in the Union "on an equality of legal privileges with all citizens under non-discriminatory laws." *Takahashi*, 334 U.S., at 420.

[***LEdHR11] [11] State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government. In *Hines v. Davidowitz*, 312 U.S., at 66-67, where this Court struck down a Pennsylvania alien registration statute (enacted in 1939, as was the statute under challenge in No. 727) on grounds of federal pre-emption, it was observed that [HN11] "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." And in *Takahashi* it was said that [HN12] the States

"can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." 334 U.S., at 419.

Congress has broadly declared as federal policy that [HN13] lawfully admitted resident aliens who become public charges for causes arising after their entry are not subject to deportation, and that as long as they are here they are entitled to the full and equal benefit of all state laws for the security of persons and property. [***546] The state statutes [*379] at issue in the instant cases impose auxiliary burdens upon the entrance or residence of aliens who suffer the distress, after entry, of economic dependency on public assistance. Alien residency requirements for welfare benefits necessarily operate, as did the residency requirements in *Shapiro*, to discourage entry into or continued residency in the State. Indeed, in No. 727 the parties stipulated that this was so.

[**1856] [***LEdHR12] [12] In *Truax* the Court considered the "reasonableness" of a state restriction on the employment of aliens in terms of its effect on the right of a lawfully admitted alien to live where he chooses:

"It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration -- to admit or exclude aliens -- is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would

be segregated in such of the States as chose to offer hospitality." 239 U.S., at 42.

The same is true here, for in the ordinary case an alien, becoming indigent and unable to work, will be unable to live where, because of discriminatory denial of public [*380] assistance, he cannot "secure the necessities of life, including food, clothing and shelter." State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible.

IV

Arizona suggests, finally, that its 15-year durational residency requirement for aliens is actually authorized by federal law. Reliance is placed on § 1402 (b) of the Social Security Act of 1935, added by the Act of Aug. 28, 1950, § 351, 64 Stat. 556, as amended, 42 U. S. C. § 1352 (b). That section provides:

[HN14] "The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes, as a condition of eligibility for aid to the permanently and totally disabled under the plan --

....

"(2) Any citizenship requirement which excludes any citizen of the United States." ¹¹

¹¹ Pursuant to his rulemaking power under the Social Security Act, 42 U. S. C. § 1302, the Secretary of Health, Education, and Welfare adopted the following regulations, upon which Arizona also relies:

"3720. Requirements for State Plans

"A State plan under titles I, X, XIV, and XVI may not impose, as a condition of eligibility, any citizenship requirement which excludes any citizen of the United States."

"3730. Interpretation of Requirement

"State plans need not contain a citizenship requirement. The purpose of IV-3720 is to ensure

that where such a requirement is imposed, an otherwise eligible citizen of the United States, regardless of how (by birth or naturalization) or when citizenship was obtained, shall not be disqualified from receiving aid or assistance under titles I, X, XIV, and XVI.

"Where there is an eligibility requirement applicable to noncitizens, State plans may, as an alternative to excluding all noncitizens, provide for qualifying noncitizens, otherwise eligible, who have resided in the United States for a specific number of years." HEW Handbook of Public Assistance Administration, pt. IV.

[*381] The [***547] meaning of this provision is not entirely clear. On its face, the statute does not affirmatively authorize, much less command, the States to adopt durational residency requirements or other eligibility restrictions applicable to aliens; it merely directs the Secretary [**1857] not to approve state-submitted plans that exclude citizens of the United States from eligibility. Cf. *Shapiro v. Thompson*, 394 U.S., at 638-641.

We have been unable to find in the legislative history of the 1950 amendments any clear indication of congressional intent in enacting § 1402 (b). ¹² The provision appears to have its roots in identical language of the old-age assistance and aid-to-the-blind sections of the Social Security Act of 1935 as originally enacted. 49 Stat. 620, 42 U. S. C. § 302 (b); 49 Stat. 645, 42 U. S. C. § 1202 (b). The House and Senate Committee Reports expressly state, with reference to old-age assistance, that:

"A person shall not be denied assistance on the ground that he has not been a United States citizen for a number of years, if in fact, when he receives assistance, he is a United States citizen. This means that a State may, if it wishes, assist only those who are citizens, but must not insist on their having been born citizens or on their having been naturalized citizens for a specified period of time." ¹³

¹² H. R. Rep. No. 1300, 81st Cong., 1st Sess., 53, 153-154; S. Rep. No. 1669, 81st Cong., 2d Sess.; H. R. Conf. Rep. No. 2771, 81st Cong., 2d Sess., 118-119.

¹³ H. R. Rep. No. 615, 74th Cong., 1st Sess., 18; S. Rep. No. 628, 74th Cong., 1st Sess., 29.

403 U.S. 365, *381; 91 S. Ct. 1848, **1857;
29 L. Ed. 2d 534, ***547; 1971 U.S. LEXIS 28

[*382] [***LEdHR13] [13] [***LEdHR14] [14] [***LEdHR15] [15] It is apparent from this that Congress' principal concern in 1935 was to prevent the States from distinguishing between native-born American citizens and naturalized citizens in the distribution of welfare benefits. It may be assumed that Congress was motivated by a similar concern in 1950 when it enacted § 1402 (b). As for the indication in the 1935 Committee Reports that the States, in their discretion, could withhold benefits from non-citizens, certain members of Congress simply may have been expressing their understanding of the law only insofar as it had then developed, that is, before *Takahashi* was decided. But if § 1402 (b), as well as the identical provisions for old-age assistance and aid to the blind, were to be read so as to authorize discriminatory treatment of aliens at the option of the States, *Takahashi* demonstrates that serious constitutional questions are presented. Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, [***548] Congress does not have the power to authorize the individual States to violate the *Equal Protection Clause*. *Shapiro v. Thompson*, 394 U.S., at 641. Under *Art. I, § 8, cl. 4, of the Constitution*, Congress' power is to "establish a uniform Rule of Naturalization." A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.¹⁴ Since [HN15] "statutes should be construed whenever possible so as to uphold [*383] their constitutionality," *United States v. Vuitch*, 402 U.S. 62, 70 (1971), we conclude that § 1402 (b) does not authorize the Arizona 15-year national residency requirement.

¹⁴ We have no occasion to decide whether Congress, in the exercise of the immigration and naturalization power, could itself enact a statute imposing on aliens a uniform nationwide

residency requirement as a condition of federally funded welfare benefits.

H

The judgments appealed from are affirmed.

It is so ordered.

MR. JUSTICE HARLAN joins in Parts III and IV of the Court's opinion, and in the judgment of the Court.

REFERENCES

3 Am Jur 2d, Aliens and Citizens 3, 6- 10, 36, 66

US L Ed Digest, Aliens 24, 48; Constitutional Law 326, 348.5, 364; Poor and Poor Laws 2; Social Security and Unemployment Compensation 3

ALR Digests, Aliens 7, 11; Constitutional Law 307; Poor and Poor Laws 2; Social Security and Unemployment Compensation 12.5

L Ed Index to Anno, Aliens; Constitutional Law; Poor Persons; States

ALR Quick Index, Aliens; Constitutional Law; Equal Protection of Law; Poor and Poor Laws

Federal Quick Index, Aliens; Due Process of Law; Equal Protection of the Laws; Poor Persons

Annotation References:

Constitutionality of state welfare programs, including those which are federally assisted. *25 L Ed 2d 907*.

Provisions of the Federal Constitution invocable by aliens independently of treaty. *68 L Ed 255*.

Constitutionality of poor relief law, as affected by requirement as to period of residence as condition of relief. *132 ALR 518*.

APPENDIX 25



GRIFFIN ET AL. v. ILLINOIS

No. 95

SUPREME COURT OF THE UNITED STATES

351 U.S. 12; 76 S. Ct. 585; 100 L. Ed. 891; 1956 U.S. LEXIS 1059; 55 A.L.R.2d 1055

December 7, 1955, Argued

April 23, 1956, Decided

PRIOR HISTORY: CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

DISPOSITION: Judgment vacated and cause remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner prisoners filed a motion under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38 §§ 826-832, in order to obtain a certified copy of the entire record. The Supreme Court of Illinois affirmed the dismissal of their petition because the charges raised no substantial state or federal constitutional questions and the prisoners appealed.

OVERVIEW: The prisoners filed a petition under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38 §§ 826-832, in order to obtain a certified copy of the entire record for their appeal. The state supreme court affirmed the dismissal of their petition because the charges raised no substantial state or federal constitutional questions. On certiorari, the prisoners contended that the failure to provide them with the

needed transcript violated the Due Process and *Equal Protection Clauses* of *U.S. Const. amend. XIV*. The court held that while the state court was not required by the federal constitution to provide appellate courts or a right to appellate review, because the state did grant appellate review at all stages of the proceedings, the Due Process and *Equal Protection Clause* protected the prisoners from invidious discriminations. The court held that destitute defendants must be afforded as adequate appellate review as defendants who had money enough to buy the transcripts. The court vacated and remanded the state supreme court's order.

OUTCOME: The court vacated and remanded the order from the state supreme court. The court held that petitioner prisoners had to be afforded as adequate appellate review as defendants with money to buy transcripts.

LexisNexis(R) Headnotes

Constitutional Law > Equal Protection > Poverty

Constitutional Law > Equal Protection > Scope of Protection***Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis***

[HN1] Illinois law provides that writs of error in all criminal cases are writs of right and shall be issued of course.

Criminal Law & Procedure > Postconviction Proceedings > Coram Nobis

[HN2] Under Illinois law in order to get full direct appellate review of alleged errors by a writ of error it is necessary for the defendant to furnish the appellate court with a bill of exceptions or report of proceedings at the trial certified by the trial judge.

Criminal Law & Procedure > Postconviction Proceedings

[HN3] A complete bill of exceptions consists of all proceedings in the case from the time of the convening of the court until the termination of the trial. It includes all of the motions and rulings of the trial court, evidence heard, instructions and other matters which do not come within the clerk's mandatory record.

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

[HN4] A state is not required by the federal Constitution to provide appellate courts or a right to appellate review at all.

Criminal Law & Procedure > Counsel > Costs & Attorney Fees***Criminal Law & Procedure > Sentencing > Proportionality******Criminal Law & Procedure > Appeals > General Overview***

[HN5] All of the states now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many states have recognized this and provided aid for convicted defendants who have a

right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.

SUMMARY:

Under Illinois law indigent defendants may obtain a free transcript to obtain appellate review of constitutional questions, but, except for capital cases, not of other alleged trial errors such as admissibility and sufficiency of evidence. After their convictions of armed robbery in an Illinois state court, the defendants filed a motion in the trial court asking that, in view of their inability to pay, a certified copy of the record, necessary for a complete bill of exceptions as required by Illinois law for a full appellate review, be furnished them without cost. The trial court denied the motion without a hearing. The defendants then filed a petition under the Illinois Post-Conviction Hearing Act, alleging that refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection. Their petitions were dismissed by the state courts. A majority of the Supreme Court vacated the judgment below.

In an opinion by Black, J., joined by Warren, Ch. J., and Douglas and Clark, JJ., it was held that the due process and *equal protection clauses of the Fourteenth Amendment* were violated by the state's denial of appellate review solely on account of a defendant's inability to pay for a transcript.

Frankfurter, J., while concurring in the judgment and apparently also agreeing with the substantive holding, expressed the view that the Court should not indulge in the fiction that the new rule announced by it has always been the law, and, therefore, that those who did not avail themselves of it in the past waived their rights.

Burton, J., with the concurrence of Minton, Reed, and Harlan, JJ., dissented, holding that the Federal Constitution does not invalidate state appellate proceedings merely because a required transcript has not been provided without cost to an indigent litigant upon his request.

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Harlan, J., in a separate dissenting opinion, also expressed the view that the constitutional question tendered by the defendants should not have been decided, because the record did not present it in that clean-cut, concrete, and unclouded form usually demanded for a decision of constitutional issues.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §509

due process -- equal protection -- review in criminal case. --

Headnote:[1]

The due process and *equal protection clauses of the Fourteenth Amendment* are violated where a state statute providing for writs of error in all criminal cases as a matter of right is so administered as to deny full appellate review in a noncapital felony case to an indigent defendant solely because of his inability to pay for a transcript of the record, while granting such review to all other defendants. Points from Separate Opinions

[***LEdHN2]

APPEAL AND ERROR §986

writ of error -- Illinois practice -- criminal cases. --

Headnote:[2]

Under Illinois law a writ of error may be prosecuted in a criminal case, not only upon a complete bill of exceptions, but also on a "mandatory record" kept by the clerk, consisting of the indictment, arraignment, plea, verdict, and sentence; while such record can be obtained free of charge by an indigent defendant, review is limited to errors on the face of the record, and there is no review of trial errors such as in an erroneous ruling on the admission of evidence. [From separate opinion by Black, J., Warren, Ch. J., Douglas and Clark, JJ.]

[***LEdHN3]

APPEAL AND ERROR §1074

bill of exceptions -- contents -- criminal cases. --

Headnote:[3]

Under Illinois law a complete bill of exceptions, necessary for a writ of error in a criminal case, consists of all proceedings in the case from the time of the convening of the court until the termination of the trial; it includes all of the motions and rulings of the trial court, evidence heard, instructions, and other matters which do not come within the clerk's mandatory record, consisting of the indictment, arraignment, plea, verdict, and sentence. [From separate opinion by Black, J., Warren, Ch. J., Douglas and Clark, JJ.]

[***LEdHN4]

CRIMINAL LAW §74

post-conviction proceedings -- questions reviewable.

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Headnote:[4]

Only questions arising under the Illinois or Federal Constitution may be raised in proceedings under the Illinois Post-Conviction Hearing Act. [From separate opinion by Black, J., Warren, Ch. J., Douglas and Clark, JJ.]

[***LEdHN5]

CONSTITUTIONAL LAW §500

due process -- equal protection -- criminal procedure. --

Headnote:[5]

The constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons; all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court. [From separate opinion by Black, J., Warren, Ch. J., Douglas and Clark, JJ.]

[***LEdHN6]

CONSTITUTIONAL LAW §316

discrimination. --

Headnote:[6]

A law nondiscriminatory on its face may be grossly

discriminatory in its operation. [From separate opinion by Black, J., Warren, Ch. J., Douglas and Clark, JJ.]

[***LEdHN7]

CONSTITUTIONAL LAW §500

criminal procedure -- prepayment of costs. --

Headnote:[7]

Neither a state nor the federal government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. [From separate opinion by Black, J., Warren, Ch. J., Douglas and Clark, JJ.]

[***LEdHN8]

CONSTITUTIONAL LAW §500

criminal procedure -- prepayment of costs. --

Headnote:[8]

In criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color; the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and cannot be used as an excuse to deprive a defendant of a fair trial. [From separate opinion by Black, J., Warren, Ch. J., Douglas and Clark, JJ.]

[***LEdHN9]

CONSTITUTIONAL LAW §509

criminal procedure -- appeals -- discrimination -- poverty. --

Headnote:[9]

A state is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all; but where a state does grant appellate review in a criminal case, it cannot discriminate against some convicted defendants on account of their poverty, and the due process and *equal protection clauses*, at all stages of the proceedings, protect a defendant from invidious discrimination. [From separate opinion by Black, J., Warren, Ch. J., Douglas and Clark, JJ.]

[***LEdHN10]

APPEAL AND ERROR §951

in forma pauperis -- criminal appeals. --

Headnote:[10]

To hold that a state may not deny an indigent defendant appellate review in a criminal case solely because of his inability to pay for a transcript of the record is not to hold that the state must purchase a stenographer's transcript in every case where a defendant cannot buy it; there may be other means of affording adequate and effective appellate review to indigent defendants, for instance, upon a bystanders' bill of exceptions. [From separate opinion by Black, J., Warren, Ch. J., Douglas and Clark, JJ.]

[***LEdHN11]

CONSTITUTIONAL LAW §317

equal protection -- classifications. --

Headnote:[11]

The equal protection of the laws does not deny a state the right to make classifications in law when such classifications are rooted in reason; the equality at which the *equal protection clause* aims is not a disembodied equality, since laws are not abstract propositions. [From separate opinion by Frankfurter, J.]

[***LEdHN12]

CONSTITUTIONAL LAW §509

discrimination -- criminal appeals. --

Headnote:[12]

Since capital offenses are sui generis, a state may take account of the irrevocability of death by allowing appeals in capital cases and not in others. [From separate opinion by Frankfurter, J.]

[***LEdHN13]

APPEAL AND ERROR §831

right of appeal. --

Headnote:[13]

The right of appeal may be accorded by a state to one accused of crime upon such terms as in its wisdom may be deemed proper. [From separate opinion by Frankfurter, J.]

[***LEdHN14]

CONSTITUTIONAL LAW §509

discrimination -- conditions -- criminal appeals. --

Headnote:[14]

Neither the fact that a state may deny the right of appeal altogether, nor the right of a state to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a state to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a state that have no relation to a rational policy of criminal appeal or authorize the imposition of conditions that offend the deepest presuppositions of society. [From separate opinion by Frankfurter, J.]

[***LEdHN15]

APPEAL AND ERROR §980

fees -- criminal appeals. --

Headnote:[15]

Notwithstanding its wide scope of discretion in matters of criminal procedure, a state cannot allow an appeal for persons convicted of crimes punishable by imprisonment of a year or more, only on payment of a fee. [Dictum from separate opinion by Frankfurter, J.]

[***LEdHN16]

APPEAL AND ERROR §951

indigent appellants -- costs. --

Headnote:[16]

When a state not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. [From separate opinion by

Frankfurter, J.]

[***LEdHN17]

COURTS §756

CRIMINAL LAW §46

FICTIONS OF LAW §1

constitutional rulings -- effect. --

Headnote:[17]

In announcing a new constitutional ruling on matters of criminal procedure, the Supreme Court should not indulge in the fiction that the new rule has always been the law, and, therefore, that those who did not avail themselves of it in the past waived their rights. [From separate opinion by Frankfurter, J.]

[***LEdHN18]

COURTS §181

state courts -- procedure. --

Headnote:[18]

In the administration of local law, the Federal Constitution permits the several states generally to follow their own familiar procedure and practice. [From separate opinion by Burton, Minton, Reed, and Harlan, JJ.]

[***LEdHN19]

CONSTITUTIONAL LAW §34

good policy -- state laws. --

Headnote:[19]

What may be a good legislative policy for a state is not necessarily required by the Constitution of the United States. [From separate opinion by Burton, Minton, Reed, and Harlan, JJ.]

[***LEdHN20]

COURTS §95.3

passing on constitutionality. --

Headnote:[20]

351 U.S. 12, *; 76 S. Ct. 585, **;
100 L. Ed. 891, ***LEdHN20; 1956 U.S. LEXIS 1059

A decision on a constitutional question should be avoided until the question is presented in a clean-cut, concrete, and unclouded form. [From separate opinion by Harlan, J.]

[***LEdHN21]

APPEAL AND ERROR §1062

bill of exceptions -- sufficiency -- certification. --

Headnote:[21]

Under Illinois law, a bill of exceptions, necessary for a writ of error in a criminal case, may consist simply of a narrative account of the trial proceedings prepared from any available sources, such as the notes or memory of the trial judge, counsel, the defendant, or bystanders, and the trial judge must either certify such a bill as accurate or point out the corrections to be made. [From separate opinion by Harlan, J.]

SYLLABUS

Illinois law gives every person convicted in a criminal trial a right of review by writ of error; but a full direct appellate review can be had only by furnishing the appellate court with a bill of exceptions or report of the trial proceedings, certified by the trial judge, and it is sometimes impossible to prepare such documents without a stenographic transcript of the trial proceedings, which are furnished free only to indigent defendants sentenced to death. Convicted in an Illinois state court of armed robbery, petitioners moved in the trial court that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished to them without cost. They alleged that they were without funds to pay for such documents and that failure of the court to provide them would violate the Due Process and *Equal Protection Clauses of the Fourteenth Amendment*. Their motion was denied. They then filed a petition under the Illinois Post-Conviction Hearing Act, under which only questions arising under the State or Federal Constitution may be raised. They alleged that there were manifest nonconstitutional errors in the trial which entitled them to have their convictions set aside on appeal, that the only impediment to full appellate review was their lack of funds to buy a transcript, and that refusal to afford full appellate review solely because of their poverty was a denial of due process and equal protection. This petition was dismissed, and the Illinois

Supreme Court affirmed, solely on the ground that the petition raised no substantial state or federal constitutional question. *Held*: Petitioners' constitutional rights were violated, the judgment of the Illinois Supreme Court is vacated, and the cause is remanded to that Court for further action affording petitioners adequate and effective appellate review. Pp. 13-26.

COUNSEL: Charles A. Horsky, acting under appointment by the Court, 349 U.S. 949, argued the cause and filed a brief for petitioners.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief was Latham Castle, Attorney General.

JUDGES: Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan

OPINION BY: BLACK

OPINION

[*13] [**588] [***895] MR. JUSTICE BLACK announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, [***896] MR. JUSTICE DOUGLAS, and MR. JUSTICE CLARK join.

[1]

[HN1] Illinois law provides that "Writs of error in all criminal cases are writs of right and shall be issued of course." ¹ The question presented here is whether Illinois may, consistent with the Due Process and *Equal Protection Clauses of the Fourteenth Amendment*, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others.

¹ Ill. Rev. Stat., 1955, c. 38, § 769.1.

The petitioners Griffin and Crenshaw were tried together and convicted of armed robbery in the Criminal Court of Cook County, Illinois. Immediately after their conviction they filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost. They alleged that they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal" These allegations were not

351 U.S. 12, *13; 76 S. Ct. 585, **588;
100 L. Ed. 891, ***896; 1956 U.S. LEXIS 1059

denied. [HN2] Under Illinois law in order to get full direct appellate review of alleged errors by a writ of error it is necessary for the defendant to furnish the appellate court with a bill of exceptions or report of proceedings at the trial certified by the trial judge.² As Illinois concedes, it is sometimes [*14] impossible to prepare such bills of exceptions³ or reports without a stenographic transcript of the trial proceedings.⁴ Indigent defendants sentenced to death are provided with a free transcript at the expense of the county where convicted.⁵ In all other criminal cases defendants needing a transcript, whether indigent or not, must themselves buy it. The petitioners [***897] contended in their motion before [*15] the trial court that failure to provide them with the needed transcript would violate the [**589] Due Process and *Equal Protection Clauses of the Fourteenth Amendment*. The trial court denied the motion without a hearing.

[2]

2 Ill. Rev. Stat., 1953, c. 110, § 259.70A (Supreme Court Rule 70A), now Ill. Rev. Stat., 1955, c. 110, § 101.65 (Supreme Court Rule 65). A writ of error may also be prosecuted on a "mandatory record" kept by the clerk, consisting of the indictment, arraignment, plea, verdict and sentence. The "mandatory record" can be obtained free of charge by an indigent defendant. In such instances review is limited to errors on the face of the mandatory record, and there is no review of trial errors such as an erroneous ruling on the admission of evidence. See *People v. Loftus*, 400 Ill. 432, 81 N. E. 2d 495. See also *Cullen v. Stevens*, 389 Ill. 35, 58 N. E. 2d 456; A Study of the Illinois Supreme Court, 15 U. of Chi. L. Rev. 107, 125.

[3]

3 [HN3] "A complete bill of exceptions consists of all proceedings in the case from the time of the convening of the court until the termination of the trial. It includes all of the motions and rulings of the trial court, evidence heard, instructions and other matters which do not come within the clerk's mandatory record." *People ex rel. Iasello v. McKinlay*, 409 Ill. 120, 124-125, 98 N. E. 2d 728, 730.

4 In oral argument counsel for Illinois stated:

"With respect to the so-called bystanders' bill of exceptions or the bill of exceptions prepared from someone's memory in condensed and narrative form and certified to by the trial judge -- as to whether that's available in Illinois I can say that everybody out there understands that it is but nobody has heard of its ever being actually used in a criminal case in Illinois in recent years. I think if you went back before the days of court reporting you would find them but none today. And I will say that Illinois has not suggested in the brief that such a narrative transcript would necessarily or even generally be the equivalent of a verbatim transcript of all of the trial.

....

"There isn't any way that an Illinois convicted person in a noncapital case can obtain a bill of exceptions without paying for it."

See *People v. Yetter*, 386 Ill. 594, 54 N. E. 2d 532; *People v. Johns*, 388 Ill. 212, 57 N. E. 2d 895; *Jennings v. Illinois*, 342 U.S. 104, 109-110, on remand, 411 Ill. 21, 23, 25, 27, 102 N. E. 2d 824, 825-827; *People v. Joyce*, 1 Ill. 2d 225, 230, 115 N. E. 2d 262, 264-265; *People v. La Frana*, 4 Ill. 2d 261, 266, 122 N. E. 2d 583, 585-586; *People ex rel. Iasello v. McKinlay*, 409 Ill. 120, 98 N. E. 2d 728; *People v. O'Connell*, 411 Ill. 591, 104 N. E. 2d 825.

5 Ill. Rev. Stat., 1955, c. 38, § 769a.

[4]

Griffin and Crenshaw then filed a petition under the Illinois Post-Conviction Hearing Act.⁶ Only questions arising under the Illinois or Federal Constitution may be raised in proceedings under this Act. A companion state act provides that indigent petitioners under the Post-Conviction Act may, under some circumstances, obtain a free transcript.⁷ The effect is that indigents may obtain a free transcript to obtain appellate review of constitutional questions but not of other alleged trial errors such as admissibility and sufficiency of evidence. In their Post-Conviction proceeding petitioners alleged that there were manifest nonconstitutional errors in the trial which entitled them to have their convictions set aside on appeal and that the only impediment to full appellate review was their lack of funds to buy a transcript. These allegations have not been denied.

351 U.S. 12, *15; 76 S. Ct. 585, **589;
100 L. Ed. 891, ***897; 1956 U.S. LEXIS 1059

Petitioners repeated their charge that refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection. This petition like the first was dismissed without hearing any evidence. The Illinois Supreme Court affirmed the dismissal solely on the ground that the charges raised no substantial state or federal constitutional questions -- the only kind of questions which may [*16] be raised in Post-Conviction proceedings. We granted certiorari. 349 U.S. 937.

6 Ill. Rev. Stat., 1955, c. 38, §§ 826-832.

7 Ill. Rev. Stat., 1955, c. 37, § 163f. This section provides in part that "In any case arising under [the Post-Conviction Hearing Act] in which the presiding judge has determined that the post-conviction petition is sufficient to require an answer, it shall be the duty of the official court reporter to transcribe, in whole or in part, his stenographic notes of the evidence introduced at the trial in which the petitioner was convicted, if instructed so to do by the State's Attorney or by the court."

Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors.⁸ There is no contention that petitioners were dilatory in their efforts to get appellate review, or that the Illinois Supreme Court denied review on the ground that the allegations of trial error were insufficient. We must therefore assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript. Counsel for Illinois denies that this violates either the Due Process or the *Equal Protection Clause*, but states that if it does, the Illinois Post-Conviction statute entitles petitioners to a free transcript. The sole question for us to decide, therefore, is whether due process or equal protection has been violated.⁹

8 See note 4, *supra*, and cases there cited.

9 A dissenting opinion argues that the constitutional question is narrower because petitioners alleged that a transcript was needed rather than required. The State made no such claim and all the briefs and arguments on both sides together with the opinion of the Illinois Supreme Court treated the sole question as being as we have stated it.

[5]

Providing equal justice for poor and rich, weak and powerful alike is an age-old problem.¹⁰ People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about [***898] in 1215 the royal concessions of Magna Charta: "To no one will we sell, to no one will we refuse, or delay, right or justice. . . . No free man shall be taken or imprisoned, or [*17] disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land." These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious [**590] discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system -- all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court." *Chambers v. Florida*, 309 U.S. 227, 241. See also *Yick Wo v. Hopkins*, 118 U.S. 356, 369.¹¹

10 "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: *but* in righteousness shalt thou judge thy neighbor." Leviticus, c. 19, v. 15.

[6]

11 Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation. For example, this Court struck down the so-called "grandfather clause" of the Oklahoma Constitution as discriminatory against Negroes although that clause was by its terms nondiscriminatory. *Guinn v. United States*, 238 U.S. 347. See also *Lane v. Wilson*, 307 U.S. 268.

[7][8]

Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance

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should be denied the right to plead not guilty or to defend themselves in court.¹² Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's [*18] guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. Indeed, a provision in the Constitution of Illinois of 1818 provided that every person in Illinois "ought to obtain right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."¹³

¹² See discussion in *Hovey v. Elliott*, 167 U.S. 409.

¹³ Ill. Constitution of 1818, Art. VIII, § 12. Substantially the same provision has been carried over into the present Illinois Constitution, Art. II, § 19.

[9]

There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that [HN4] a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e. g., *McKane v. Durston*, 153 U.S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal [***899] *Protection Clauses* protect persons like petitioners from invidious discriminations. See *Cole v. Arkansas*, 333 U.S. 196, 201; *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 208; *Cochran v. Kansas*, 316 U.S. 255, 257; *Frank v. Mangum*, 237 U.S. 309, 327.

[HN5] All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication

of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate [*19] courts.¹⁴ Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a [**591] transcript but are unable to pay for it.¹⁵ A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.¹⁶ There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.

¹⁴ See Note, Reversals in Illinois Criminal Cases, 42 Harv. L. Rev. 566.

¹⁵ See, e. g., Ariz. Code Ann., 1939, § 44-2525; Ark. Stat., 1947, § 22-357; Page's *Ohio Rev. Code Ann.*, 1954, § 2301.24; S. C. Code, 1952, § 15-1903; McKinney's N. Y. Laws, Crim. Code, 1945 (Supp. 1955), § 456. See also Note, 100 A. L. R. 321.

¹⁶ The Criminal Court of Appeals in Oklahoma in 1913 spoke in the tradition of this country's dedication to due process and equal protection when it declared that the law is no respecter of persons and said:

"We want the people of Oklahoma to understand, one and all, that the poorest and most unpopular person in the state . . . can depend upon it that justice is not for sale in Oklahoma, and that no one can be deprived of his right of appeal simply because he is unable to pay a stenographer to extend the notes of the testimony." *Jeffries v. State*, 9 Okla. Cr. 573, 576, 132 P. 823, 824.

[10]

The Illinois Supreme Court denied these petitioners relief under the Post-Conviction Act because of its holding that no constitutional rights were violated. In view of our holding to the contrary the State Supreme Court may decide that petitioners are now entitled to a transcript, as the State's brief suggests. See Ill. Rev. Stat., 1955, c. 37, § 163f. Cf. *Dowd v. United States ex rel. Cook*, 340 U.S., at 209-210. [*20] We do not hold, however, that Illinois must purchase a stenographer's

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100 L. Ed. 891, ***899; 1956 U.S. LEXIS 1059

transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases.¹⁷ The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice.¹⁸ We are confident that the State will provide corrective rules to meet the problem which this case lays bare.

¹⁷ See *Weatherford v. Wilson*, 3 Ill. (2 Scam.) 253 (1840); *People ex rel. Maher v. Williams*, 91 Ill. 87 (1878); *People ex rel. Hall v. Holdom*, 193 Ill. 319, 61 N. E. 1014 (1901); *People v. Joyce*, 1 Ill. 2d 225, 230, 115 N. E. 2d 262, 264-265 (1953); *Miller v. United States*, 317 U.S. 192 (1942); Note, 15 Ann. Cas. 737.

¹⁸ Ill. Rev. Stat., 1955, c. 110, § 2; Ill. Rev. Stat., 1955, c. 110, § 101.65 (Supreme Court Rule 65); *People v. Callopy*, 358 Ill. 11, 192 N. E. 634.

The judgment of the Supreme Court of Illinois is vacated and the cause is remanded to that court for further action not inconsistent with the foregoing paragraph. MR. JUSTICE [***900] FRANKFURTER joins in this disposition of the case.

Vacated and remanded.

CONCUR BY: FRANKFURTER

CONCUR

MR. JUSTICE FRANKFURTER, concurring in the judgment.

The admonition of de Tocqueville not to confuse the familiar with the necessary has vivid application to appeals in criminal cases. The right to an appeal from a conviction for crime is today so established that this leads to the easy assumption that it is fundamental to the protection of life and liberty and therefore a necessary ingredient of due process of law. "Due process" is, perhaps, the least frozen concept of our law -- the least [*21] confined to history and the most absorptive of powerful social standards of a progressive society. But neither the unfolding content of "due process" nor the particularized safeguards of the *Bill of Rights* disregard procedural ways that reflect a national historic policy. It

is significant that no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again with exceptions not now pertinent) until 1907. Thus, it is now settled that due [**592] process of law does not require a State to afford review of criminal judgments.

[11][12][13]

Nor does the equal protection of the laws deny a State the right to make classifications in law when such classifications are rooted in reason. "The equality at which the 'equal protection' clause aims is not a disembodied equality. The *Fourteenth Amendment* enjoins 'the equal protection of the laws,' and laws are not abstract propositions." *Tigner v. Texas*, 310 U.S. 141, 147. Since capital offenses are *sui generis*, a State may take account of the irrevocability of death by allowing appeals in capital cases and not in others. Again, "the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper." *McKane v. Durston*, 153 U.S. 684, 687-688. The States have exercised this discriminating power. The different States and the same State from time to time have conditioned criminal appeals by fixing the time within which an appeal may be taken, by delimiting the scope of review, by shaping the mechanism by which alleged errors may be brought before the appellate tribunal, and so forth.

[14][15]

But neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down [*22] conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society. Surely it would not need argument to conclude that a State could not, within its wide scope of discretion in these matters, allow an appeal for persons convicted of crimes punishable by imprisonment of a year or more, only on payment of a fee of \$ 500. Illinois, of course, has done nothing so crude as that. But Illinois has said, in effect, that the Supreme Court of Illinois can consider alleged errors occurring in

a criminal trial only if the basis for determining whether there were errors is brought before it by a bill of exceptions and not otherwise. * From this [***901] it follows that Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal by the Illinois Supreme Court. (See *People v. La Frana*, 4 Ill. 2d 261, 266, [*23] 122 N. E. 2d 583, 585-586.) It has thereby shut off means of appellate review for indigent defendants.

* "The record in the trial court may consist only of the mandatory record, viz., indictment, arraignment, plea, trial and judgment. . . . This appears in the clerk's record in every case The record may include also a bill of exceptions, which consists of all of the motions and rulings of the trial court, evidence heard, instructions, and other matters which do not come directly within the clerk's mandatory record. This may be only a part of the record on review when a bill of exceptions is prayed and allowed, and certified by the court. . . . Therefore, when the review is had upon the common-law record, the sole matter only that may be considered by the court is error appearing upon the face of the record, and matters may not be added by argument, affidavit, or otherwise, to supply or expand the record. The case must stand or fall upon the errors appearing in the record. Of course, where there is a bill of exceptions, which includes motions, evidence, rulings on evidence, instructions, and the like, and such bill of exceptions is made a part of the record, errors may be reached by the remedy of writ of error. . . ." *People v. Loftus*, 400 Ill. 432, 433-434, 81 N. E. 2d 495, 497-498.

This Court would have to be willfully blind not to know that there have in the past been prejudicial trial errors which called for reversal of convictions of indigent defendants, and that the number of those who have not had the means for paying for the cost of a bill of exceptions is not so negligible as to invoke whatever truth there may be in the maxim *de minimis*.

Law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of

course a State need not equalize economic conditions. A man of means may [**593] be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." (John Courmos, *A Modern Plutarch*, p. 27.)

[*24] [16]The State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity. The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope. But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither [***902] bolt the door to equal justice nor support a wasteful abuse of the appellate process.

It follows that the petitioners must be accorded an appeal from their conviction, either by having the State furnish them a transcript of the proceedings in the trial court, or by any other means, of which we have not been advised, that may be available under Illinois law, so that the errors of which they complain can effectively be brought for review to the Illinois Supreme Court. It is

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100 L. Ed. 891, ***902; 1956 U.S. LEXIS 1059

not for us to tell Illinois what means are open to the indigent and must be chosen. Illinois may prescribe any means that are within the wide area of its constitutional discretion.

The case of these petitioners is that the only adequate means of bringing for review allegedly fatal trial defects resulting in a potentially reversible conviction was a bill of exceptions which their poverty precluded them from securing. The order of the Illinois Supreme Court and the argument of the Attorney General of Illinois in support of that court's judgment apparently assumed that that was the case. Considering the nature of the issue [*25] thus raised by petitioners appearing for themselves, it would savor of disrespect to the Supreme Court of Illinois for us to find an implication in its unqualified rejection of the claims of the petitioners that an effective review other than by bill of exceptions could be had in the present situation. Cf. *Diaz v. Gonzalez*, 261 U.S. 102, 105-106. When the case again reaches the Illinois Supreme Court, that court may, of course, find within the existing resources of Illinois law means of according to petitioners effective satisfaction of their constitutional right not to be denied the equal protection of the laws.

We must be mindful of the fact that there are undoubtedly convicts under confinement in Illinois prisons, in numbers unknown to us and under unappealed sentences imposed years ago, who will find justification in this opinion, unless properly qualified, for proceedings both in the state and the federal courts upon claims that they are under illegal detention in that they have been denied a right under the Federal Constitution. It would be an easy answer that a claim that was not duly asserted -- as was the timely claim by these petitioners -- cannot be asserted now. The answer is too easy. Candor compels acknowledgment [**594] that the decision rendered today is a new ruling. Candor compels the further acknowledgment that it would not be unreasonable for all indigent defendants, now incarcerated, who at the time were unable to pay for transcripts of proceedings in trial courts, to urge that they were justified in assuming that such a restriction upon criminal appeals in Illinois was presumably a valid exercise of the State's power at the time when they suffered its consequences. Therefore it could well be claimed that thereby any conscious waiver of a constitutional right is negated.

The Court ought neither to rely on casuistic

arguments in denying constitutional claims, nor deem itself imprisoned within a formal, abstract dilemma. The judicial [*26] choice is not limited to a new ruling necessarily retrospective, or to rejection of what the requirements of equal protection of the laws, as now perceived, require. For sound reasons, law generally speaks prospectively. More than a hundred years ago, for instance, the Supreme Court of Ohio, confronted with a problem not unlike the one before us, found no difficulty in doing so when it concluded that legislative divorces were unconstitutional. *Bingham v. Miller*, 17 Ohio 445. In arriving at a new principle, the judicial process is not impotent to define its scope and limits. Adjudication is not a mechanical exercise nor does it compel "either/or" determinations.

[***903] [17]We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. That this is consonant with the spirit of our law and justified by those considerations of reason which should dominate the law, has been luminously expounded by Mr. Justice Cardozo, shortly before he came here and in an opinion which he wrote for the Court. See Address of Chief Judge Cardozo, 55 Report of New York State Bar Assn., 263, 294 *et seq.*, and *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 363-366. Such a molding of law, by way of adjudication, is peculiarly applicable to the problem at hand. The rule of law announced this day should be delimited as indicated.

DISSENT BY: BURTON; MINTON; HARLAN

DISSENT

MR. JUSTICE BURTON and MR. JUSTICE MINTON, whom MR. JUSTICE REED and MR. JUSTICE HARLAN join, dissenting.

While we do not disagree with the desirability of the policy of supplying an indigent defendant with a free transcript of testimony in a case like this, we do not agree [*27] that the Constitution of the United States compels each State to do so with the consequence that, regardless of the State's legislation and practice to the contrary, this

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Court must hold invalid state appellate proceedings wherever a required transcript has not been provided without cost to an indigent litigant who has requested that it be so provided. It is one thing for Congress and this Court to prescribe such procedure for the federal courts. It is quite another for this Court to hold that the Constitution of the United States has prescribed it for all state courts.

[18]

In the administration of local law the Constitution has been interpreted as permitting the several States generally to follow their own familiar procedure and practice. In so doing this Court has recognized the widely differing but locally approved procedures of the several States. Whether approving of the particular procedures or not, this Court has treated them largely as matters reserved to the States and within the broad range of permissible "due process" in a constitutional sense.

Illinois, as the majority admit, could thus deny an appeal altogether in a criminal case without denying due process of law. *McKane v. Durston*, 153 U.S. 684. To allow an appeal at all, but with some difference among convicted persons as to the terms upon which an appeal is exercised, does not deny due process. It may present a question of equal protection. The petitioners urge that point here.

[**595] Whether the Illinois statute denies equal protection depends upon whether, first, it is an arbitrary and unreasonable distinction for the legislature to make, between those convicted of a capital offense and those convicted of a lesser offense, as to their right to a free transcript. It seems to us the whole practice of criminal law teaches that there are valid distinctions between the ways in which criminal cases may be looked upon and treated [*28] without violating the Constitution. Very often we have cases where the convicted seek only to avoid the death penalty. As all practicing lawyers know, who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty. There is something pretty final about a death sentence.

If the actual practice of law recognizes this distinction between capital and noncapital cases, we see no reason why the legislature of a State may not extend the full benefit of appeal to those convicted of [***904] capital offenses and deny it to those convicted of lesser

offenses. It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations. Examples of such will readily occur. All States allow a larger number of preemptory challenges of jurors in capital cases than in other cases. Most States permit changes of venue in capital cases on different terms than in other criminal cases. Some States require a verdict of 12 jurors for conviction in a capital case but allow less than 12 jurors to convict in noncapital cases. On the other side of the coin, most States provide no statute of limitations in capital cases. We think the distinction here made by the Illinois statute between capital cases and noncapital cases is a reasonable and valid one.

[19]

Secondly, certainly Illinois does not deny equal protection to convicted defendants when the terms of appeal are open to all, although some may not be able to avail themselves of the full appeal because of their poverty. Illinois is not bound to make the defendants economically equal before its bar of justice. For a State to do so may be a desirable social policy, but what may be a good legislative policy for a State is not necessarily required by the Constitution of the United States. Persons charged with crimes stand before the law with varying degrees of economic and social advantage. Some can afford better [*29] lawyers and better investigations of their cases. Some can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?

The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such laws.

MR. JUSTICE BLACK's opinion is not limited to the future. It holds that a past as well as a future conviction of crime in a state court is invalid where the State has failed to furnish a free transcript to an indigent defendant who has sought, as petitioner did here, to obtain a review of a ruling that was dependent upon the evidence in his case. This is an interference with state power for what may be a desirable result, but which we believe to be within the field of local option.

Whether Illinois would permit appeals adequate to pass upon alleged errors on bills of exception, prepared by counsel and approved by judges, without requiring

that full stenographic notes be transcribed is not before us. We assume that it would.

MR. JUSTICE HARLAN, dissenting.

Much as I would prefer to see free transcripts furnished to indigent defendants in all felony cases, I find myself unable to join in the Court's holding that the *Fourteenth Amendment* requires a State to do so or to furnish indigents with equivalent means of exercising a right to appeal. The importance of the question decided by the Court justifies adding to what MR. JUSTICE BURTON and MR. JUSTICE MINTON have written my further grounds for dissenting and the reasons why I find the majority opinions unsatisfying.

[20]

1. *Inadequacy of the Record*. -- I would decline to decide the constitutional [**596] question tendered by petitioners because the record does not present it in that "clean-cut," [*30] "concrete," and "unclouded" form usually demanded for a decision of constitutional issues. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584. In my judgment the case should be remanded to the Illinois courts for further proceedings so that we might know the precise nature of petitioners' claim before passing on it.

The record contains nothing more definite than the allegation that "petitioners are poor persons with no [***905] means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal from their convictions." For my part I cannot tell whether petitioners' claim is that a transcript was "needed" because (a) under Illinois law a transcript is a prerequisite to appellate review of trial errors,¹ or (b) as a *factual* matter petitioners could not prepare an adequate bill of exceptions short of having a transcript.

1 The Illinois Supreme Court may have interpreted the pleadings in this manner. It described the petitioners' "sole contention" as being that they were "unable to purchase a bill of exceptions and were, therefore, unable to obtain a complete review by this Court." This suggests that the state court construed the claim to be that an appeal was necessarily precluded by the lack of a transcript, not that the petitioners' particular circumstances produced that result. If that is what the Illinois court meant, its construction, having a

reasonable basis, would be binding on this Court and would constitute an adequate state ground for the denial of any claim premised on the existence of particular circumstances preventing the petitioners from pursuing other available methods of review.

[21]

If the claim is that a transcript was *legally* necessary, it is based on an erroneous view of Illinois law. The Illinois cases cited by the petitioners establish only that trial errors cannot be reviewed in the absence of a bill of exceptions, and not that a transcript is essential to the preparation of such a bill.² To the contrary, an [*31] unbroken line of Illinois cases establishes that a bill of exceptions may consist simply of a narrative account of the trial proceedings prepared from any available sources -- for example, from the notes or memory of the trial judge, counsel, the defendant, or bystanders -- and that the trial judge must either certify such a bill as accurate or point out the corrections to be made.³ Viewed in the [**597] light of these cases, the only constitutional question [*32] presented by petitioners' bare allegation that they were unable to purchase a transcript would be: Is an indigent defendant, who has not shown that he is unable to obtain full appellate review of his [***906] conviction by a narrative bill of exceptions, constitutionally entitled to the added advantage of a free transcript of the trial proceedings for use as a bill of exceptions? I need hardly pause to suggest that such a claim would present no substantial constitutional question.

2 *E. g.*, *People v. Johns*, 388 Ill. 212, 57 N. E. 2d 895; *People v. Loftus*, 400 Ill. 432, 81 N. E. 2d 495; *People v. O'Connell*, 411 Ill. 591, 104 N. E. 2d 825.

3 *Weatherford v. Wilson*, 3 Ill. (2 Scam.) 253 (1840); *People ex rel. Maher v. Williams*, 91 Ill. 87 (1878); *People ex rel. Munson v. Gary*, 105 Ill. 264 (1883); *People ex rel. Hall v. Holdom*, 193 Ill. 319, 61 N. E. 1014 (1901); *162 East Ohio Street Hotel Corp. v. Lindheimer*, 368 Ill. 294, 13 N. E. 2d 970 (1938); *Weber v. Sneeringer*, 247 Ill. App. 294 (1928); *Merkle v. Kegerreis*, 350 Ill. App. 103, 112 N. E. 2d 175 (1953); see also *People ex rel. North American Restaurant v. Chetlain*, 219 Ill. 248, 76 N. E. 364 (1906); *Mayville v. French*, 246 Ill. 434, 92 N. E. 919

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100 L. Ed. 891, ***906; 1956 U.S. LEXIS 1059

(1910); *People ex rel. Simus v. Donoghue*, 377 Ill. 122, 35 N. E. 2d 371 (1941). This line of cases was reaffirmed by the Illinois Supreme Court in 1953, just three months before the petitioners were convicted, in *People v. Joyce*, 1 Ill. 2d 225, 230, 115 N. E. 2d 262, 264-265, in which the *Williams, Gary, Holdom and Lindheimer* cases, *supra*, were cited with approval for the proposition that trial errors may be presented on a writ of error by a "constructed or 'bystander's' bill of exceptions." The holding of that case was that a defendant to whom these alternative methods were not available "as a practical matter" because of his indigence and incarceration did not, by failing to seek direct review of his conviction, "waive" the right given him by the Illinois Post-Conviction Hearing Act to assert his constitutional claims in a collateral proceeding. Accord: *People v. La Frana*, 4 Ill. 2d 261, 266, 122 N. E. 2d 583, 585-586. That holding does not, of course, detract from the court's affirmation that a transcript is not legally required for appellate review of trial errors. It is equally clear that Illinois' recognition of "practicalities" in not applying a strict doctrine of waiver to the remedial Post-Conviction Hearing Act does not necessarily mean that the alternative methods of obtaining review are not sufficiently "available" to satisfy any supposed constitutional requirements. That question would depend upon the facts of the particular case -- of which we have not been informed here -- and upon the evaluation of them for constitutional purposes.

The Court, however, either takes judicial notice that as a practical matter the alternative methods of preparing a bill of exceptions are inadequate or finds in petitioners' claims an allegation of *fact* that their circumstances were such as to prevent them from utilizing the alternative methods. But even accepting this reading of the pleadings, the constitutional question tendered should not be decided without knowing the circumstances underlying the conclusory allegation of "need." Petitioners' indigence, the only underlying "fact" alleged, did not in itself necessarily preclude them from preparing a narrative bill of exceptions, and we are told nothing as to the other circumstances which prevented them from doing so. The record does not even disclose whether petitioners were incarcerated during the period in which the bill of exceptions had to be filed, or whether they

were represented by counsel at the trial. We are left to speculate on the nature of the alleged trial errors and the scope of the bill of exceptions needed to present them. Who can say that if we knew the facts we might not have before us a much narrower constitutional question than the one decided today, or perhaps no such question at all. In these circumstances, I would follow the salutary policy "of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty," *Rescue Army v. Municipal Court of Los Angeles*, *supra*, at p. 576, and would refuse to decide the [*33] constitutional question in the abstract form in which it has been presented here.

According to petitioners' tabulation, no more than 29 States provide free transcripts as of right to indigents convicted of non-capital crimes. Thus the sweeping constitutional pronouncement made by the Court today will touch the laws of at least 19 States⁴ and will create a host of problems affecting the status of an unknown multitude of indigent convicts. A decision having such wide impact should not be made upon a record as obscure as this, especially where there are means ready at hand to have clarified the issue sought to be presented.

4 Of these 19 at least 5 have, however, expressly given the trial courts discretionary power to order free transcripts in non-capital cases. Mass. Ann. Laws, c. 278, § 33A, as amended by Acts 1955, c. 352 ("by order of the court"); N. D. Rev. Code, 1943, § 27-0606 (when "there is reasonable cause therefor"); Ore. Rev. Stat., 1953, § 21.470 (if "justice will be thereby promoted"); S. D. Code, 1939, § 34.3903 (if "essential to the protection of the substantial rights of the defendant"); Wash. Rev. Code, 1951, § 2.32.240 (if "justice will thereby be promoted"). The Rhode Island Supreme Court has reached a similar result by interpretation of a statute authorizing reimbursement for expenditures of appointed counsel. *State v. Hudson*, 55 R. I. 141, 179 A. 130 (1935) ("sound discretion . . . to be exercised with great circumspection and only for serious cause"). In addition, petitioners' brief refers to a letter from the Chief Justice of the Connecticut Supreme Court of Errors which states that free transcripts may be furnished in the discretion of the court in non-capital cases.

However, since I stand alone in my view that the

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Court should refrain from deciding the broad question urged upon us until the necessity for such a decision becomes manifest, I deem it appropriate also to note my disagreement with the Court's decision of that question. Inasmuch as the Court's decision is not -- and on this record cannot be -- based on any facts peculiar to this case, I consider that question to be: Is an indigent defendant [*34] who "needs" a transcript in order to appeal [***907] constitutionally entitled, regardless of the nature of the circumstances producing that need, to have the State either furnish a free transcript or [**598] take some other action to assure that he does in fact obtain full appellate review?

2. *Equal Protection.* -- In finding an answer to that question in the *Equal Protection Clause*, the Court has painted with a broad brush. It is said that a State cannot discriminate between the "rich" and the "poor" in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. Illinois has not imposed any arbitrary conditions upon the exercise of the right of appeal nor any requirements unnecessary to the effective working of its appellate system. Trial errors cannot be reviewed without an appropriate record of the proceedings below; if a transcript is used, it is surely not unreasonable to require the appellant to bear its cost; and Illinois has not foreclosed any other feasible means of preparing such a record. Nor is this a case where the State's own action has prevented a defendant from appealing. Cf. *Dowd v. United States ex rel. Cook*, 340 U.S. 206; *Cochran v. Kansas*, 316 U.S. 255. All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.

The Court thus holds that, at least in this area of criminal appeals, the *Equal Protection Clause* imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances. That holding produces the anomalous result that a constitutional admonition to the States to treat all persons equally means in this instance that Illinois must give to some what it requires others to pay for. Granting that such a classification would be reasonable, it does not follow that a State's failure to make it can be regarded as discrimination. [*35] It may as accurately be said that the real issue in this case is not whether Illinois *has* discriminated but whether it has a duty *to* discriminate.

I do not understand the Court to dispute either the necessity for a bill of exceptions or the reasonableness of the general requirement that the trial transcript, if used in its preparation, be paid for by the appealing party. The Court finds in the operation of these requirements, however, an invidious classification between the "rich" and the "poor." But no economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against "indigents" by name would be unconstitutional. Thus, while the exclusion of "indigents" from a free state university would deny them equal protection, requiring the payment of tuition fees surely would not, despite the resulting exclusion of those who could not afford to pay the fees. And if imposing a condition of payment is not the equivalent of a classification by the State in one case, I fail to see why it should be so regarded in another. Thus if requiring defendants in felony cases to pay for a transcript constitutes a discriminatory denial to indigents of the right of appeal available to others, why is it not a similar denial in misdemeanor cases or, for that matter, civil cases?

It is no answer to say that equal protection is not an absolute, and that in other than criminal cases the differentiation is "reasonable." The resulting *classification* would be invidious in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences. Hence it must be that the differences are "reasonable" in other cases not because the "classification" is reasonable [***908] but simply because it is not unreasonable in those cases for the State to fail to relieve indigents of the economic burden. That is, the issue here [*36] is not the typical equal protection question of the reasonableness of a "classification" on the basis of which the State has imposed legal disabilities, but rather the reasonableness of the State's failure to remove natural disabilities. The Court holds that the failure of the State to do so is constitutionally unreasonable in this case although it might not be in others. I submit that the basis for that holding is simply an unarticulated conclusion that it violates "fundamental fairness [**599] " for a State which provides for appellate review, and thus apparently considers such review necessary to assure justice, not to see to it that such appeals are in fact available to those it would imprison for serious crimes. That of course is the traditional language of due process, see *Betts v. Brady*,

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100 L. Ed. 891, ***908; 1956 U.S. LEXIS 1059

316 U.S. 455, 462, and I see no reason to import new substance into the concept of equal protection to dispose of the case, especially when to do so gives rise to the all-too-easy opportunity to ignore the real issue and solve the problem simply by labeling the Illinois practice as invidious "discrimination."

3. *Due Process*. -- Has there been a violation of the Due Process Clause? The majority of the Court concedes that the *Fourteenth Amendment* does not require the States to provide for any kind of appellate review. Nevertheless, Illinois, in the forefront among the States, established writs of error in criminal cases as early as 1827.⁵ In 1887, it provided for official court reporters, thereby relieving defendants of the burden of hiring reporters in order to obtain a transcript.⁶ In 1927, it provided that for indigents sentenced to death "all necessary costs and expenses" incident to a writ of error, including the cost of a transcript, would be paid by [*37] the counties.⁷ And in 1953, free transcripts were authorized for the presentation of constitutional claims.⁸ Thus Illinois has steadily expanded the protection afforded defendants in criminal cases, and in recent years has made substantial strides towards alleviating the natural disadvantages of indigents. Can it be that, while it was not unconstitutional for Illinois to afford no appeals, its steady progress in increasing the safeguards against erroneous convictions has resulted in a constitutional decline?

5 Ill. Rev. L. 1827, Crim. Code, §§ 186, 187; Ill. Rev. Stat., 1955, c. 38, § 769.1.

6 Ill. Laws 1887, p. 159; Ill. Rev. Stat., 1955, c. 37, § 163b.

7 Ill. Laws 1927, p. 400, § 1 1/2; Ill. Rev. Stat., 1955, c. 38, § 769a.

8 Ill. Laws 1953, p. 859; Ill. Rev. Stat., 1955, c. 37, § 163f.

Of course the fact that appeals are not constitutionally required does not mean that a State is free of constitutional restraints in establishing the terms upon which appeals will be allowed. It does mean, however, that there is no "right" to an appeal in the same sense that there is a right to a trial.⁹ Rather the constitutional right under the Due Process Clause is simply the right not to be denied an appeal for arbitrary or capricious reasons. Nothing of that kind, however, can be found in any of the steps by which Illinois has established its appellate system.

9 This difference makes of dubious validity any analogy between a condition imposed upon the right to defend oneself and a condition imposed upon the right to appeal.

We are all agreed that no objection of substance can be made to the provisions for free transcripts in capital and constitutional cases. The due process challenge must therefore be directed to the basic step of permitting appeals at all without also providing an *in forma pauperis* procedure. But whatever else may be said of Illinois' reluctance [***909] to expend public funds in perfecting appeals for indigents, it can hardly be said to be arbitrary. A policy of economy may be unenlightened, but it is certainly [*38] not capricious. And that it has never generally been so regarded is evidenced by the fact that our attention has been called to no State in which *in forma pauperis* appeals were established contemporaneously with the right of appeal. I can find nothing in the past decisions of this Court justifying a holding that the *Fourteenth Amendment* confines the States to a choice between allowing no appeals at all or undertaking to bear the cost of appeals for indigents, which is what the Court in effect now holds.

It is argued finally that, even if it cannot be said to be "arbitrary," the failure of Illinois to provide petitioners with the means of exercising the right of appeal that others are able to exercise is simply so "unfair" as to be a denial of due process. I have some question whether the non-arbitrary denial of a right that the State may withhold altogether could ever be so characterized. [**600] In any event, however, to so hold it is not enough that we consider free transcripts for indigents to be a desirable policy or that we would weigh the competing social values in favor of such a policy were it our function to distribute Illinois' public funds among alternative uses. Rather the question is whether some method of assuring that an indigent is able to exercise his right of appeal is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, so that the failure of a State so to provide constitutes a "denial of fundamental fairness, shocking to the universal sense of justice," *Betts v. Brady, supra*, at 462. Such an equivalence between persons in the means with which to exercise a right of appeal has not, however, traditionally been regarded as an essential of "fundamental fairness," and the reforms extending such aid to indigents have only recently gained widespread acceptance. Indeed, it was not until an Act of Congress in 1944 that defendants in federal criminal

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100 L. Ed. 891, ***909; 1956 U.S. LEXIS 1059

[*39] cases became entitled to free transcripts,¹⁰ and to date approximately one-third of the States still have not taken that step. With due regard for the constitutional limitations upon the power of this Court to intervene in State matters, I am unable to bring myself to say that Illinois' failure to furnish free transcripts to indigents in all criminal cases is "shocking to the universal sense of justice."

¹⁰ 58 Stat. 5, 28 U. S. C. §§ 753 (f), 1915 (a). On the prior federal practice, see, e. g., *Estabrook v. King*, 119 F.2d 607, 610 (C. A. 8th Cir.); *United States v. Fair*, 235 F. 1015 (D. C. N. D. Calif.).

As I view this case, it contains none of the elements hitherto regarded as essential to justify action by this Court under the *Fourteenth Amendment*. In truth what we have here is but the failure of Illinois to adopt as promptly as other States a desirable reform in its criminal procedure. Whatever might be said were this a question of procedure in the federal courts, regard for our system of federalism requires that matters such as this be left to the States. However strong may be one's inclination to hasten the day when *in forma pauperis* criminal procedures will be universal among the States, I think it is beyond the province of this Court to tell Illinois that it must provide such procedures.

APPENDIX 26



KENT ET AL. v. DULLES, SECRETARY OF STATE

No. 481

SUPREME COURT OF THE UNITED STATES

357 U.S. 116; 78 S. Ct. 1113; 2 L. Ed. 2d 1204; 1958 U.S. LEXIS 814

April 10, 1958, Argued

June 16, 1958, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: *101 U. S. App. D. C. 278, 239, 248 F.2d 600, 561*, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Certiorari was granted to the United States Court of Appeals for the District of Columbia Circuit to review a judgment by respondent, Secretary of State, that denied the passports of petitioner American citizens after petitioners refused to submit the affidavits pursuant to 22 C.F.R. § 51.135 for stating whether they were, or had ever been, Communists.

OVERVIEW: Respondent denied passports to petitioners under the authority of 22 C.F.R. § 51.135 when petitioners refused to submit the affidavits as to whether they were, or had ever been, Communists. The district court dismissed petitioners' complaints. The court of appeals affirmed. The Supreme Court reversed. The Court held that the right to travel was a part of the liberty

that a citizen could not be deprived of without due process of law under U.S. *Amend. V*. The Court held that 8 U.S.C.S. § 1185 and 22 U.S.C.S. § 211a did not delegate to respondent the authority to withhold passports to citizens because of their beliefs or associations. The Court held that the two grounds for refusing to issue a passport that could properly be asserted had to relate to citizenship or allegiance or to criminal or unlawful conduct. The Court stated that these were the only general categories for refusal that one could fairly argue, in light of prior administrative practice, Congress had adopted.

OUTCOME: The Court reversed the judgment of the court of appeals.

LexisNexis(R) Headnotes

Constitutional Law > Substantive Due Process > Citizenship

Immigration Law > Citizenship > General Overview

[HN1] See 22 CFR § 51.135.

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Constitutional Law > Substantive Due Process > Citizenship

Immigration Law > Citizenship > General Overview
[HN2] See 22 C.F.R. § 51.142.

Constitutional Law > Substantive Due Process > Citizenship

Immigration Law > Citizenship > General Overview
[HN3] A passport not only is of great value, indeed necessary abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States.

Constitutional Law > The Presidency > General Overview

Constitutional Law > Substantive Due Process > Citizenship

Governments > Federal Government > Executive Offices

[HN4] 8 U.S.C.S. § 1185, which states that, after a prescribed proclamation by the President of the United States, it is unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Constitutional Law > Substantive Due Process > Scope of Protection

Transportation Law > Right to Travel

[HN5] The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under *U.S. Const. amend. V*.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Constitutional Law > Substantive Due Process > Scope of Protection

[HN6] The right of exit is a personal right included within the word "liberty" as used in *U.S. Const. amend. V*. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. Where activities or enjoyment, natural and often necessary to the well being of an American citizen, such as travel, are involved, the courts will construe narrowly all delegated powers that curtail or dilute them.

SUMMARY:

The Secretary of State refused to issue passports to each of the two plaintiffs because of their refusal to file an affidavit concerning their membership in the Communist Party. To obtain the passport, each of the plaintiffs instituted an action against the Secretary of State in the United States District Court for the District of Columbia. The District Court decided in favor of the Secretary of State and the Court of Appeals for the District of Columbia Circuit affirmed by a divided vote (*101 App DC 278, 248 F2d 600-- Kent v Dulles--and 101 App DC 239, 248 F2d 561--Briehl v Dulles*).

On certiorari, the United States Supreme Court reversed. In an opinion by Douglas, J., expressing the views of five members of the Court, it was held that the pertinent statutes-- 215 of the Immigration and Nationality Act of 1952 and 1 of the Act of Congress of July 3, 1926--did not authorize the Secretary of State to withhold a passport for the reason stated above.

Clark, J., with the concurrence of Burton, Harlan, and Whittaker, JJ., dissented on the ground that the Secretary had statutory authority to withhold passports under the circumstances described above.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

PASSPORT §1

purpose. --

Headnote:[1]

A passport is an aid in establishing citizenship for purposes of re-entry into the United States.

[***LEdHN2]

LAW §525

right to travel. --

Headnote:[2]

The right to travel is a part of the "liberty" of which a citizen cannot be deprived without the due process of law of the *Fifth Amendment*.

[***LEdHN3]

PASSPORT §1

strict construction -- rights of citizens. --

STATUTES §108

Headnote:[6]

authority of Secretary of State -- administrative construction. --

The Supreme Court will construe narrowly all delegated powers that curtail or dilute activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel.

Headnote:[3]

In view of the constitutional protection of a citizen's right to travel, the Supreme Court will not impute to Congress when--by 215 of the Immigration and Nationality Act of 1952 (8 USC 1185)--it made a passport necessary for foreign travel, a purpose to give the Secretary of State unbridled discretion to grant or withhold a passport, where, as to denial of passports, the administrative practice under the Act of July 3, 1926 (44 Stat 887), conferring on the Secretary the authority to issue passports, was limited to situations involving either citizenship and allegiance to the United States or criminal activity, the wartime administrative practice being immaterial.

[***LEdHN7]

PASSPORT §1

issuance -- conditions -- Communists. --

Headnote:[7]

Section 215 of the Immigration and Nationality Act of 1952 (8 USC 1185), making a passport necessary for foreign travel, and 1 of the Act of Congress of July 3, 1926 (22 USC 211(a)), authorizing the Secretary of State to issue passports, do not empower the Secretary to make the issuance of a passport depend upon an affidavit to be filed by the applicant as to his membership in the Communist Party it being immaterial whether the applicant is, or is not, a Communist.

[***LEdHN4]

PASSPORT §1

purpose. --

Headnote:[4]

While the issuance of a passport as a subordinate function, carries some implication of intention to extend to the bearer diplomatic protection, its crucial function today is control over exit.

[***LEdHN8]

STATUTES §105.5

construction -- constitutional rights. --

Headnote:[8]

In construing a statute, the Supreme Court assumes that Congress is faithful to respect a constitutional right of a citizen, such as his right to travel.

[***LEdHN5]

LAW §50

right of exit -- delegation of power. --

Headnote:[5]

A citizen's right of exit can be regulated only pursuant to the lawmaking functions of the Congress; and if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests.

[***LEdHN9]

PASSPORTS §1

authority of Secretary of State. --

Headnote:[9]

In the absence of explicit terms in the pertinent statutes, the Secretary of State has no authority to withhold passports from citizens because of their beliefs and associations. Points from Separate Opinion

[***LEdHN6]

STATUTES §189

[***LEdHN10]

357 U.S. 116, *; 78 S. Ct. 1113, **;
2 L. Ed. 2d 1204, ***LEdHN10; 1958 U.S. LEXIS 814

PASSPORTS §1

issuance -- giving information. --

Headnote:[10]

The Secretary of State is authorized by Congress (22 USC 213) to request from an applicant for a passport information relevant to any ground upon which the Secretary might properly refuse to issue a passport. [From separate opinion by Clark, Burton, Harlan, and Whittaker, JJ.]

[***LEdHN11]

COURTS §95.3

STATES §70

avoiding constitutional question -- dissenters. --

Headnote:[11]

It is inappropriate for a dissenting justice of the Supreme Court to consider constitutional questions which the majority does not reach because of its resolution of questions of statutory construction. [From separate opinion by Clark, Burton, Harlan, and Whittaker, JJ.]

SYLLABUS

At a time when an Act of Congress required a passport for foreign travel by citizens if a state of national emergency had been declared by the President and when the Proclamation necessary to make the Act effective had been made, the Secretary of State denied passports to petitioners because of their alleged Communistic beliefs and associations and their refusal to file affidavits concerning present or past membership in the Communist Party. *Held*: The Secretary was not authorized to deny the passports for these reasons under the Act of July 3, 1926, 22 U. S. C. § 211a, or § 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1185. Pp. 117-130.

(a) The right to travel is a part of the "liberty" of which a citizen cannot be deprived without due process of law under the *Fifth Amendment*. Pp. 125-127.

(b) The broad power of the Secretary under 22 U. S. C. § 211a to issue passports, which has long been considered "discretionary," has been construed generally

to authorize the refusal of a passport only when the applicant (1) is not a citizen or a person owing allegiance to the United States, or (2) was engaging in criminal or unlawful conduct. Pp. 124-125, 127-128.

(c) This Court hesitates to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to withhold a passport from a citizen for any substantive reason he may choose. P. 128.

(d) No question concerning the exercise of the war power is involved in this case. P. 128.

(e) If a citizen's liberty to travel is to be regulated, it must be pursuant to the law-making functions of Congress, any delegation of the power must be subject to adequate standards, and such delegated authority will be narrowly construed. P. 129.

(f) The Act of July 3, 1926, 22 U. S. C. § 211a, and § 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1185, do not delegate to the Secretary authority to withhold passports to citizens because of their beliefs or associations, and any Act of Congress purporting to do so would raise grave constitutional questions. Pp. 129-130.

(g) The only Act of Congress expressly curtailing the movement of Communists across our borders, §§ 2 and 6 of the Internal Security Act of 1950, has not yet become effective, because the Communist Party has not registered under that Act and there is not in effect a final order of the Board requiring it to do so. P. 121, n. 3, p. 130.

COUNSEL: Leonard B. Boudin argued the cause for petitioners. With him on the brief were Victor Rabinowitz and David Rein. Daniel G. Marshall was also on the brief for Briehl, petitioner.

Solicitor General Rankin argued the cause for respondent. With him on the brief were Assistant Attorney General Doub, Samuel D. Slade and B. Jenkins Middleton.

Osmond K. Fraenkel and William J. Butler filed a brief for the American Civil Liberties Union, as amicus curiae.

JUDGES: Warren, Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker

OPINION BY: DOUGLAS

OPINION

[*117] [***1206] [**1114] MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case concerns two applications for passports, denied by the Secretary of State. One was by Rockwell Kent who desired to visit England and attend a meeting of an organization known as the "World Council of Peace" in Helsinki, Finland. The Director of the Passport Office informed Kent that issuance of a passport was precluded by § 51.135 of the Regulations promulgated by the Secretary of State on two grounds: ¹ (1) that he was a [*118] Communist and (2) that he had had "a consistent and prolonged adherence to the Communist Party line." The letter of denial specified in some detail the facts on which those conclusions were based. Kent was also advised of his right to an informal hearing under § 51.137 of the Regulations. But he was also told that whether or not a hearing was requested it would be necessary, before a passport would be issued, to submit an affidavit as to whether he was then or ever had been a Communist. ² Kent did not ask for a hearing but filed a new passport application listing several European countries he desired to visit. When advised that a hearing was still available to him, his attorney replied that Kent took the position [*119] that the requirement of an affidavit concerning Communist Party membership "is unlawful and that for that reason and as a matter of conscience," he would not supply one. He did, however, have a hearing at which the principal evidence against him was from his book *It's Me O Lord*, which Kent agreed was accurate. He again refused to submit the affidavit, maintaining that any matters unrelated to the question of his citizenship were irrelevant to the Department's consideration of his application. The Department advised him that no further consideration of his application would be given until he satisfied the requirements of the Regulations.

¹ [HN1] 22 CFR § 51.135 provides:

"In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

"(a) Persons who are members of the

Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion -- not otherwise rebutted by the evidence -- that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

"(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion -- not otherwise rebutted by the evidence -- that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

² [HN2] Section 51.142 of the Regulations provides:

"At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings."

Thereupon Kent sued in the District Court for declaratory relief. The District Court granted summary [***1207] judgment for respondent. On appeal the case of Kent was heard with that of Dr. Walter Briehl, a psychiatrist. When Briehl applied for a passport, the Director of the [**1115] Passport Office asked him to supply the affidavit covering membership in the Communist Party. Briehl, like Kent, refused. The Director then tentatively disapproved the application on the following grounds:

"In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a

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member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication 'Social Work Today'; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that [*120] you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Incorporated."

The Director advised Briehl of his right to a hearing but stated that whether or not a hearing was held, an affidavit concerning membership in the Communist Party would be necessary. Briehl asked for a hearing and one was held. At that hearing he raised three objections: (1) that his "political affiliations" were irrelevant to his right to a passport; (2) that "every American citizen has the right to travel regardless of politics"; and (3) that the burden was on the Department to prove illegal activities by Briehl. Briehl persisted in his refusal to supply the affidavit. Because of that refusal Briehl was advised that the Board of Passport Appeals could not under the Regulations entertain an appeal.

Briehl filed his complaint in the District Court which held that his case was indistinguishable from Kent's and dismissed the complaint.

The Court of Appeals heard the two cases *en banc* and affirmed the District Court by a divided vote. 101 U. S. App. D. C. 278, 239, 248 F.2d 600, 561. The cases are here on writ of certiorari. 355 U.S. 881.

The Court first noted the function that the passport performed in American law in the case of *Urtetiqui v. D'Arbel*, 9 Pet. 692, 699, decided in 1835:

"There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary [*121] with him. No inquiry is instituted

by him to ascertain the fact of citizenship, or any proceedings had, that will in any manner bear the character of a judicial inquiry. It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."

***LEdHR1 [1][HN3] A passport not only is of great ***1208] value -- indeed necessary -- abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States. See *Browder v. United States*, 312 U.S. 335, 339; [*1116] 3 Moore, Digest of International Law (1906), § 512. But throughout most of our history -- until indeed quite recently -- a passport, though a great convenience in foreign travel, was not a legal requirement for leaving or entering the United States. See Jaffe, *The Right to Travel: The Passport Problem*, 35 Foreign Affairs 17. Apart from minor exceptions to be noted, it was first³ made a requirement by § 215 of the Act of June 27, 1952, 66 Stat. 190, [HN4] 8 U. S. C. § 1185, which states that, after a prescribed proclamation by the President, it is "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United [*122] States unless he bears a valid passport." ⁴ And the Proclamation necessary to make the restrictions of this Act applicable and in force has been made. ⁵

3 Sections 2 and 6 of the Act of September 23, 1950, known as the Internal Security Act of 1950, 64 Stat. 987, 993, 50 U. S. C. §§ 781, 785, provide that it shall be unlawful, when a Communist organization is registered under the Act or when "there is in effect a final order of the Board requiring an organization to register," for any member having knowledge of such registry and order to apply for a passport or for any official to issue him one. But the conditions precedent have not yet materialized.

4 That section provides in relevant part:

"(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in

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addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful --

"(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

....

"(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

....

"(b) After such proclamation as is provided for in subsection (a) has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

5 Proc. No. 3004, 67 Stat. C31.

Prior to 1952 there were numerous laws enacted by Congress regulating passports and many decisions, rulings, and regulations by the Executive Department concerning them. Thus in 1803 Congress made it unlawful for an official knowingly to issue a passport to an alien certifying that he is a citizen. 2 Stat. 205. In 1815, just prior to the termination of the War of 1812, it made it illegal for a citizen to "cross the frontier" into enemy [*123] territory, to board vessels of the enemy on waters of the United States or to visit any of his camps within the limits of the United States, "without a passport first obtained" from the Secretary of State or other designated official. 3 Stat. 199-200. The Secretary of State took similar steps during the Civil War. See Dept. of State, *The American Passport* (1898), 50. In 1850 Congress ratified a treaty with Switzerland requiring

passports from citizens of [***1209] the two nations. 11 Stat. 587, 589-590. Finally in 1856 Congress enacted what remains today as our basic passport statute. Prior to that time various federal officials, state and local officials, and notaries public had undertaken to issue either certificates of citizenship or other documents in the nature of letters of introduction to foreign officials requesting treatment according [*1117] to the usages of international law. By the Act of August 18, 1856, 11 Stat. 52, 60-61, 22 U. S. C. § 211a, Congress put an end to those practices.⁶ This provision, as codified by the Act of July 3, 1926, 44 Stat., Part 2, 887, reads,

"The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

6 See 9 *Op. Atty. Gen.* 350, 352.

Thus for most of our history a passport was not a condition to entry or exit.

It is true that, at intervals, a passport has been required for travel. Mention has already been made of the restrictions imposed during the War of 1812 and during the Civil War. A like restriction, which was the forerunner of that contained in the 1952 Act, was imposed by Congress in 1918.

[*124] The Act of May 22, 1918, 40 Stat. 559, made it unlawful, while a Presidential Proclamation was in force, for a citizen to leave or enter the United States "unless he bears a valid passport." See H. R. Rep. No. 485, 65th Cong., 2d Sess. That statute was invoked by Presidential Proclamation No. 1473 on August 8, 1918, 40 Stat. 1829, which continued in effect until March 3, 1921. 41 Stat. 1359.

The 1918 Act was effective only in wartime. It was amended in 1941 so that it could be invoked in the then-existing emergency. 55 Stat. 252. See S. Rep. No. 444, 77th Cong., 1st Sess. It was invoked by Presidential Proclamation No. 2523, November 14, 1941, 55 Stat. 1696. That emergency continued until April 28, 1952. Proc. No. 2974, 66 Stat. C31. Congress extended the statutory provisions until April 1, 1953. 66 Stat. 54, 57, 96, 137, 330, 333. It was during this extension period that the Secretary of State issued the Regulations here complained of.⁷

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7 Dept. Reg. No. 108.162, effective August 28, 1952, 17 Fed. Reg. 8013.

Under the 1926 Act and its predecessor a large body of precedents grew up which repeat over and again that the issuance of passports is "a discretionary act" on the part of the Secretary of State. The scholars,⁸ the courts,⁹ the Chief Executive,¹⁰ and the Attorneys General,¹¹ all [*125] [**1118] so said. This long-continued [***1210] executive construction should be enough, it is said, to warrant the inference that Congress had adopted it. See *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 544-545; *United States v. Allen-Bradley Co.*, 352 U.S. 306, 310. But the key to that problem, as we shall see, is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion.

8 See 2 Hyde, *International Law* (2d rev. ed. 1945), § 399; 3 Hackworth, *Digest of International Law* (1942), § 268.

9 See *Perkins v. Elg*, 307 U.S. 325, 350.

10 Exec. Order No. 654, June 13, 1907; *id.*, No. 2119-A, Jan. 12, 1915; *id.*, No. 2286-A, Dec. 17, 1915; *id.*, No. 2362-A, Apr. 17, 1916; *id.*, No. 2519-A, Jan. 24, 1917; *id.*, No. 4382-A, Feb. 12, 1926; *id.*, No. 4800, Jan. 31, 1928; *id.*, No. 5860, June 22, 1932; *id.*, No. 7856, Mar. 31, 1938, 3 Fed. Reg. 681, 22 CFR § 51.75. The present provision is that last listed and reads in part as follows:

"The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries."

The Department, however, did not feel that the Secretary of State could exercise his discretion willfully without cause. Acting Secretary Wilson wrote on April 27, 1907, "The issuance of passports is a discretionary act on the part of the Secretary of State, and he may, for reasons deemed by him to be sufficient, direct the refusal of a passport to an American citizen; but a passport is not to be refused to an American citizen, even if his character is doubtful, unless there is reason to believe that he will put the passports to an improper or unlawful use."

Foreign Relations of the United States, Pt. II (1910), 1083. See 3 Moore, *Digest of International Law* (1906), § 512. Freund, *Administrative Powers over Persons and Property* (1928), 97, states ". . . in practice it is clear that the Department of State acts upon the theory that it must grant the passport unless there is some circumstance making it a duty to refuse it. Any other attitude would indeed be intolerable; it would mean an executive power of a political character over individuals quite out of harmony with traditional American legislative practice."

11 13 *Op. Atty. Gen.* 89, 92; 23 *Op. Atty. Gen.* 509, 511.

[***LEdHR2] [2][HN5] 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*. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta.¹² Chafee, [*126] *Three Human Rights in the Constitution of 1787* (1956), 171-181, 187 *et seq.*, shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall v. Nevada*, 6 Wall. 35, 44; *Williams v. Fears*, 179 U.S. 270, 274; *Edwards v. California*, 314 U.S. 160. "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." *Id.*, at 197.

12 Article 42 reads as follows:

"It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above." And see Jaffe, *op. cit. supra*, 19-20; Sibley, *The Passport System*, 7 J. Soc. Comp.

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Leg. (N. S.) 26, 32-33; 1 Blackstone Commentaries 134-135.

Freedom of movement also has large social values. As Chafee put it:

"Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities.¹³ Then there are reasons close to the core of personal life -- marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American [***1211] citizens to understand that people like themselves live in Europe and helps them to be well-informed [*127] on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American [**1119] newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home." *Id.*, at 195-196. And see Vestal, Freedom of Movement, 41 Iowa L. Rev. 6, 13-14.

13 The use of foreign travel to promote educational interests is reviewed by Francis J. Colligan in 30 Dept. State Bull. 663.

Freedom to travel is, indeed, an important aspect of the citizen's "liberty." We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment.

The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." 32 Stat. 386, 22 U. S. C. § 212. Second, was the question whether the applicant was participating in illegal conduct,

trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States. See 3 Moore, Digest of International Law (1906), § 512; 3 Hackworth, Digest of International Law (1942), § 268; 2 Hyde, International Law (2d rev. ed.), § 401.

[*128] [***LEdHR3] [3]The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice. One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.

More restrictive regulations were applied in 1918 and in 1941 as war measures. We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579.

In a case of comparable magnitude, *Korematsu v. United States*, 323 U.S. 214, 218, we allowed the Government in time of war to exclude citizens from their homes and restrict [***1212] their freedom of movement only on a showing of "the gravest imminent danger to the public safety." There the Congress and the Chief Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here.

[*129] [***LEdHR4] [4] [***LEdHR5] [5] [***LEdHR6] [6] Since we start with an exercise by an American citizen of an activity included in constitutional protection, we [**1120] will not readily infer that

357 U.S. 116, *129; 78 S. Ct. 1113, **1120;
2 L. Ed. 2d 1204, ***LEdHR6; 1958 U.S. LEXIS 814

Congress gave the Secretary of State unbridled discretion to grant or withhold it. If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case. But there is more involved here. In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than "request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection" to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit. And, as we have seen, [HN6] the right of exit is a personal right included within the word "liberty" as used in the *Fifth Amendment*. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet & Tube Co. v. Sawyer, supra*. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co. v. Ryan, 293 U.S. 388, 420-430*. Cf. *Cantwell v. Connecticut, 310 U.S. 296, 307*; *Niemotko v. Maryland, 340 U.S. 268, 271*. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo, 323 U.S. 283, 301-302*. Cf. *Hannegan v. Esquire, Inc., 327 U.S. 146, 156*; *United States v. Rumely, 345 U.S. 41, 46*. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

[***LEdHR7] [7]Thus we do not reach the question of constitutionality. We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here. [*130] We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations. They do not seek to escape the law nor to violate it. They may or may not be Communists. But assuming they are, the only law which Congress has passed expressly curtailing the movement of Communists across our borders has not yet become effective.¹⁴ It would therefore be strange to infer that pending the effectiveness of that law, the Secretary has been silently granted by Congress the larger, the more pervasive power to curtail in his discretion [***1213] the free movement of citizens in order to satisfy himself

about their beliefs or associations.

14 See note 3, *supra*.

[***LEdHR8] [8] [***LEdHR9] [9]To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement.

Reversed.

DISSENT BY: CLARK

DISSENT

MR. JUSTICE CLARK, with whom MR. JUSTICE BURTON, MR. JUSTICE HARLAN, and MR. JUSTICE WHITTAKER concur, dissenting.

[**1121] On August 28, 1952, acting under authority vested by Executive Order No. 7856, 22 CFR § 51.77, the Secretary of State issued the regulations in question, § 51.142 of [*131] which provides that a passport applicant may be required to make a statement under oath "with respect to present or past membership in the Communist Party." 22 CFR § 51.142. Since 1917, the Congress has required that every passport application "contain a true recital of each and every matter of fact which may be required by . . . any rules" of the Secretary of State, and that requirement must be satisfied "before a passport is issued to any person." 40 Stat. 227, 22 U. S. C. § 213. In the context of that background, the Secretary asked for, and petitioners refused to file, affidavits stating whether they then were or ever had been members of the Communist Party. Thereupon the Secretary refused to further consider petitioners' applications until such time as they filed the required affidavits.

[***LEdHR10] [10]The Secretary's action clearly must be held authorized by Congress if the requested information is relevant to any ground upon which the Secretary might properly refuse to issue a passport. The Court purports today to preclude the existence of such a ground by holding that the Secretary has not been

357 U.S. 116, *131; 78 S. Ct. 1113, **1121;
2 L. Ed. 2d 1204, ***LEdHR10; 1958 U.S. LEXIS 814

authorized to deny a passport to a Communist whose travel abroad would be inimical to our national security.

In thus construing the authority of the Secretary, the Court recognizes that all during our history he has had discretion to grant or withhold passports. That power, first exercised without benefit of statute, was made the subject of specific legislative authority in 1856 when the Congress consolidated all power over passports in the hands of the Secretary. 11 Stat. 60-61. In 1874 the statutory language, "shall be authorized to grant and issue," was changed to "may grant and issue." 1874 R. S. § 4075. In slightly modified form, the Secretary's power has come through several re-enactments, *e. g.*, 44 Stat., Part 1, p. 657 in 1926, to its present-day embodiment in 44 Stat., Part 2, p. 887, 22 U. S. C. § 211a.

[*132] This discretionary authority, which we previously acknowledged in *Perkins v. Elg*, 307 U.S. 325, 349-350 (1939), was exercised both in times of peace and in periods of war. During war and other periods of national emergency, however, the importance of the Secretary's passport power was tremendously magnified by a succession of "travel-control [***1214] statutes" making possession of a passport a legal necessity to leaving or entering this country. The first of these was enacted in 1815 just prior to the end of the War of 1812, when it was made illegal for any citizen to "cross the frontier" into enemy territory without a passport. 3 Stat. 199. After the same result was accomplished during the Civil War without congressional sanction, 3 Moore, Digest of International Law, 1015-1021, World War I prompted passage in 1918 of the second travel-control statute, 40 Stat. 559. The 1918 statute, directly antecedent to presently controlling legislation, provided that in time of war and upon public proclamation by the President that the public safety required additional travel restrictions, no citizen could depart from or enter into the country without a passport. Shortly thereafter, President Wilson made the required proclamation of public necessity, and provided that no citizen should be granted a passport unless it affirmatively appeared that his "departure or entry is not prejudicial to the interests of the United States." Proc. No. 1473, 40 Stat. 1829.

The legislative history of the 1918 Act sharply indicates that Congress meant the Secretary to deny passports to those whose travel abroad would be contrary to our national security. The Act came to the floor of the

House of Representatives [**1122] accompanied by the following explanation in the Report of the House Committee on Foreign Affairs, H. R. Rep. No. 485, 65th Cong., 2d Sess. 2-3:

"That some supervision of travel by American citizens is essential appeared from statements made [*133] before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined.

....

"It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. It is obviously impracticable to appeal to Congress for further legislation in each new emergency. Swift Executive action is the only effective counterstroke.

"The committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous suspicious departures for Cuba which it was impossible to prevent. Other individual cases of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons reasonably suspected of aiding Germany's purposes."

[*134] During debate of the bill on the floor of the House, its House spokesman stated:

"The Government is now very [***1215] much hampered by lack of authority to control the travel to and from this country, even of people suspected of not being loyal, and even of those whom they suspect of being in the employ of enemy governments." 56 Cong. Rec. 6029.

357 U.S. 116, *134; 78 S. Ct. 1113, **1122;
2 L. Ed. 2d 1204, ***1215; 1958 U.S. LEXIS 814

....

"Our ports are open, so far as the law is concerned, to alien friends, citizens, and neutrals, to come and go at will and pleasure, and that notwithstanding the Government may suspect the conduct and the intention of the individuals who come and go." *Id.* at 6065.

His counterpart in the Senate stated in debate:

"The chief object of the bill is to correct a very serious trouble which the Department of State, the Department of Justice, and the Department of Labor are having with aliens and alien enemies and renegade American citizens, I am sorry to say, entering the United States from nests they have in Cuba and over the Mexican border. They can now enter and depart without any power of the departments or of the Government to intercept or delay them. There is no law that covers this case. It is believed that all the information which goes to Germany of the war preparations of the United States and of the transportation of troops to France passes through Mexico. The Government [*1123] is having a great deal of trouble along that border. It is an everyday occurrence, and the emergency of this measure is very great. The bill is supplementary to the espionage [*135] laws and necessary for their efficient execution in detecting and punishing German spies." 56 Cong. Rec. 6192.

The implication is unmistakable that the Secretary was intended to exercise his traditional passport function in such a manner as would effectively add to the protection of this country's internal security.

That the Secretary so understood and so exercised his passport power in this period is evident from two State Department documents in 1920. A memorandum of the Under Secretary of State, dated November 30, 1920, declared, "Any assistance in the way of passport facilities, which this Government may render to a person who is working either directly or indirectly in behalf of the Soviet Government is a help to the Soviet Government" Memorandum Re Applicants for Passports Who are Bolsheviks or Who are Connected with Bolshevik Government, Code No. 5000. Accordingly, it was recommended that passports be refused any person "who counsels or advocates publicly or privately the overthrow [of] organized Governments by force." *Id.* Among the examples stated were "members of the Communist Party." *Id.* Two weeks

later, the State Department published office instructions, dated December 16, 1920, to our embassies throughout the world, implementing Code No. 5000 by prohibiting issuance of passports to "anarchists" and "revolutionary radicals." Expressly included among the proscribed classes of citizens were those who "believe in or advocate the overthrow by force or violence of the Government of the United States," as well as all those who "are members of or are affiliated with any organization" that believes in or advocates such overthrow.

By its terms a war statute, the 1918 Act expired in March 1921, see 41 Stat. 1359, after which no more travel [*136] controls existed until 1941. In that year, Congress amended the 1918 Act so as to provide the same controls during the national emergency proclaimed by the President on May 27, 1941, should the President [***1216] find and publicly proclaim that the interest of the United States required that such restrictions be reimposed. 55 Stat. 252. Shortly thereafter, President Roosevelt invoked this authority, 55 Stat. 1696, and implementing regulations were issued by the State Department. 22 CFR § 53. The legislative history of the 1941 amendment is as clear as that of the 1918 Act: the purpose of the legislation was to so use the passport power of the Secretary as to block travel to and from the country by those persons whose passage would not be in the best interests and security of the United States. The Report of the Senate Committee on the Judiciary, S. Rep. No. 444, 77th Cong., 1st Sess. 1-2, declared:

"Since the outbreak of the present war it has come to the attention of the Department of State and of other executive departments that there are many persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments, and others who are engaged in activities inimical to the best interests of the United States, who desire to travel from time to time between the United States and foreign countries in connection with their activities"

During debate on the House floor, the "sole purpose" of the bill was stated to be establishment of "a sort of clearing house," where those persons wishing to enter or leave the country "would have to give their reasons why they were going or coming, and where it would be determined whether . . . their coming [**1124] in or going out would be inimical to the interests of the United States." 87 [*137] Cong. Rec. 5052. See also 87 Cong.

357 U.S. 116, *137; 78 S. Ct. 1113, **1124;
2 L. Ed. 2d 1204, ***1216; 1958 U.S. LEXIS 814

Rec. 5048-5053, 5386-5388. The carrying out of this legislative purpose resulted in a "complete change in emphasis of the work of the Division from that of an agency to afford protection to the individual to that of one whose principal purpose was to safeguard and maintain the security of the state." 12 Dept. State Bull. 1070. That transformation involved "the clearance *upon a basis of security for the state* of the entry and departure of hundreds of thousands of persons into and from the United States." *Id.* (Emphasis added.)

While the national emergency to which the 1941 amendment related was officially declared at an end on April 28, 1952, Proc. No. 2974, 66 Stat. C31, Congress continued the provisions of the Act in effect until April 1, 1953. 66 Stat. 54. In that interim period, Congress passed the Immigration and Nationality Act of 1952, which both repealed the 1918 Act as amended in 1941, 66 Stat. 279, and re-enacted it as § 215 of the 1952 Act, amending it only to the extent that its provisions would be subject to invocation "during the existence of any national emergency proclaimed by the President." 66 Stat. 190. There is practically no legislative history on this incorporation of the 1918 statute in the 1952 Act apart from a comment in the House Report that the provisions of § 215 are "incorporated in the bill . . . in practically the same form as they now appear in the act of May 22, 1918." H. R. Rep. No. 1365, 82d Cong., 2d Sess. 53. For that reason, the legislative history of the 1918 Act and the 1941 amendment, which I have set out at some detail, is doubly important in ascertaining the intent of the Congress as to the authority of the Secretary to deny passports under § 215 of the 1952 Act. Cf. *United States v. Plesha*, 352 U.S. 202, 205 (1957).

At the time of the 1952 Act, a national emergency proclaimed by [***1217] President Truman on December 16, 1950, in [*138] response to the Korean conflict, was -- and still is today -- in existence. Proc. No. 2914, 64 Stat. A454. In reliance on that, the President invoked the travel restrictions of § 215 on January 17, 1953. Proc. No. 3004, 67 Stat. C31. The proclamation by which this was done carefully pointed out that none of its provisions should be interpreted as revoking any regulation "heretofore issued relating to the departure of persons from, or their entry into, the United States." *Id.* Among the regulations theretofore issued were those now attacked relating to the issuance of passports to Communists, for they had been promulgated to be effective on August 28, 1952, shortly after passage

of the 1952 Act. 17 Fed. Reg. 8013.

Congress, by virtue of § 215 of the 1952 Act, has approved whatever use of his discretion the Secretary had made prior to the June 1952 date of that legislation.¹ That conclusion necessarily follows from the fact that § 215 continued to make legal exit or entry turn on possession of a passport, without in any way limiting the discretionary passport power theretofore exercised by the Secretary. See *United States v. Allen-Bradley Co.*, 352 U.S. 306, 310-311 (1957); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 544-545 (1954); [**1125] *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337, 339 (1908). But the Court then determines (1) that the Secretary's denial of passports in peacetime extended to only two categories of cases, those involving allegiance and those involving criminal activity, and (2) that the Secretary's [*139] wartime exercise of his discretion, while admittedly more restrictive, has no relevance to the practice which Congress can be said to have approved in 1952. Since the present denials do not involve grounds either of allegiance or criminal activity, the Court concludes that they were beyond the pale of congressional authorization. Both of the propositions set out above are vital to the Court's final conclusion. Neither of them has any validity: the first is contrary to fact, and the second to common sense.

1 This is not seriously disputed by the majority. However, reference is made to a reluctance to interpret broadly the practice of the Secretary approved by Congress in the 1952 Act because the denial of passports on security grounds had not "jelled" at the time of the 1926 Act. But that overlooks (1) that it is congressional intent in the 1952 statute, not the 1926 statute, to which we look, and (2) that there is abundant evidence, set out in this opinion, of security denials before as well as after 1926.

The peacetime practice of the State Department indisputably involved denial of passports for reasons of national security. The Report of the Commission on Government Security (1957), 470-473, summarizes the Department's policy on granting passports to Communists by excerpts from State Department documents. Shortly after the 1917 Russian Revolution, the Department "became aware of the scope and danger of the worldwide revolutionary movement and the attendant purpose to overthrow all existing governments, including our own."

357 U.S. 116, *139; 78 S. Ct. 1113, **1125;
2 L. Ed. 2d 1204, ***1217; 1958 U.S. LEXIS 814

Thereafter "passports were refused to American Communists who desired to go abroad for indoctrination, instruction, etc. *This policy was continued until 1931 . . .*" (Emphasis added.) From 1931 "until World War II no persons were refused passports because they were [***1218] Communists." After World War II, "at first passports were refused," but upon reconsideration of the matter in 1948, "the decision was made that passports would be issued to Communists and supporters of communism who satisfied the Department that they did not intend, while abroad, to engage in the promotion of Communist activities." At the same time, however, it was decided that "passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States." Later in 1948 the policy was changed to give Communist journalists passports even though they were "actively [*140] promoting the Communist cause." Nearly two years later, in September 1950, the latter leniency was reversed, after it was pointed out "that the Internal Security Act of 1950 clearly showed the desire of Congress that no Communists should be issued passports of this Government." ² The matter was referred to the Department's Legal Adviser, "who agreed that it was the duty of the State Department to refuse passports to all Communists, including journalists."

2 For a comprehensive story of Communism in America indicating the necessity for passport control, see Hoover, *Masters of Deceit* (1958).

Other evidence of peacetime denials for security reasons is more scattered, but nevertheless existent. Much of it centers around opposition to the Internal Security Act of 1950, for one of the stated aims of that legislation was denial of passports to Communists. The minority report of the Senate Committee on the Judiciary objected, "But this can be done under the existing discretionary powers of the Secretary of State . . . as evidenced by the recent denial or cancellation of a passport to Paul Robeson." S. Rep. No. 2369, Part 2, 81st Cong., 2d Sess. 10. President Truman, in vetoing that Act, stated: "It is claimed that this bill would deny passports to Communists. The fact is that the Government can and does deny passports to Communists under existing law." 96 Cong. Rec. 15631. ³

3 To the same effect see the statement of Senator Kilgore during Senate debate on the Act, 96 Cong. Rec. 14538, and an amendment offered to

the Act in both the House, 96 Cong. Rec. 13756, and Senate, 96 Cong. Rec. 14599.

[**1126] In 1869 Attorney General Hoar advised the Secretary of State that good reason existed for the passport power being discretionary in nature, for it might sometimes be "most inexpedient for the public interests for this country to grant a passport to a citizen of the United States." [*141] *23 Op. Atty. Gen. 509, 511*. As an example he referred to the case of "an avowed anarchist," for if such person were to seek a passport, "the public interests might require that his application be denied." *Ibid.* See also, *13 Op. Atty. Gen. 89, 92*.

Orders promulgated by the Passport Office periodically have required denial of passports to "political adventurers" and "revolutionary radicals," the latter phrase being defined to include "those who wish to go abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States." See, shortly after the end of World War I, Passport Office Instructions of May 4, 1921; in 1937, Passport Office Instructions of July 30, 1937; in 1948, Foreign Service Regulations of July 9, 1948.

An even more serious error of the Court is its determination that the [***1219] Secretary's wartime use of his discretion is wholly irrelevant in determining what discretionary practices were approved by Congress in enactment of § 215. In a wholly realistic sense there is no peace today, and there was no peace in 1952. At both times the state of national emergency declared by the President in 1950, wherein he stated that "world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world" and that "the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible," was in full effect. Proc. No. 2914, 64 Stat. A454. It is not a case, then, of judging what may be done in peace by what has been done in war. Professor Jaffe has aptly exposed the fallacy upon which the majority proceeds:

"The criterion here is the defense of the country from external enemies. It is asserted that the precedents of 'war' have no relevance to 'peace.' But the [*142] critical consideration is defense against an external enemy; and communication abroad between our citizens and the enemy cannot by its nature be controlled by the usual criminal process. The facts in a particular case as to the

357 U.S. 116, *142; 78 S. Ct. 1113, **1126;
2 L. Ed. 2d 1204, ***1219; 1958 U.S. LEXIS 814

citizen's intention are inevitably speculative: all is to be done after the bird has flown. Now our Congress and the Administration have concluded that the Communist International is a foreign and domestic enemy. We deal with its domestic aspect by criminal process; we would seem justified in dealing with its external aspect by exit control. If an avowed Communist is going abroad, it may be assumed that he will take counsel there with his fellows, will arrange for the steady and dependable flow of cash and information, and do his bit to promote the purposes of the 'conspiracy.'" Jaffe, *The Right to Travel: The Passport Problem*, 35 *Foreign Affairs* 17, 26.

Were this a time of peace, there might very well be no problem for us to decide, since petitioners then would not need a passport to leave the country. The very structure of § 215 is such that either war or national emergency is prerequisite to imposition of its restrictions.

Indeed, rather than being irrelevant, the wartime practice may be the only relevant one, for the discretion with which we are concerned is a discretionary control over international travel. Yet only in times of war and national emergency has a passport been required to leave or enter this country, and hence only in such times has passport power [**1127] necessarily meant power to control travel.⁴

4 Peacetime exercise of the passport power may still be relevant from another point of view, namely, if other countries hinge entry on possession of a passport, the right of international travel of a United States citizen who cannot secure a passport will thereby be curtailed. For though he can get out of this country, he cannot get into another.

[*143] Finally, while distinguishing away the Secretary's passport denials in wartime, the majority makes no attempt to distinguish the Secretary's practice during periods when there has been no official state of

war but when nevertheless a presidential proclamation of national emergency has been in effect, the very situation which has prevailed since the end of World War II. Throughout that time, as I have pointed out, the Secretary refused passports to those "whose purpose in traveling abroad was believed to be to subvert the interest of the [***1220] United States." Report of the Commission on Government Security, *supra*. Numerous specific instances of passport denials on security grounds during the years 1947-1951 were reported in a February 1952 law review article, nearly half a year prior to passage of § 215. Note, *Passport Refusals for Political Reasons*, 61 *Yale L. J.* 171.

[***LEdHR11] [11]On this multiple basis, then, I am constrained to disagree with the majority as to the authority of the Secretary to deny petitioners' applications for passports. The majority's resolution of the authority question prevents it from reaching the constitutional issues raised by petitioners, relating to claimed unlawful delegation of legislative power, violation of free speech and association under the *First Amendment*, and violation of international travel under the *Fifth Amendment*. In view of that, it would be inappropriate for me, as a dissenter, to consider those questions at this time. Cf. *Peters v. Hobby*, 349 *U.S.* 331, 353-357 (1955). Accordingly, I would affirm on the issue of the Secretary's authority to require the affidavits involved in this case, without reaching any constitutional questions.

REFERENCES

Annotation References:

1. Administrative or practical construction of a statute as precedent for judicial construction, 73 L ed 322 and 84 L ed 28.
2. Permissible limits of delegation of legislative power, 79 L ed 474.

APPENDIX 27



**ROBERT LATTOMUS; ANTHONY HUMPHREYS; RALPH HENKEL; JAMES
GALLAGHER, Plaintiffs - Appellants, v. GENERAL BUSINESS SERVICES
CORPORATION; BERNARD BROWNING; ROBERT PIRTLE, Defendants -
Appellees**

No. 89-2200

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

911 F.2d 723; 1990 U.S. App. LEXIS 13420

**February 8, 1990, Submitted
August 6, 1990, Decided**

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: As Amended August 17, 1990.

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge. CA-89-842-B.

DISPOSITION: *AFFIRMED*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff regional directors sought review of a judgment from the United States District Court for the District of Maryland, which dismissed with prejudice their action against defendants,

a franchisor of business counsellors and its chairman and president.

OVERVIEW: Plaintiff initiated an action against defendants alleging, inter alia, Racketeer Influenced and Corrupt Organizations Act violations, and fraud and breach of contract claims in connection with defendants' termination of their franchise agreements. The case was transferred to a district located in another state and the district court, pursuant to local rules of court, required plaintiff to post a security bond for costs. After the plaintiff's repeatedly failed to comply with the order to post a bond, the district court granted defendants' motion to dismiss the action with prejudice. On appeal, the court affirmed the dismissal and found that the district court did not abuse its discretion in granting the dismissal because, in addition to plaintiff's repeated failure to post a bond, the record revealed numerous instances of plaintiff's failure to comply with court orders and procedural rules. The court noted that plaintiff had ample time, almost four months after the district court's initial

order requiring posting of security and almost five weeks after the initial order of dismissal, to post valid security and yet plaintiff failed to do so.

OUTCOME: The court affirmed the dismissal with prejudice of plaintiff's action against defendants.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview

[HN1] Any party against whom affirmative relief, other than a compulsory counterclaim, is filed may file a motion requesting that the party seeking the affirmative relief give security for costs if that party is not a resident of the district. U.S. Dist. Ct., D. Md., R. 103(4). The district court may dismiss the claim of a party who fails to deposit the required security.

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN2] The abuse of discretion standard governs the appellate court's review of a dismissal with prejudice for failure to post a required bond.

COUNSEL: Steven M. Kramer, STEVEN M. KRAMER & ASSOCIATES, New York, New York; Elmer Newhouse, Baltimore, Maryland, for Appellants.

Gary C. Tepper, BROWNSTEIN, ZEIDMAN AND SCHOMER, Washington, D.C., for Appellees.

JUDGES: WIDENER, PHILLIPS, and WILKINSON, Circuit Judges.

OPINION BY: PER CURIAM

OPINION

Robert Lattomus, James Gallagher, Ralph Henkel, and Anthony Humphreys appeal the district court's

dismissal with prejudice of their action against General Business Services Corporation (GBS) and Bernard Browning and Robert Pirtle, the chairman and president of GBS, respectively. The plaintiffs alleged, *inter alia*, RICO violations, fraud, and breach of contract in connection with GBS's termination of their franchise agreements. After the plaintiffs repeatedly failed to comply with a court order under District [*2] of Maryland Local Rule 103(4) to post security for costs, the court dismissed the action with prejudice, as permitted under the local rule. Finding no abuse of discretion, we affirm the dismissal.

The appellants served under franchise agreements as Regional Directors for GBS, a franchisor of business counsellors, before 1987. In 1987, GBS determined that its system of Regional Directors was an inefficient means of recruiting and training franchisees to serve as Area Directors. GBS therefore offered its Regional Directors the option of terminating their Regional Director Agreements and entering into consulting agreements that provided for periodic cash payments. All of GBS's fifty-six Regional Directors accepted the consulting agreements except for the four appellants in this action and one other Regional Director. The appellants did not object to the termination of their Regional Director Agreements, but rather demanded a larger cash payment than GBS was willing to offer. After GBS refused the increased payment, Lattomus, Henkel, and Humphreys executed renewals of their existing Regional Director Agreements when those agreements approached expiration. Gallagher never executed a renewal, [*3] as his current Regional Director Agreement had not expired, at least as of the time of this appeal. Thus, at the time of the filing of this action, all of the appellants still served as Regional Directors for GBS.

Alleging RICO violations and common law claims arising from the termination of their prior agreements, the appellants sued GBS, Browning, and Pirtle in the United States District Court for the District of Pennsylvania in May 1988. The case was transferred to the District of Maryland in February 1989. On June 1, 1989, the district court ordered each of the appellants, none of whom was a Maryland resident, to post a \$ 1000 bond as security for costs, pursuant to [HN1] District of Maryland Local Rule 103(4):

Any party against whom affirmative relief (other than a compulsory counterclaim) is filed may file a

motion requesting that the party seeking the affirmative relief give security for costs if that party is not a resident of this district. . . . The Court may dismiss the claim of a party who fails to deposit the required security.

The court order required the bond to be posted by June 16. That deadline passed without the appellants posting the bond or requesting an extension [*4] of time. Accordingly, on June 26, GBS, Browning, and Pirtle moved to dismiss the action. Shortly after the motion to dismiss was filed, GBS, Browning, and Pirtle received a copy of a letter, addressed to the district court and dated June 24, in which the appellants requested a thirty-day extension -- until July 24 -- to post bond. On July 13, the appellants filed an opposition to the motion to dismiss and attached to that document a letter dated June 29 instructing Robert B. Blaikie & Co. to issue a bond. GBS, Browning, and Pirtle promptly notified the district court and the appellants, on July 17, that Robert B. Blaikie & Co. was not authorized under 31 U.S.C. §§ 9304 & 9305 to act as a surety in federal court.

Another month passed, and the appellants still had not arranged for a bond with an authorized surety. Therefore, on August 17 -- over three weeks after the July 24 expiration of the requested extension -- the district court entered an order dismissing the appellants' complaint. In its order, the district court noted that its exercise of discretion to dismiss under Local Rule 103(4) was taken "upon consideration of the entire record in these proceedings. [*5] " The entire record as of that date revealed numerous instances of the appellants' failure to comply with court orders and procedural rules. For example, all four appellants failed to answer an initial set of interrogatories and document requests, and three of the four have yet to comply with a court order compelling answers and document production, while the fourth complied belatedly. The appellants also failed to respond to a second set of interrogatories, despite several requests for extensions of time. After appellants' original counsel was permitted to withdraw from the case (upon stating in open court that he had an ethical duty to withdraw because of the appellants' refusal to abandon frivolous claims, Joint Appendix at 10), the appellants then did not engage new counsel until over one month after the date by which the court ordered the appearance of new counsel. On numerous other occasions, the appellants failed to file timely oppositions to defense motions to dismiss, transfer venue, and post security for costs.

On August 17, 1989, the day of the court order dismissing this action, the appellants filed with the district court an undertaking by an authorized surety to post [*6] security for costs. The undertaking filed on the 17th was dated August 3. The appellants claimed that the clerk of court had refused to file the document earlier because it was defective in certain material respects: it was not signed by an attorney qualified to act as Attorney-in-Fact in Maryland, and it covered only one of the four appellants. No explanation was given as to why those defects had not been cured by the 17th. Still without having attempted to cure the defects or otherwise post valid security, the appellants filed on August 24 a motion for reconsideration of the dismissal order. The district court denied the motion for reconsideration on September 22. As of that date -- almost four months after the initial order requiring posting of security within fifteen days and almost five weeks after the initial order of dismissal -- appellants had yet to post valid security.

II

[HN2] The abuse of discretion standard governs our review of a dismissal with prejudice for failure to post a required bond. *See Patuxent Section 1 Corp. v. St. Mary's County Metro. Comm'n*, 19 F.R. Serv. 2d 1395-96 (4th Cir. 1975) (per curiam). In this case, the appellants still had not complied [*7] with a court order requiring the posting of security for costs over three months after the June 16 deadline set by the court. The court's forbearance in not ruling earlier than August 17 on the motion to dismiss indicates that the appellants had ample opportunity, which they did not take, to comply with the order even after the expiration of the June 16 deadline. As the district court apparently sensed, the appellants' delay in complying with this order was of a piece with prior instances of the appellants' dilatory and recalcitrant approach to other court orders and rules of procedure. ¹ On the record as a whole, the district court did not abuse its discretion in granting GBS, Browning, and Pirtle's motion to dismiss the action with prejudice. ²

1 As GBS is required by federal law to disclose to prospective franchisees any pending suits against it, this record would permit the inference that the appellants have adopted a strategy of delay to improve their position in settlement negotiations. A letter from appellants' counsel to GBS in late 1987 noted "the existence of such a suit involves embarrassing disclosure

responsibilities under the FTC rule with respect to your 'UFOC' (Uniform Franchise Offering Circular) which may adversely affect your potential to attract new franchisees." Joint Appendix at 64.

2 It appears that the appellants have also failed to comply with a December 11, 1989, order of the district court requiring each appellant personally to post \$ 250 in cash as security for costs on appeal. *See Fed. R. App. P. 7*. The appellees have requested as an alternative to a merits disposition that we dismiss this appeal on the ground that the appellants have not complied with the order to post bond on appeal. We have opted to address the merits, as the nature of this appeal suggests no compelling reason to dismiss.

[*8] \$-P1292*8

For the foregoing reasons, the district court's dismissal of this action with prejudice is affirmed. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.³

3 At the conclusion of their brief, appellees GBS, Browning, and Pirtle have requested "that attorneys' fees and costs relating to this appeal be assessed against appellees [sic]." Under *Fed. R. App. P. 39*, "costs shall be taxed against the appellant[s]" because we affirm in this case. If appellees desire to seek further sanctions, the appropriate means is by a motion to this court under *Fed. R. App. P. 38*.

AFFIRMED

APPENDIX 28



**SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF
CORRECTIONS, ET AL., PETITIONERS v. FLETCHER CASEY, JR., ET AL.**

No. 94-1511

SUPREME COURT OF THE UNITED STATES

***518 U.S. 343; 116 S. Ct. 2174; 135 L. Ed. 2d 606; 1996 U.S. LEXIS 4220; 64 U.S.L.W.
4587; 96 Cal. Daily Op. Service 4559; 96 Daily Journal DAR 7362; 10 Fla. L. Weekly
Fed. S 39***

November 29, 1995, Argued

June 24, 1996, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *43 F.3d 1261*, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner Arizona Department of Corrections (ADOC) sought review of a judgment of the United States Court of Appeals for the Ninth Circuit upholding an injunction ordering ADOC to provide meaningful access to prison law libraries in respondent prisoners' class action alleging that ADOC deprived prisoners of their rights of access to the courts and counsel as protected by the *First*, *Sixth*, and *Fourteenth Amendments*.

OVERVIEW: ADOC contended that the district court exceeded its authority in imposing an injunction that

mandated sweeping changes in access to prison law libraries and legal assistance. The Court found that actual injury was required to establish standing for a violation of constitutional rights, which meant a showing that the inmates were denied the tools required to attack their sentences, directly or collaterally, or to challenge conditions of their confinement. Apart from the district court's identification of two instances of actual injury to two inmates, there was no evidence that illiterate prisoners could not obtain the minimal help necessary to file claims. Thus, the district court's granting of a systemwide remedy improperly went beyond what was necessary to provide relief to the two inmates. The Court also found that the district court failed to accord adequate deference to the judgment of the prison authorities with respect to restrictions on lockdown prisoners' access to law libraries, that the injunction was inordinately intrusive, and that the order was developed through a process that failed to give adequate consideration to the views of state prison authorities.

518 U.S. 343, *; 116 S. Ct. 2174, **;
135 L. Ed. 2d 606, ***; 1996 U.S. LEXIS 4220

OUTCOME: The Court reversed the judgment of the court of appeals and remanded the case for further proceedings consistent with its opinion.

LexisNexis(R) Headnotes

***Civil Rights Law > Prisoner Rights > Access to Courts
Criminal Law & Procedure > Postconviction
Proceedings > Imprisonment***

[HN1] The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

***Civil Rights Law > Prisoner Rights > Access to Courts
Criminal Law & Procedure > Postconviction
Proceedings > Imprisonment***

[HN2] Because Bounds did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. Insofar as the right vindicated by Bounds is concerned, meaningful access to the courts is the touchstone, and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.

***Constitutional Law > The Judiciary > Case or
Controversy > Standing > General Overview***

[HN3] The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.

***Civil Procedure > Summary Judgment > Burdens of
Production & Proof > General Overview***

***Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Motions for
Summary Judgment > General Overview***

[HN4] Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i. e., with the manner and degree of

evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts, if controverted, must be supported adequately by the evidence adduced at trial.

Civil Rights Law > Prisoner Rights > Access to Courts

[HN5] The United States Constitution does not require that prisoners (literate or illiterate) be able to conduct generalized research, but only that they be able to present their grievances to the courts -- a more limited capability that can be produced by a much more limited degree of legal assistance.

***Civil Rights Law > Prisoner Rights > General Overview
Constitutional Law > Substantive Due Process > Scope
of Protection***

[HN6] A prison regulation impinging on inmates' constitutional rights is valid if it is reasonably related to legitimate penological interests.

***Contracts Law > Consideration > General Overview
Governments > Courts > Judicial Comity
Governments > State & Territorial Governments >
Relations With Governments***

[HN7] The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors also require giving the states the first opportunity to correct the errors made in the internal administration of their prisons.

DECISION:

Inmate who alleges violation of right of access to courts held required to show actual injury; Federal District Court's injunction mandating systemwide changes in prison law libraries and legal assistance programs held improper.

SUMMARY:

518 U.S. 343, *; 116 S. Ct. 2174, **;
135 L. Ed. 2d 606, ***; 1996 U.S. LEXIS 4220

In *Bounds v Smith* (1977) 430 US 817, 52 L Ed 2d 72, 97 S Ct 1491, the United States Supreme Court held that the fundamental federal constitutional right of access to the courts required prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing the inmates with adequate law libraries or adequate assistance from persons trained in the law. In 1990, 22 inmates of various prisons operated by the Arizona department of corrections filed a class action in the United States District Court for the District of Arizona against Arizona prison authorities. The inmates alleged that the authorities were depriving them of their constitutional right of access to the courts. Following a bench trial, the District Court ruled that (1) the prison system failed to comply with constitutional standards with respect to access to the courts in a number of areas relating to the adequacy and availability of law libraries and legal assistance programs; and (2) two groups of inmates--prisoners in lockdown and illiterate or non-English-speaking inmates--were particularly affected by the inadequacies of the system. The District Court also appointed a special master to investigate and report about appropriate relief (834 F Supp 1553). Thereafter, the District Court adopted, without substantial change, the special master's proposed permanent injunction, which mandated detailed changes with respect to the prison system's law libraries and legal assistance programs (see 43 F3d 1261, Appendix A). The United States Court of Appeals for the Ninth Circuit refused to grant the prison authorities' application for a stay of the injunction, but the Supreme Court granted such a stay pending the filing and disposition of a petition for a writ of certiorari (511 US ___, 128 L Ed 2d 360, 114 S Ct 1638). On the merits of the authorities' appeal, the Court of Appeals affirmed the terms of the injunction with minor exceptions (43 F3d 1261).

On certiorari, the Supreme Court reversed and remanded. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and O'Connor, Kennedy, and Thomas, JJ., and joined as to holding 3 below by Souter, Ginsburg, and Breyer, JJ., it was held that (1) an inmate who, in a federal court suit, alleged a violation of *Bounds v Smith* had to show actual injury pursuant to the federal constitutional doctrine of standing; (2) the District Court's injunctive order was improper, where (a) after the trial, the District Court had found actual injury on the part of only one named plaintiff, who was illiterate, and (b) the inadequacy that caused the actual injury to the named plaintiff was not widespread enough to justify

systemwide relief; and (3) the District Court's injunctive order also was improper on the ground that the District Court had failed to accord adequate deference to the judgment of the prison authorities.

Thomas, J., concurring, expressed the view that (1) there was no basis in constitutional text, precedent, history, or tradition for the conclusion in *Bounds v Smith* that the constitutional right of access to the courts imposed affirmative obligations on the states to finance and support prisoner litigation; and (2) for the last half century, the federal judiciary has been exercising equitable powers and issuing structural decrees entirely out of line with its constitutional mandate.

Souter, J., joined by Ginsburg and Breyer, JJ., concurring in part, dissenting in part, and concurring in the judgment, expressed the view that (1) the demise of the claims by prisoners in lockdown and non-English-speaking inmates in the case at hand should have been expressed as a failure of proof on the merits; (2) systemic relief was inappropriate solely because of the failure to prove that Arizona had denied court access to illiterate prisoners in every prison or many prisons; and (3) in a case not involving substantial, systemic deprivation of access to the courts, the requirements of Article III of the Federal Constitution normally would be satisfied if a prisoner demonstrated that (a) the prisoner had a claim that the prisoner would raise if the access scheme provided by the state were to indicate that the claim was actionable, and (b) such scheme was so inadequate that the prisoner could not research, consult about, file, or litigate the claim.

Stevens, J., dissenting, (1) agreed that the relief ordered by the District Court was broader than necessary and that the case should be remanded; but (2) expressed the view that (a) because most or all of the prison authorities' concerns regarding the District Court's order could have been addressed with a simple remand, there was no need to resolve the other constitutional issues that the Supreme Court reached out to address, and (b) it was wrong to suggest that the District Court had denied Arizona a fair opportunity to be heard in the case at hand.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

PARTIES §3

standing -- inmate's right of access to courts -- actual injury --

Headnote:[1A][1B][1C]

An inmate who, in a federal court suit, alleges a violation of the United States Supreme Court's holding in *Bounds v Smith* (1977) 430 US 817, 52 L Ed 2d 72, 97 S Ct 1491--that the fundamental federal constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing the inmates with adequate law libraries or adequate assistance from persons trained in the law--must show actual injury pursuant to the federal constitutional doctrine of standing; insofar as meaningful access to the courts is the touchstone of the right vindicated by *Bounds v Smith*, the inmate must demonstrate that the alleged shortcomings in a prison's library or legal assistance program hindered the inmate's efforts to pursue a legal claim by showing, for example, that (1) a complaint which the inmate prepared was dismissed for failure to satisfy some technical requirement which the inmate could not have known because of deficiencies in the prison's legal assistance facilities, or (2) the inmate suffered arguably actionable harm that the inmate wished to bring before the courts, but was so stymied by inadequacies of the law library that the inmate was unable even to file a complaint; prison law libraries and legal assistance programs are not ends in themselves, but only the means for insuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts, and hence an inmate cannot establish relevant actual injury by establishing that the inmate's law library or legal assistance program is subpar in some theoretical sense. (Souter, Ginsburg, Breyer, and Stevens, JJ., dissented from this holding.)

[***LEdHN2]

PRISONS AND CONVICTS §1

injunction against state authorities -- right of access to courts --

Headnote:[2A][2B][2C][2D][2E]

A Federal District Court's injunctive order in a class action brought against a state prison system by 22 inmates of various prisons in the system who alleged that prison authorities were depriving them of their federal

constitutional right of access to the courts--which order mandated detailed systemwide changes with respect to the system's law libraries and legal assistance programs and imposed particular requirements with respect to prisoners in lockdown and illiterate and non-English-speaking inmates--is improper, where (1) after trial, the District Court found actual injury on the part of only one named plaintiff, for whom the prison had failed to provide the special services that the inmate would have needed in light of his illiteracy to avoid dismissal of his case, and thus provisions directed at special services or special facilities required by non-English-speakers, prisoners in lockdown, and the inmate population at large are not the proper object of the District Court's remediation; (2) as to remediation of the inadequacy that caused the actual injury to the one named plaintiff, such inadequacy is not widespread enough to justify systemwide relief, since there were only two findings by the District Court of instances where an illiterate inmate wishing to file a claim was unable to receive the assistance necessary to do so; and (3) regardless of whether a class of plaintiffs with frustrated nonfrivolous claims exists, and no matter how extensive this class may be, unless it was established that violations with respect to that class occurred in all institutions of the system, there is no basis for a remedial decree imposed upon all those institutions. (Souter, Ginsburg, and Breyer, JJ., dissented in part from this holding.)

[***LEdHN3]

PRISONS AND CONVICTS §1

injunction against state authorities -- right of access to courts --

Headnote:[3A][3B][3C][3D]

A Federal District Court's injunctive order in a class action brought against a state prison system by 22 inmates of various prisons in the system who alleged that prison authorities were depriving them of their federal constitutional right of access to the courts--which order mandated detailed systemwide changes with respect to the system's law libraries and legal assistance programs and imposed particular requirements with respect to prisoners in lockdown and illiterate and non-English-speaking inmates--is improper on the ground that the District Court failed to accord adequate deference to the judgment of the authorities, because (1) although the District Court concluded that the system's restrictions

518 U.S. 343, *; 116 S. Ct. 2174, **;
135 L. Ed. 2d 606, ***LEdHN3; 1996 U.S. LEXIS 4220

on lockdown prisoners' access to law libraries were unjustified in that such prisoners routinely experienced delays, some as long as 16 days, in receiving legal materials or legal assistance, such delays--even where actual injury results--are not of constitutional significance so long as the delays are the product of prison regulations reasonably related to legitimate penological interests; (2) the injunction imposed by the District Court is inordinately intrusive insofar as it is enmeshed in the minutiae of prison operations; and (3) the District Court's order was developed through a process that failed to give adequate consideration to the views of state prison authorities, in that (a) after the District Court found a violation of the right of access to the courts, the District Court conferred upon a special master who was a law professor in another state, rather than upon the prison authorities, the responsibility for devising a remedial plan, and (b) while the District Court severely limited the remedies that the special master could choose--by instructing that the District Court would implement its order in an earlier access-to-courts case on a statewide basis, with any modifications that the parties and the special master determined were necessary due to the particular circumstances of the prison facility--the state was entitled to far more than an opportunity for rebuttal. (Stevens, J., dissented in part from this holding.)

[***LEdHN4]

COURTS §247

federal jurisdiction -- waiver --

Headnote:[4A][4B]

The issue of standing to litigate in federal court is jurisdictional and not subject to waiver.

[***LEdHN5]

CONSTITUTIONAL LAW §69

judicial power -- encroachment on other branches --
standing -- inmate claims --

Headnote:[5]

The doctrine of standing is a federal constitutional principle that prevents federal courts of law from undertaking tasks assigned to the political branches; it is the role of courts to provide relief to claimants, in individual or class actions, who have suffered or will

imminently suffer actual harm, while it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Federal Constitution; however, the two roles may briefly and partially coincide when a court, in granting relief against actual harm that has been suffered or imminently will be suffered by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm; thus, it is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts, while it is for the political branches of the state and federal governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.

[***LEdHN6]

COURTS §774

precedent -- unaddressed defects --

Headnote:[6A][6B]

The existence of unaddressed jurisdictional defects in a decision of the United States Supreme Court has no precedential effect.

[***LEdHN7]

PARTIES §3

standing -- actual injury -- deprivation of claims --

Headnote:[7A][7B]

Pursuant to the doctrine of standing, not everyone who can point to some concrete act and is adverse can call in the federal courts to examine the propriety of executive action, but only someone who has been actually injured; for such purposes, depriving a person of an arguable, though not yet established, claim inflicts actual injury because the person is deprived of something of value in that arguable claims are settled, bought, and sold, but depriving a person of a frivolous claim deprives that person of nothing except perhaps the punishment of sanctions under *Rule 11 of the Federal Rules of Civil Procedure*. (Souter, Ginsburg, and Breyer, JJ., dissented from this holding.)

[***LEdHN8]

518 U.S. 343, *; 116 S. Ct. 2174, **;
135 L. Ed. 2d 606, ***LEdHN8; 1996 U.S. LEXIS 4220

PRISONS AND CONVICTS §1

right of access to courts -- extent --

Headnote:[8]

The Federal Constitution does not require, as part of the right of access to the courts, that a state must enable prisoners to discover grievances and to litigate effectively once in court, since to demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and largely illiterate prison population is effectively to demand permanent provision of counsel. (Souter, Ginsburg, and Breyer, JJ., dissented from this holding; Stevens, J., dissented in part from this holding.)

[***LEdHN9]

PRISONS AND CONVICTS §1

right of access to courts -- requirements --

Headnote:[9A][9B]

The tools required to be provided to inmates by the United States Supreme Court's holding in *Bounds v Smith* (1977) 430 US 817, 52 L Ed 2d 72, 97 S Ct 1491--that the fundamental federal constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law--are those that the inmates need in order to directly or collaterally attack their sentences and challenge the conditions of their confinement; the holding in *Bounds v Smith* guarantees no particular methodology, but rather the conferral of the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts; thus, when any inmate--even an illiterate or non-English-speaking inmate--shows that an actionable claim of this nature which the inmate desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because the capability of filing suit has not been provided, the inmate demonstrates that the state has failed to furnish adequate law libraries or adequate assistance from persons trained in the law; impairment of any other litigating capacity is one of the incidental, and constitutional, consequences of conviction and incarceration. (Souter, Ginsburg, Breyer, and Stevens, JJ., dissented in part from this holding.)

[***LEdHN10]

CONSTITUTIONAL LAW §69

judicial power -- encroachment on other branches --

Headnote:[10A][10B]

For purposes of preventing the federal courts from undertaking tasks assigned to the political branches, once a plaintiff has demonstrated harm from one particular inadequacy in government administration, the remedy provided by a court must be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established; this is no less true with respect to class actions than with respect to other suits.

[***LEdHN11]

CLASS ACTIONS §2

standing --

Headnote:[11]

The fact that a federal court suit may be a class action adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that the injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.

[***LEdHN12]

EVIDENCE §103

PLEADING §114

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §4

plaintiff's burden -- standing --

Headnote:[12]

Since the elements of standing are not mere pleading requirements but rather an indispensable part of a federal court plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, that is, with the manner and degree of evidence required at the successive stages of the litigation; thus, at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, but in response to a summary

judgment motion, the plaintiff must set forth, by affidavit or other evidence, specific facts, which will be taken to be true for purposes of the motion; and at the final stage, those facts, if controverted, must be supported adequately by the evidence adduced at trial.

[***LEdHN13]

PLEADING §104

dismissal -- inferences --

Headnote:[13]

On a motion to dismiss, a federal court presumes that general allegations embrace those specific facts that are necessary to support the claim.

[***LEdHN14]

PARTIES §3

standing -- other kinds of injuries --

Headnote:[14A][14B]

Standing to litigate in federal court is not dispensed in gross; a plaintiff who has been subject to injurious conduct of one kind does not possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which the plaintiff has not been subject.

[***LEdHN15]

CLASS ACTIONS §2

standing -- certification --

Headnote:[15A][15B]

A federal court's determination of standing to complain of certain injuries in a class action is separate from certification of the class.

[***LEdHN16]

COURTS §225.1

remedial power --

Headnote:[16A][16B]

Federal courts have no power to presume and

remediate harm that has not been established.

[***LEdHN17]

PRISONS AND CONVICTS §1

state administration -- correction of errors --

Headnote:[17A][17B][17C]

The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors also require giving the states the first opportunity to correct errors made in the administration of the states' prisons; such rule is not to be set aside when a federal judge decides that a state was insufficiently cooperative in a different, earlier case.

SYLLABUS

Respondents, who are inmates of various prisons operated by the Arizona Department of Corrections (ADOC), brought a class action against petitioners, ADOC officials, alleging that petitioners were furnishing them with inadequate legal research facilities and thereby depriving them of their right of access to the courts, in violation of *Bounds v. Smith*, 430 U.S. 817. The District Court found petitioners to be in violation of *Bounds* and issued an injunction mandating detailed, systemwide changes in ADOC's prison law libraries and in its legal assistance programs. The Ninth Circuit affirmed both the finding of a *Bounds* violation and the injunction's major terms.

Held: The success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and the District Court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid. Pp. 348-364.

(a) *Bounds* did not create an abstract, freestanding right to a law library or legal assistance; rather, the right that *Bounds* acknowledged was the right of *access to the courts*. *E. g.*, 430 U.S. at 817, 821, 828. Thus, to establish a *Bounds* violation, the "actual injury" that an inmate must demonstrate is that the alleged shortcomings in the prison library or legal assistance program have hindered, or are presently hindering, his efforts to pursue a nonfrivolous legal claim. This requirement derives

518 U.S. 343, *; 116 S. Ct. 2174, **;
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ultimately from the doctrine of standing. Although *Bounds* made no mention of an actual injury requirement, it can hardly be thought to have eliminated that constitutional prerequisite. Pp. 349-353.

(b) Statements in *Bounds* suggesting that prison authorities must also enable the prisoner to *discover* grievances, and to *litigate effectively* once in court, 430 U.S. at 825-826, and n. 14, have no antecedent in this Court's pre-*Bounds* cases, and are now disclaimed. Moreover, *Bounds* does not guarantee inmates the wherewithal to file any and every type of legal claim, but requires only that they be provided with the tools to attack their sentences, directly or collaterally, and to challenge the conditions of their confinement. Pp. 354-355.

(c) The District Court identified only two instances of actual injury: It found that ADOC's failures with respect to illiterate prisoners had resulted in the dismissal with prejudice of inmate Bartholic's lawsuit and the inability of inmate Harris to file a legal action. Pp. 356-357.

(d) These findings as to injury do not support the systemwide injunction ordered by the District Court. The remedy must be limited to the inadequacy that produced the injury in fact that the plaintiff has established; that this is a class action changes nothing, for even named plaintiffs in a class action must show that they personally have been injured, see, e. g., *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40, n. 20. Only one named plaintiff, Bartholic, was found to have suffered actual injury -- as a result of ADOC's failure to provide the special services he would have needed, in light of his particular disability (illiteracy), to avoid dismissal of his case. Eliminated from the proper scope of the injunction, therefore, are provisions directed at special services or facilities required by non-English speakers, by prisoners in lockdown, and by the inmate population at large. Furthermore, the inadequacy that caused actual injury to illiterate inmates Bartholic and Harris was not sufficiently widespread to justify systemwide relief. There is no finding, and no evidence discernible from the record, that in ADOC prisons other than those occupied by Bartholic and Harris illiterate inmates cannot obtain the minimal help necessary to file legal claims. Pp. 357-360.

(e) There are further reasons why the order here cannot stand. In concluding that ADOC's restrictions on

lockdown inmates were unjustified, the District Court failed to accord the judgment of prison authorities the substantial deference required by cases such as *Turner v. Safley*, 482 U.S. 78, 89. The court also failed to leave with prison officials the primary responsibility for devising a remedy. Compare *Preiser v. Rodriguez*, 411 U.S. 475, 492. The result of this improper procedure was an inordinately intrusive order. Pp. 361-363.

JUDGES: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined, and in Parts I and III of which SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a concurring opinion, post, p. 364. SOUTER, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which GINSBURG and BREYER, JJ., joined, post, p. 393. STEVENS, J., filed a dissenting opinion, post, p. 404.

OPINION BY: SCALIA

OPINION

[***614] [**2177] [*346] JUSTICE SCALIA delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A] [***LEdHR3A] [3A] In *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977), we held that [HN1] "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.*, at 828. Petitioners, who are officials of the Arizona Department of Corrections (ADOC), contend that the United States District Court for the District of Arizona erred in finding them in violation of *Bounds*, and that the court's remedial order exceeded lawful authority. [***615]

I

Respondents are 22 inmates of various prisons operated by ADOC. In January 1990, they filed this class action "on behalf of all adult prisoners who are or will be incarcerated by the State of Arizona Department of Corrections," App. 22, alleging that petitioners were "depriving [respondents] of their rights of access to the courts and counsel protected by the *First*, *Sixth*, and

518 U.S. 343, *346; 116 S. Ct. 2174, **2177;
135 L. Ed. 2d 606, ***615; 1996 U.S. LEXIS 4220

Fourteenth Amendments," *id.*, at 34. Following a 3-month bench trial, the District Court ruled in favor of respondents, finding that "prisoners have a constitutional right of access to the courts that is adequate, effective and meaningful," 834 F. Supp. 1553, 1566 (*Ariz.* 1992), citing *Bounds*, *supra*, at 822, and that "[ADOC's] system fails to comply with constitutional standards," 834 F. Supp., at 1569. The court identified a variety of shortcomings of the ADOC system, in matters ranging from the training of [**2178] library staff, to the updating of legal materials, to the availability of photocopying services. In addition to these general [*347] findings, the court found that two groups of inmates were particularly affected by the system's inadequacies: "lockdown prisoners" (inmates segregated from the general prison population for disciplinary or security reasons), who "are routinely denied physical access to the law library" and "experience severe interference with their access to the courts," *id.*, at 1556; and illiterate or non-English-speaking inmates, who do not receive adequate legal assistance, *id.*, at 1558.

Having thus found liability, the court appointed a special master "to investigate and report about" the appropriate relief -- that is (in the court's view), "how best to accomplish the goal of constitutionally adequate inmate access to the courts." App. to Pet. for Cert. 87a. Following eight months of investigation, and some degree of consultation with both parties, the special master lodged with the court a proposed permanent injunction, which the court proceeded to adopt, substantially unchanged. The 25-page injunctive order, see *id.*, at 61a-85a, mandated sweeping changes designed to ensure that ADOC would "provide meaningful access to the Courts for all present and future prisoners," *id.*, at 61a. It specified in minute detail the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), the content of a videotaped legal-research course for inmates (to be prepared by persons appointed by the special master but funded by ADOC), and similar matters. *Id.*, at 61a, 67a, 71a. The injunction addressed the court's concern for lockdown prisoners by ordering that "ADOC prisoners in all housing areas and custody levels shall be provided regular and comparable visits to the law library," except that such visits "may be postponed on an individual basis because of the prisoner's documented inability to use the law library without

creating [*348] a threat to safety or security, or a physical condition if determined by medical personnel to prevent library use." *Id.*, at 61a. With respect to illiterate and non-English-speaking inmates, the injunction declared that they were entitled to "direct assistance" from lawyers, paralegals, or "a sufficient number of [***616] at least minimally trained prisoner Legal Assistants"; it enjoined ADOC that "particular steps must be taken to locate and train bilingual prisoners to be Legal Assistants." *Id.*, at 69a-70a.

Petitioners sought review in the Court of Appeals for the Ninth Circuit, which refused to grant a stay prior to argument. We then stayed the injunction pending filing and disposition of a petition for a writ of certiorari. 511 U.S. 1066 (1994). Several months later, the Ninth Circuit affirmed both the finding of a *Bounds* violation and, with minor exceptions not important here, the terms of the injunction. 43 F.3d 1261 (1994). We granted certiorari, 514 U.S. 1126 (1995).

II

[***LEdHR4A] [4A]Although petitioners present only one question for review, namely, whether the District Court's order "exceeds the constitutional requirements set forth in *Bounds*," Brief for Petitioners (i), they raise several distinct challenges, including renewed attacks on the court's findings of *Bounds* violations with respect to illiterate, non-English-speaking, and lock-down prisoners, and on the breadth of the injunction. But their most fundamental contention is that the District Court's findings of injury were inadequate to justify the finding of *systemwide* injury and hence the granting of systemwide relief. This argument has two related components. First, petitioners claim that in order to establish a violation of *Bounds*, an inmate must show that the alleged inadequacies of a prison's library facilities or legal assistance program caused him "actual injury" -- that is, "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim." [*349] Brief for Petitioners 30. ¹ Second, [**2179] they claim that the District Court did not find enough instances of actual injury to warrant systemwide relief. We agree that the success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid.

1 [***LEdHR4B] [4B]

Respondents contend that petitioners failed properly to present their "actual injury" argument to the Court of Appeals. Brief for Respondents 25-26. Our review of petitioners' briefs before that court leads us to conclude otherwise, and in any event, as we shall discuss, the point relates to standing, which is jurisdictional and not subject to waiver. See *United States v. Hays*, 515 U.S. 737, 742, 132 L. Ed. 2d 635, 115 S. Ct. 2431 (1995); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). JUSTICE SOUTER recognizes the jurisdictional nature of this point, *post*, at 394, which is difficult to reconcile with his view that we should not "reach out to address" it, *ibid*.

A

[***LEdHR1B] [1B] [***LEdHR5] [5]The requirement that an inmate alleging a violation of *Bounds* must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. See *Allen v. Wright*, 468 U.S. 737, 750-752, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982). It is the role of courts to provide relief to claimants, in individual or class actions, who [***617] have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur. [*350] Of course, the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the

status of being subject to a governmental institution that was not organized or managed properly. If -- to take another example from prison life -- a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care, see *Estelle v. Gamble*, 429 U.S. 97, 103, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.

[***LEdHR1C] [1C]The foregoing analysis would not be pertinent here if, as respondents seem to assume, the right at issue -- the right to which the actual or threatened harm must pertain -- were the right to a law library or to legal assistance. But *Bounds* established no such right, any more than *Estelle* established a right to a prison hospital. The right that *Bounds* acknowledged was the (already well-established) right of *access to the courts*. E. g., *Bounds*, 430 U.S. at 817, 821, 828. In the cases to which *Bounds* traced its roots, we had protected that right by prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents, e. g., *Johnson v. Avery*, 393 U.S. 483, 484, 489-490, 21 L. Ed. 2d 718, 89 S. Ct. 747 (1969), or file them, e. g., *Ex parte Hull*, 312 U.S. 546, 547-549, 85 L. Ed. 1034, 61 S. Ct. 640 (1941), and by requiring state courts to waive filing fees, e. g., *Burns v. Ohio*, 360 U.S. 252, 258, 3 L. Ed. 2d 1209, 79 S. Ct. 1164 (1959), or transcript fees, e. g., *Griffin v. Illinois*, 351 U.S. 12, 19, 100 L. Ed. 891, 76 S. Ct. 585 (1956), for indigent inmates. *Bounds* focused on the same entitlement of access to the courts. Although it affirmed a court [**2180] order [*351] requiring North Carolina to make law library facilities available to inmates, it stressed that that was merely "one constitutionally acceptable method to assure meaningful access to the courts," and that "our decision here . . . does not foreclose alternative means to achieve that goal." 430 U.S. at 830. In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring "a reasonably adequate opportunity to present claimed violations [***618] of fundamental constitutional rights to the courts." *Id.*, at 825.

[HN2] Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal

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assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned, "meaningful access to the courts is the touchstone," *id.*, at 823 (internal quotation marks omitted), and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

[***LEdHR6A] [6A] [***LEdHR7A]
[7A] Although *Bounds* itself made no mention of an actual-injury requirement, it can hardly be thought to have eliminated that constitutional prerequisite. And actual injury is apparent on the face of almost all the opinions in the 35-year line of access-to-courts cases on which *Bounds* relied, see *id.*, [*352] at 821-825.² Moreover, the assumption of an actual-injury requirement seems to us implicit in the opinion's statement that "we encourage local experimentation" in various methods of assuring access to the courts. *Id.*, at 832. One such experiment, for example, might replace libraries with some minimal access to legal advice and a system of court-provided forms such as those that contained the original complaints in two of the more significant inmate-initiated cases in recent years, *Sandin v. Conner*, 515 U.S. 472, [***619] 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), and *Hudson v. McMillian*, 503 U.S. 1, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992) -- forms that asked the inmates to provide only the facts and not to attempt any legal analysis. We hardly think that what we meant by "experimenting" with such an alternative was simply announcing it, whereupon suit would immediately lie to declare it theoretically inadequate and bring the experiment to a close. We [**2181] think we envisioned, instead, that the new [*353] program would remain in place at least until some inmate could demonstrate that a nonfrivolous³ legal claim had been frustrated or was being impeded.⁴

2 [***LEdHR6B] [6B]

JUSTICE STEVENS suggests that *Ex parte Hull*, 312 U.S. 546, 85 L. Ed. 1034, 61 S. Ct. 640 (1941), establishes that even a lost *frivolous* claim establishes standing to complain of a denial of access to courts, see *post*, at 408-409. As an initial matter, that is quite impossible, since standing was neither challenged nor discussed in that case, and we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect. See, e. g., *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97, 130 L. Ed. 2d 439, 115 S. Ct. 537 (1994); *United States v. More*, 7 U.S. 159, 3 Cranch 159, 172, 2 L. Ed. 397 (1805) (Marshall, C. J.) (statement at oral argument). On the merits, however, it is simply not true that the prisoner's claim in *Hull* was frivolous. We rejected it because it had been procedurally defaulted by, *inter alia*, failure to object at trial and failure to include a transcript with the petition, 312 U.S. at 551. If all procedurally defaulted claims were frivolous, *Rule 11* business would be brisk indeed. JUSTICE STEVENS's assertion that "we held that the smuggled petition had insufficient merit even to require an answer from the State," *post*, at 408-409, is misleading. The attorney general of Michigan appeared in the case, and our opinion discussed the merits of the claim at some length, see 312 U.S. at 549-551. The posture of the case was such, however, that we treated the claim "as a motion for leave to file a petition for writ of habeas corpus," *id.*, at 550; after analyzing petitioner's case, we found it "insufficient to compel an order requiring the warden to answer," *id.*, at 551 (emphasis added). That is not remotely equivalent to finding that the underlying claim was frivolous.

3 [***LEdHR7B] [7B]

JUSTICE SOUTER believes that *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977), guarantees prison inmates the right to present frivolous claims -- the determination of which suffices to confer standing, he says, because it assumes that the dispute "will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *post*, at 398-399, quoting *Flast v. Cohen*, 392 U.S. 83, 101, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968). This would perhaps have seemed

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like good law at the time of *Flast*, but our later opinions have made it explicitly clear that *Flast* erred in assuming that assurance of "serious and adversarial treatment" was the only value protected by standing. See, e. g., *United States v. Richardson*, 418 U.S. 166, 176-180, 41 L. Ed. 2d 678, 94 S. Ct. 2940 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-223, 41 L. Ed. 2d 706, 94 S. Ct. 2925 (1974). *Flast* failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-a-vis the other branches, concrete adverseness or not. That is where the "actual injury" requirement comes from. Not everyone who can point to some "concrete" act and is "adverse" can call in the courts to examine the propriety of executive action, but only someone who has been *actually injured*. Depriving someone of an arguable (though not yet established) claim inflicts actual injury because it deprives him of something of value -- arguable claims are settled, bought, and sold. Depriving someone of a frivolous claim, on the other hand, deprives him of nothing at all, except perhaps the punishment of *Federal Rule of Civil Procedure 11* sanctions.

4 JUSTICE SOUTER suggests that he would waive this actual-injury requirement in cases "involving substantial, systemic deprivation of access to court" -- that is, in cases involving "a direct, substantial and continuous . . . limit on legal materials," "total denial of access to a library," or "an *absolute* deprivation of access to all legal materials," *post*, at 401, and 400, n. 2. That view rests upon the expansive understanding of *Bounds* that we have repudiated. Unless prisoners have a freestanding right to libraries, a showing of the sort JUSTICE SOUTER describes would establish no *relevant* injury in fact, *i. e.*, injury-in-fact *caused by the violation of legal right*. See *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). Denial of access to the courts could not possibly cause the harm of inadequate libraries, but only the harm of lost, rejected, or impeded legal claims.

Of course, JUSTICE SOUTER's proposed exception is unlikely to be of much real-world significance in any event. Where the situation is so extreme as to constitute "an *absolute*

deprivation of access to *all* legal materials," finding a prisoner with a claim affected by this extremity will probably be easier than proving the extremity.

[***LEdHR8] [8] [*354] It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present, see, e. g., *Ex parte Hull*, 312 U.S. at 547-548; *Griffin v. Illinois*, 351 U.S. at 13-16; *Johnson v. Avery*, 393 U.S. at 489. These statements appear to suggest that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court. See *Bounds*, 430 U.S. at 825-826, and n. 14. These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them. To demand the conferral of such so-phisticated legal capabilities upon a [***620] mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.

[***LEdHR9A] [9A] Finally, we must observe that the injury requirement is not satisfied by just any type of frustrated legal claim. Nearly all of the access-to-courts cases in the *Bounds* line involved attempts by inmates to pursue direct appeals from the convictions for which they were incarcerated, see *Douglas v. California*, 372 U.S. 353, 354, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963); *Burns v. Ohio*, 360 U.S. at 253, 258; *Griffin v. Illinois*, *supra*, at 13, 18; *Cochran v. Kansas*, 316 U.S. 255, 256, 86 L. Ed. 1453, 62 S. Ct. 1068 (1942), or habeas petitions, see *Johnson v. Avery*, *supra*, at 489; *Smith v. Bennett*, 365 U.S. 708, 709-710, 6 L. Ed. 2d 39, 81 S. Ct. 895 (1961); *Ex parte Hull*, *supra*, at 547-548. In *Wolff v. McDonnell*, 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), we extended this universe of relevant claims only slightly, to "civil rights actions" -- *i. e.*, actions under 42 U.S.C. § 1983 to vindicate [**2182] "basic constitutional rights." 418 U.S. at 579. Significantly, we felt compelled to justify even this slight extension of the right of access to the courts, stressing that "the demarcation line between civil rights actions and habeas [*355] petitions is not always clear," and that "it is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ." *Ibid*. The prison law library imposed in *Bounds* itself was far from an all-subject facility. In

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rejecting the contention that the State's proposed collection was inadequate, the District Court there said:

"This Court does not feel inmates need the entire U.S. Code Annotated. Most of that code deals with federal laws and regulations that would never involve a state prisoner. . . .

"It is also the opinion of this Court that the cost of N. C. Digest and Modern Federal Practice Digest will surpass the usefulness of these research aids. They cover mostly areas not of concern to inmates." ⁵ Supplemental App. to Pet. for Cert. in *Bounds v. Smith*, O. T. 1976, No. 75-915, p. 18.

In other words, *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

5 The District Court order in this case, by contrast, required ADOC to stock each library with, *inter alia*, the Arizona Digest, the Modern Federal Practice Digest, Corpus Juris Secundum, and a full set of the United States Code Annotated, and to provide a 30-40 hour videotaped legal research course covering "relevant tort and civil law, including immigration and family issues." App. to Pet. for Cert. 69a, 71a; 834 F. Supp. 1553, 1561-1562 (*Ariz.* 1992).

[*356] B

Here the District Court identified [***621] only two instances of actual injury. In describing ADOC's failures with respect to illiterate and non-English-speaking prisoners, it found that "as a result of the inability to receive adequate legal assistance, prisoners who are slow readers have had their cases dismissed with prejudice," and that "other prisoners have been unable to file legal actions." 834 F. Supp., at 1558. Although the use of the

plural suggests that several prisoners sustained these actual harms, the court identified only one prisoner in each instance. *Id.*, at 1558, nn. 37 (lawsuit of inmate Bartholic dismissed with prejudice), 38 (inmate Harris unable to file a legal action).

[***LEdHR9B] [9B]Petitioners contend that "any lack of access experienced by these two inmates is not attributable to unconstitutional State policies," because ADOC "has met its constitutional obligations," Brief for Petitioners 32, n. 22. The claim appears to be that all inmates, including the illiterate and non-English speaking, have a right to nothing more than "physical access to excellent libraries, *plus* help from legal assistants and law clerks." *Id.*, at 35. This misreads *Bounds*, which as we have said guarantees no particular methodology but rather the conferral of a capability -- the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts. When any inmate, even an illiterate or non-English-speaking inmate, shows that an actionable claim of this nature which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the State has failed to furnish "*adequate* law libraries or *adequate* assistance from persons trained in the law," *Bounds*, 430 U.S. at 828 (emphasis added). Of course, we leave it to prison officials to determine how best to ensure that inmates with language problems have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement. But it is [*357] that capability, rather than the capability of turning pages in a law library, that is the touchstone.

[**2183] C

[***LEdHR10A] [10A]Having rejected petitioners' argument that the injuries suffered by Bartholic and Harris do not count, we turn to the question whether those injuries, and the other findings of the District Court, support the injunction ordered in this case. The actual-injury requirement would hardly serve the purpose we have described above -- of preventing courts from undertaking tasks assigned to the political branches -- if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration. [HN3] The remedy must of course be

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limited to the inadequacy that produced the injury in fact that the plaintiff has established. See *Missouri v. Jenkins*, 515 U.S. 70, 88, 89, 132 L. Ed. 2d 63, 115 S. Ct. 2038 (1995) ("The nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation") (citation and internal quotation marks omitted).

[***LEdHR2B] [2B] [***LEdHR10B] [10B]
[***LEdHR11] [11] [***LEdHR12] [12]
[***LEdHR13] [13] [***LEdHR14A] [14A]
[***LEdHR15A] [15A] This is no less true with respect to class actions than with respect to other suits. [***622] "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40, n. 20, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976), quoting *Warth v. Seldin*, 422 U.S. 490, 502, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). The general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs, and hence standing to demand remediation, with respect to various alleged inadequacies in the prison system, including failure to provide adequate legal assistance to non-English-speaking inmates and lockdown prisoners. That point is irrelevant now, however, for we are beyond the pleading stage.

[*358] [HN4] "Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence

specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (citations and internal quotation marks omitted).

After the trial in this case, the court found actual injury on the part of only one named plaintiff, Bartholic; and the cause of that injury -- the inadequacy which the suit empowered the court to remedy -- was failure of the prison to provide the special services that Bartholic would have needed, in light of his illiteracy, to avoid dismissal of his case. At the outset, therefore, we can eliminate from the proper scope of this injunction provisions directed at special services or special facilities required by non-English speakers, by prisoners in lockdown, and by the inmate population at large. If inadequacies of this character exist, they have not been found to have harmed any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation.⁶

6 [***LEdHR14B] [14B]

JUSTICE STEVENS concludes, in gross, that Bartholic's and Harris' injuries are "sufficient to satisfy any constitutional [standing] concerns," *post*, at 408. But standing is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982). As even JUSTICE SOUTER concedes, the inability of respondents to produce *any* evidence of actual injury to other than *illiterate* inmates (Bartholic and Harris) "dispose[s] of the challenge to remedial orders insofar as they touch non-English

speakers and lockdown prisoners." *Post*, at 395.

[***LEdHR15B] [15B]

Contrary to JUSTICE STEVENS's suggestion, see *post*, at 408, n. 4, our holding that respondents lacked standing to complain of injuries to non-English speakers and lockdown prisoners does *not* amount to "a conclusion that the class was improper." The standing determination is quite separate from certification of the class. Again, *Blum* proves the point: In that case, we held that a class of "all residents of skilled nursing and health related nursing facilities in New York State who are recipients of Medicaid benefits" lacked standing to challenge transfers to higher levels of care, even though they had standing to challenge discharges and transfers to lower levels; but we did not disturb the class definition. See *457 U.S. at 997, n. 11, 999-1002*.

[***LEdHR2C] [2C] [*359] [**2184] As to remediation of the inadequacy [***623] that caused Bartholic's injury, a further question remains: Was that inadequacy widespread enough to justify systemwide relief? The only findings supporting the proposition that, in all of ADOC's facilities, an illiterate inmate wishing to file a claim would be unable to receive the assistance necessary to do so were (1) the finding with respect to Bartholic, at the Florence facility, and (2) the finding that Harris, while incarcerated at Perryville, had once been "unable to file [a] legal action." *834 F. Supp., at 1558*. These two instances were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief. See *Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 417, 53 L. Ed. 2d 851, 97 S. Ct. 2766 (1977)* ("Instead of tailoring a remedy commensurate with the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope"); *id., at 420* ("Only if there has been a systemwide impact may there be a systemwide remedy"); [*360] *Califano v. Yamasaki, 442 U.S. 682, 702, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979)* ("The scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class").

[***LEdHR2D] [2D] [***LEdHR16A] [16A] To be sure, the District Court also noted that "the trial testimony . . . indicated that there are prisoners who are unable to research the law because of their functional illiteracy," *834 F. Supp., at 1558*. As we have discussed,

however, [HN5] the Constitution does not require that prisoners (literate or illiterate) be able to conduct generalized research, but only that they be able to present their grievances to the courts -- a more limited capability that can be produced by a much more limited degree of legal assistance. Apart from the dismissal of Bartholic's claim with prejudice, and Harris's inability to file his claim, there is no finding, and as far as we can discern from the record no evidence, that in Arizona prisons illiterate prisoners cannot obtain the minimal help necessary to file particular claims that they wish to bring before the courts. The constitutional violation has not been shown to be systemwide, and granting a remedy beyond what was necessary to provide relief to Harris and Bartholic was therefore improper.⁷

7 Our holding regarding the inappropriateness of systemwide relief for illiterate inmates does not rest upon the application of standing rules, but rather, like JUSTICE SOUTER's conclusion, upon "the respondents' failure to prove that denials of access to illiterate prisoners pervaded the State's prison system," *post*, at 397. In one respect, however, JUSTICE SOUTER's view of this issue differs from ours. He believes that systemwide relief would have been appropriate "had the findings shown libraries in shambles throughout the prison system," *ibid.* That is consistent with his view, which we have rejected, that lack of access to adequate library facilities qualifies as relevant injury in fact, see n. 4, *supra*.

[***LEdHR2E] [2E] [***LEdHR16B] [16B]

Contrary to JUSTICE SOUTER's assertion, *post*, at 397, the issue of systemwide relief has nothing to do with the law governing class actions. *Whether or not* a class of plaintiffs with frustrated nonfrivolous claims *exists*, and no matter how *extensive* this class may be, unless it was established that violations with respect to that class occurred in all institutions of Arizona's system, there was no basis for a remedial decree imposed upon all those institutions. However inadequate the library facilities may be as a theoretical matter, various prisons may have other means (active assistance from "jailhouse lawyers," complaint forms, etc.) that suffice to prevent the legal harm of denial of access to the

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courts. Courts have no power to presume and remediate harm that has not been established.

[***624] [*361] [**2185] III

There are further reasons why the order here cannot stand. We held in *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), that [HN6] a prison regulation impinging on inmates' constitutional rights "is valid if it is reasonably related to legitimate penological interests." *Id.*, at 89. Such a deferential standard is necessary, we explained,

"if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.' Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Ibid.* (citation omitted), quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977).

These are the same concerns that led us to encourage "local experimentation" in *Bounds*, see *supra*, at 352, and we think it quite obvious that *Bounds* and *Turner* must be read *in pari materia*.

[***LEdHR3B] [3B]The District Court here failed to accord adequate deference to the judgment of the prison authorities in at least three significant respects. First, the court concluded that ADOC's restrictions on lockdown prisoners' access to law libraries were unjustified. *Turner's* principle of deference has special force with regard to that issue, since the inmates in lockdown include "the most dangerous and violent prisoners in the Arizona prison system," and other inmates presenting special disciplinary and security concerns. Brief for Petitioners 5. The District Court made much of the fact [*362] that lockdown prisoners routinely experience delays in receiving legal materials or legal assistance, some as long as 16 days, 834 F. Supp., at 1557, and n. 23, but so long as they are the product of prison regulations reasonably related to legitimate penological interests, such delays are not of constitutional

significance, even where they result in actual injury (which, of course, the District Court did not find here).

Second, the injunction imposed by the District Court was inordinately -- indeed, wildly -- intrusive. There is no need to belabor this point. One need only read the order, see App. to Pet. for Cert. 61a-85a, to appreciate that it is the *ne plus ultra* of what [***625] our opinions have lamented as a court's "in the name of the Constitution, becoming . . . enmeshed in the minutiae of prison operations." *Bell v. Wolfish*, 441 U.S. 520, 562, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979).

[***LEdHR3C] [3C] [***LEdHR17A] [17A]Finally, the order was developed through a process that failed to give adequate consideration to the views of state prison authorities. We have said that [HN7] "the strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 492, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973). For an illustration of the proper procedure in a case such as this, we need look no further than *Bounds* itself. There, after granting summary judgment for the inmates, the District Court refrained from "dictating precisely what course the State should follow." *Bounds*, 430 U.S. at 818. Rather, recognizing that "determining the 'appropriate relief to be ordered . . . presents a difficult problem,'" the court "charged the Department of Correction with the task of devising a Constitutionally sound program' to assure inmate access to the courts." *Id.*, at 818-819. The State responded with a proposal, which the District Court ultimately approved with minor changes, after considering objections [*363] raised by the inmates. *Id.*, at 819-820. We praised this procedure, observing that the court had "scrupulously respected the limits on [its] role," by "not . . . thrusting itself into prison administration" and instead permitting "prison administrators [to] exercise wide discretion within the bounds of constitutional requirements." *Id.*, at 832-833.

[***LEdHR3D] [3D] [***LEdHR17B] [17B]As *Bounds* was an exemplar of what should be done, this case is a model of what [**2186] should not. The District Court totally failed to heed the admonition of *Preiser*. Having found a violation of the right of access to the courts, it conferred upon its special master, a law

professor from Flushing, New York, rather than upon ADOC officials, the responsibility for devising a remedial plan. To make matters worse, it severely limited the remedies that the master could choose. Because, in the court's view, its order in an earlier access-to-courts case (an order that adopted the recommendations of the same special master) had "resolved successfully" most of the issues involved in this litigation, the court instructed that as to those issues it would implement the earlier order statewide, "with any modifications that the parties and Special Master determine are necessary due to the particular circumstances of the prison facility." App. to Pet. for Cert. 88a (footnote omitted). This will not do. The State was entitled to far more than an opportunity for rebuttal, and on that ground alone this order would have to be set aside.⁸

8 [***LEdHR17C] [17C]

JUSTICE STEVENS believes that the State of Arizona "is most to blame for the objectionable character of the final [injunctive] order," *post*, at 411, for two reasons: First, because of its lack of cooperation in prison litigation three to five years earlier before the same judge, see *Gluth v. Kangas*, 773 F. Supp. 1309 (Ariz. 1988). But the rule that federal courts must "give the States the first opportunity to correct the errors made in the internal administration of their prisons," *Preiser v. Rodriguez*, 411 U.S. 475, 492, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973), is not to be set aside when a judge decides that a State was insufficiently cooperative in a *different, earlier case*. There was no indication of obstructive tactics by the State in the present case, from which one ought to have concluded that the State had learned its lesson. Second, JUSTICE STEVENS contends that the State failed vigorously to oppose application of the *Gluth* methodology to the present litigation. But surely there was no reasonable doubt that the State objected to that methodology. JUSTICE STEVENS demands from the State, we think, an unattainable degree of courage and foolishness in insisting that, having been punished for its recalcitrance in the earlier case by the imposition of the *Gluth* methodology, it antagonize the District Court further by "zealously" insisting that that methodology, recently vindicated on appeal, must be abandoned. It sufficed, we think, for the State to submit for the record at every turn that

"Defendants' objections and suggestions for modifications shall not be deemed a waiver of these Defendants' right to appeal prior rulings and orders of this Court or appeal from the subsequent final Order setting forth the injunctive relief regarding legal access issues," see, *e. g.*, App. 221, 225, 231, 239, 243.

[***626] [*364] * * *

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: THOMAS; SOUTER (In Part)

CONCUR

JUSTICE THOMAS, concurring.

The Constitution charges federal judges with deciding cases and controversies, not with running state prisons. Yet, too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree. This case is a textbook example. Dissatisfied with the quality of the law libraries and the legal assistance at Arizona's correctional institutions, the District Court imposed a statewide decree on the Arizona Department of Corrections (ADOC), dictating in excruciatingly minute detail a program to assist inmates in the filing of lawsuits -- right down to permissible noise levels in library reading rooms. Such gross overreaching by a federal district court simply cannot be tolerated in our federal system. Principles of federalism and separation of powers dictate that exclusive responsibility for administering state prisons resides with the State and its officials.

[*365] Of course, prison officials must maintain their facilities consistent with the restrictions and obligations imposed by the Constitution. In *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977), we recognized as part of the State's constitutional obligations a duty to provide prison inmates with law libraries or other legal assistance at state expense, an obligation we described as part of a loosely defined "right of access to the courts" enjoyed by prisoners. While the Constitution may guarantee state inmates an opportunity to bring suit to vindicate their federal constitutional

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rights, I find no basis in the Constitution -- and *Bounds* cited none -- for the right to have the government finance the endeavor.

[**2187] I join the majority opinion because it places sensible and much-needed limitations on the seemingly limitless right to assistance created in *Bounds* and because it clarifies the scope of the federal courts' authority to subject state prisons to remedial decrees. I write separately to make clear my doubts about the validity of [***627] *Bounds* and to reiterate my observation in *Missouri v. Jenkins*, 515 U.S. 70, 132 L. Ed. 2d 63, 115 S. Ct. 2038 (1995), that the federal judiciary has for the last half century been exercising "equitable" powers and issuing structural decrees entirely out of line with its constitutional mandate.

I

A

This case is not about a right of "access to the courts." There is no proof that Arizona has prevented even a single inmate from filing a civil rights lawsuit or submitting a petition for a writ of habeas corpus. Instead, this case is about the extent to which the Constitution requires a State to finance or otherwise assist a prisoner's efforts to bring suit against the State and its officials.

In *Bounds v. Smith*, *supra*, we recognized for the first time a "fundamental constitutional right" of all inmates to have the State "assist [them] in the preparation and filing of meaningful legal papers." *Id.*, at 828. We were not explicit [*366] as to the forms the State's assistance must take, but we did hold that, at a minimum, States must furnish prisoners "with adequate law libraries or adequate assistance from persons trained in the law." *Ibid.* Although our cases prior to *Bounds* occasionally referenced a constitutional right of access to the courts, we had never before recognized a freestanding constitutional right that requires the States to "shoulder affirmative obligations," *id.*, at 824, in order to "insure that inmate access to the courts is adequate, effective, and meaningful," *id.*, at 822.

Recognition of such broad and novel principles of constitutional law are rare enough under our system of law that I would have expected the *Bounds* Court to explain at length the constitutional basis for the right to state-provided legal materials and legal assistance. But the majority opinion in *Bounds* failed to identify a single

provision of the Constitution to support the right created in that case, a fact that did not go unnoticed in strong dissents by Chief Justice Burger and then-JUSTICE REHNQUIST. See *id.*, at 833-834 (opinion of Burger, C. J.) ("The Court leaves us unenlightened as to the source of the 'right of access to the courts' which it perceives or of the requirement that States 'foot the bill' for assuring such access for prisoners who want to act as legal researchers and brief writers"); *id.*, at 840 (opinion of REHNQUIST, J.) ("The 'fundamental constitutional right of access to the courts' which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived"). The dissents' calls for an explanation as to which provision of the Constitution guarantees prisoners a right to consult a law library or a legal assistant, however, went unanswered. This is perhaps not surprising: Just three years before *Bounds* was decided we admitted that the "the precise rationale" for many of the "access to the courts" cases on which *Bounds* relied had "never been explicitly stated," and that no Clause that had thus far been advanced "by itself provides [*367] an entirely satisfactory basis for the result reached." *Ross v. Moffitt*, 417 U.S. 600, 608-609, [***628] 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974).

The weakness in the Court's constitutional analysis in *Bounds* is punctuated by our inability, in the 20 years since, to agree upon the constitutional source of the supposed right. We have described the right articulated in *Bounds* as a "consequence" of due process, *Murray v. Giarratano*, 492 U.S. 1, 11, n. 6, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (plurality opinion) (citing *Procunier v. Martinez*, 416 U.S. 396, 419, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974)), as an "aspect" of equal protection, 492 U.S. at 11, n. 6 (citation omitted), or as an "equal protection guarantee," *Pennsylvania v. Finley*, 481 U.S. 551, 557, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987). In no instance, however, have we [**2188] engaged in rigorous constitutional analysis of the basis for the asserted right. Thus, even as we endeavor to address the question presented in this case -- whether the District Court's order "exceeds the constitutional requirements set forth in *Bounds*," Pet. for Cert. i -- we do so without knowing which Amendment to the Constitution governs our inquiry.

It goes without saying that we ordinarily require more exactitude when evaluating asserted constitutional rights. "As a general matter, the Court has always been

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reluctant" to extend constitutional protection to "unchartered area[s]," where the "guideposts for responsible decisionmaking . . . are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). It is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental. Strict adherence to this approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views.

B

In lieu of constitutional text, history, or tradition, *Bounds* turned primarily to precedent in recognizing the right to state assistance in the researching and filing of prisoner [*368] claims. Our cases, however, had never recognized a right of the kind articulated in *Bounds*, and, in my opinion, could not reasonably have been read to support such a right. Prior to *Bounds*, two lines of cases dominated our so-called "access to the courts" jurisprudence. One of these lines, rooted largely in principles of equal protection, invalidated state filing and transcript fees and imposed limited affirmative obligations on the States to ensure that their criminal procedures did not discriminate on the basis of poverty. These cases recognized a right to *equal* access, and any affirmative obligations imposed (*e. g.*, a free transcript or counsel on a first appeal as of right) were strictly limited to ensuring equality of access, not access in its own right. In a second line of cases, we invalidated state prison regulations that restricted or effectively prohibited inmates from filing habeas corpus petitions or civil rights lawsuits in federal court to vindicate federally protected rights. While the cases in this line did guarantee a certain amount of access to the federal courts, they imposed no affirmative obligations on the States to facilitate access, and held only that States may not "abridge or impair" prisoners' efforts to petition [***629] a federal court for vindication of federal rights. *Ex parte Hull*, 312 U.S. 546, 549, 85 L. Ed. 1034, 61 S. Ct. 640 (1941). Without pausing to consider either the reasoning behind, or the constitutional basis for, each of these independent lines of case law, the Court in *Bounds* engaged in a loose and selective reading of our precedents as it created a freestanding and novel right to state-supported legal assistance. Despite the Court's purported reliance on prior

cases, *Bounds* in fact represented a major departure both from precedent and historical practice.

1

In a series of cases beginning with *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956), the Court invalidated state rules that required indigent criminal defendants to pay for trial transcripts or to pay other fees necessary to have their appeals [*369] or habeas corpus petitions heard. According to the *Bounds* Court, these decisions "struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful." 430 U.S. at 822. This is inaccurate. Notwithstanding the suggestion in *Bounds*, our transcript and fee cases did *not* establish a freestanding right of access to the courts, meaningful or otherwise.

In *Griffin*, for instance, we invalidated an Illinois rule that charged criminal defendants a fee for a trial transcript necessary to secure full direct appellate review of a criminal conviction. See 351 U.S. at 13-14; *id.*, at 22 (Frankfurter, J., concurring in judgment). See also *Ross v. Moffitt*, 417 U.S. at 605-606. Though we held the fee to be unconstitutional, our decision did not turn on the effectiveness or adequacy of the access [**2189] afforded to criminal defendants generally. We were quite explicit in reaffirming the century-old principle that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review *at all*." *Griffin*, *supra*, at 18 (emphasis added) (citing *McKane v. Durston*, 153 U.S. 684, 687-688, 38 L. Ed. 867, 14 S. Ct. 913 (1894)). Indeed, the Court in *Griffin* was unanimous on this point. See 351 U.S. at 21 (Frankfurter, J., concurring in judgment) ("It is now settled that due process of law does not require a State to afford review of criminal judgments"); *id.*, at 27 (Burton, J., dissenting) ("Illinois, as the majority admit, could thus deny an appeal altogether in a criminal case without denying due process of law"); *id.*, at 36 (Harlan J., dissenting) ("The majority of the Court concedes that the *Fourteenth Amendment* does not require the States to provide for any kind of appellate review").¹ In light [***630] of the *Griffin* Court's unanimous [*370] pronouncement that a State is not constitutionally required to provide *any* court access to criminals who wish to challenge their convictions, the *Bounds* Court's description of *Griffin* as ensuring "adequate and effective appellate review," 430 U.S. at 822 (quoting *Griffin*,

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supra, at 20), is unsustainable.

1 We reaffirmed this principle almost two decades later, and just three years before *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977), in *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974), where we observed that *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956), and "succeeding cases invalidated . . . financial barriers to the appellate process, at the same time reaffirming the traditional principle that a State is not obliged to provide any appeal at all for criminal defendants." 417 U.S. at 606 (citing *McKane v. Durston*, 153 U.S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1894)). See also 417 U.S. at 611.

Instead, *Griffin* rested on the quite different principle that, while a State is not obliged to provide appeals in criminal cases, the review a State chooses to afford must not be administered in a way that excludes indigents from the appellate process solely on account of their poverty. There is no mistaking the principle that motivated *Griffin*:

"It is true that a State is not required by the Federal Constitution to provide a appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. . . . At all stages of the proceedings the Due Process and *Equal Protection Clauses* protect [indigent persons] from invidious discriminations. . . .

". . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 18-19 (plurality opinion) (citation omitted).

Justice Frankfurter, who provided the fifth vote for the majority, confirmed in a separate writing that it was invidious discrimination, and not the denial of adequate,

effective, or meaningful access to the courts, that rendered the Illinois regulation unconstitutional: "When a State deems it wise [*371] and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such a review . . ." *Id.*, at 23 (opinion concurring in judgment). Thus, contrary to the characterization in *Bounds*, *Griffin* stands not for the proposition that all inmates are entitled to adequate appellate review of their criminal convictions, but for the more modest rule that, if the State chooses to afford appellate review, it "can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin, supra*, at 17 (plurality opinion).²

2 This is what Justice Brennan came to call the "*Griffin* equality principle," *United States v. MacCollom*, 426 U.S. 317, 331, 48 L. Ed. 2d 666, 96 S. Ct. 2086 (1976) (dissenting opinion), and it provided the rationale for a string of decisions that struck down a variety of state transcript and filing fees as applied to indigent prisoners. *Bounds* cited a number of these cases in support of the right to "adequate, effective and meaningful" access to the courts. See 430 U.S. at 822, and n. 8. But none of the transcript and fee cases on which *Bounds* relied were premised on a substantive standard of court access. Rather, like *Griffin*, these cases were primarily concerned with invidious discrimination on the basis of wealth. See, e. g., *Smith v. Bennett*, 365 U.S. 708, 709, 6 L. Ed. 2d 39, 81 S. Ct. 895 (1961) ("To interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws"); *Gardner v. California*, 393 U.S. 367, 370-371, 21 L. Ed. 2d 601, 89 S. Ct. 580 (1969) ("In the context of California's habeas corpus procedure denial of a transcript to an indigent marks the same invidious discrimination which we held impermissible in . . . *Griffin*").

[**2190] If we left any doubt as to the basis of our decision in *Griffin*, we eliminated [***631] it two decades later in *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963), where we held for the first time that States must provide assistance of counsel on a first appeal as of right for all indigent defendants. Like *Griffin*, *Douglas* turned not on a right of access *per*

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se, but rather on the right not to be denied, on the basis of poverty, access afforded to others. We did not say in *Douglas* that indigents have a right to a "meaningful appeal" that could not be realized absent appointed counsel. Cf. *Bounds*, 430 U.S. at 823. [*372] What we did say is that, in the absence of state-provided counsel, "there is lacking that equality demanded by the *Fourteenth Amendment* where the rich man, who appeals as of right, enjoys the benefit of counsel . . . while the indigent . . . is forced to shift for himself." *Douglas*, *supra*, at 357-358. Just as in *Griffin*, where "we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty," *Douglas*, 372 U.S. at 355, the evil motivating our decision in *Douglas* was "discrimination against the indigent," *ibid.*³

3 There is some discussion of due process by the plurality in *Griffin*, see 351 U.S. at 17-18, and a passing reference to "fair procedure" in *Douglas*, 372 U.S. at 357. These unexplained references to due process, made in the course of equal protection analyses, provide an insufficient basis for concluding that the regulations challenged in *Griffin* and *Douglas* independently violated the Due Process Clause. And attempts in subsequent cases to salvage a role for the Due Process Clause in this context and to explain the difference between the equal protection and due process analyses in *Griffin* have, in my opinion, been unpersuasive. See *Evitts v. Lucey*, 469 U.S. 387, 402-405, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985); *Bearden v. Georgia*, 461 U.S. 660, 665-667, 76 L. Ed. 2d 221, 103 S. Ct. 2064 (1983). In any event, there do not appear to have been five votes in *Griffin* in support of a holding under the Due Process Clause; subsequent transcript and fee cases turned primarily, if not exclusively, on equal protection grounds, see, e. g., *Smith v. Bennett*, *supra*, at 714; and the *Douglas* Court, with its "obvious emphasis" on equal protection, 372 U.S. at 361 (Harlan, J., dissenting), does not appear to have reached the due process question, notwithstanding Justice Harlan's supposition to the contrary, see *id.*, at 360-361.

It is difficult to see how due process could be implicated in these cases, given our consistent reaffirmation that the States can abolish criminal appeals altogether consistently with due process.

See, e. g., *Ross v. Moffitt*, 417 U.S. at 611. The fact that a State affords some access "does not automatically mean that a State then acts unfairly," and hence violates due process, by denying indigents assistance "at every stage of the way." *Ibid.* Under our cases, "unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty," a question "more profitably considered under an equal protection analysis." *Ibid.*

[*373] Our transcript and fee cases were, therefore, limited holdings rooted in principles of equal protection. In *Bounds*, these cases were recharacterized almost beyond recognition, as the Court created a new and different right on behalf of prisoners -- a right to have the State pay for law libraries or other forms of legal assistance without regard to the equality of access. Only by divorcing our [***632] prior holdings from their reasoning, and by elevating dicta over constitutional principle, was the Court able to reach such a result.

The unjustified transformation of the right to nondiscriminatory access to the courts into the broader, untethered right to legal assistance generally would be reason enough for me to conclude that *Bounds* was wrongly decided. However, even assuming that *Bounds* properly relied upon the *Griffin* line of cases for the proposition for which those [**2191] cases actually stood, the *Bounds* Court failed to address a significant intervening development in our jurisprudence: the fact that the equal protection theory underlying *Griffin* and its progeny had largely been abandoned prior to *Bounds*. The provisions invalidated in our transcript and fee cases were all facially neutral administrative regulations that had a disparate impact on the poor; there is no indication in any of those cases that the State imposed the challenged fee with the purpose of deliberately discriminating against indigent defendants. See, e. g., *Douglas*, *supra*, at 361 (Harlan, J., dissenting) (criticizing the Court for invalidating a state law "of general applicability" solely because it "may affect the poor more harshly than it does the rich"). In the years between *Douglas* and *Bounds*, however, we rejected a disparate impact theory of the *Equal Protection Clause*. That the doctrinal basis for *Griffin* and its progeny has largely been undermined -- and in fact had been before *Bounds* was decided -- confirms the invalidity of the right to law libraries and legal assistance created in *Bounds*.

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We first cast doubt on the proposition that a facially neutral law violates the *Equal Protection Clause* solely because [*374] it has a disparate impact on the poor in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973). In *Rodriguez*, the respondents challenged Texas' traditional system of financing public education under the *Equal Protection Clause* on the ground that, under that system, "some poorer people receive less expensive educations than other more affluent people." *Id.*, at 19. In rejecting the claim that this sort of disparate impact amounted to unconstitutional discrimination, we declined the respondents' invitation to extend the rationale of *Griffin*, *Douglas*, and similar cases. We explained that, under those cases, unless a group claiming discrimination on the basis of poverty can show that it is "completely unable to pay for some desired benefit, and as a consequence, . . . sustained an *absolute deprivation* of a meaningful opportunity to enjoy that benefit," 411 U.S. at 20 (emphasis added), strict scrutiny of a classification based on wealth does not apply. Because the respondents in *Rodriguez* had not shown that "the children in districts having relatively low assessable property values are receiving *no* public education," but rather claimed only that "they are receiving a poorer quality education than that available to children in districts having more assessable wealth," *id.*, at 23 (emphasis added), we held that the "Texas system does not operate to the peculiar disadvantage of any suspect class," *id.*, at 28. After *Rodriguez*, it was clear that "wealth discrimination alone [does not] provide [***633] an adequate basis for invoking strict scrutiny," *id.*, at 29, and that, "at least where wealth is involved, the *Equal Protection Clause* does not require absolute equality or precisely equal advantages," *id.*, at 24. See also *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458, 101 L. Ed. 2d 399, 108 S. Ct. 2481 (1988); *Harris v. McRae*, 448 U.S. 297, 322-323, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980); *Maher v. Roe*, 432 U.S. 464, 470-471, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977).⁴

4 The absence of a prison law library or other state-provided legal assistance can hardly be said to deprive inmates absolutely of an opportunity to bring their claims to the attention of a federal court. Clarence Earl Gideon, perhaps the most celebrated *pro se* prisoner litigant of all time, was able to obtain review by this Court even though he had no legal training and was incarcerated in a prison that apparently did not provide prisoners

with law books. See Answer to Respondent's Response to Pet. for Cert. in *Gideon v. Wainwright*, O. T. 1962, No. 155, p. 1 ("The petitioner is not a [*sic*] attorney or versed in law nor does not have the law books to copy down the decisions of this Court. . . . Nor would the petitioner be allowed to do so").

Like anyone else seeking to bring suit without the assistance of the State, prisoners can seek the advice of an attorney, whether *pro bono* or paid, and can turn to family, friends, other inmates, or public interest groups. Inmates can also take advantage of the liberal pleading rules for *pro se* litigants and the liberal rules governing appointment of counsel. Federal fee-shifting statutes and the promise of a contingency fee should also provide sufficient incentive for counsel to take meritorious cases.

[*375] [**2192] We rejected a disparate impact theory of the *Equal Protection Clause* altogether in *Washington v. Davis*, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), decided just one Term before *Bounds*. There we flatly rejected the idea that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the *Equal Protection Clause* simply because it may affect a greater proportion of one race than of another." 426 U.S. at 242. We held that, absent proof of discriminatory purpose, a law or official act does not violate the Constitution "solely because it has a . . . disproportionate impact." *Id.*, at 239 (emphasis in original). See also *id.*, at 240 (acknowledging "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"). At bottom, *Davis* was a recognition of "the settled rule that the *Fourteenth Amendment* guarantees equal laws, not equal results." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979).⁵

5 Our decisions in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973), and *Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), validated the position taken by Justice Harlan in his dissents in *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956), and *Douglas v. California*, 372 U.S. 353, 9 L. Ed.

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2d 811, 83 S. Ct. 814 (1963). As Justice Harlan persuasively argued in *Douglas*, facially neutral laws that disproportionately impact the poor "do not deny equal protection to the less fortunate for one essential reason: the *Equal Protection Clause* does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.' To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the *Equal Protection Clause* to give to some whatever others can afford." *Id.*, at 362 (dissenting opinion). See also *Griffin*, 351 U.S. at 35-36 (Harlan, J., dissenting); *id.*, at 29 (Burton, J., dissenting) ("The Constitution requires the equal protection of the law, but it does not require the States to provide equal financial means for all defendants to avail themselves of such laws").

[*376] The *Davis* Court was motivated in no small part by the potentially radical [***634] implications of the *Griffin/Douglas* rationale. As Justice Harlan recognized in *Douglas*: "Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent." 372 U.S. at 361 (dissenting opinion). Under a disparate impact theory, Justice Harlan argued, regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down. See *id.*, at 361-362.⁶ Echoing Justice Harlan, we rejected in *Davis* the disparate impact approach in part because of the recognition that "[a] rule that a statute designed to serve neutral ends is nevertheless [*377] invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U.S. at 248. [**2193] See also *id.*, at 248, n. 14.

⁶ Although he concurred in the judgment in *Griffin*, Justice Frankfurter expressed similar concerns. He emphasized that "the equal

protection of the laws [does not] deny a State the right to make classifications in law when such classifications are rooted in reason," *id.*, at 21, and that "a State need not equalize economic conditions," *id.*, at 23. Justice Frankfurter acknowledged that differences in wealth are "contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion." *Ibid.* He also expressed concern that if absolute equality were required, a State would no longer be able to "protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." *Id.*, at 24. See also *United States v. MacCollom*, 426 U.S. at 330 (Blackmun, J., concurring in judgment) (the Constitution does not "require that an indigent be furnished every possible legal tool, no matter how speculative its value, and no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources in a quest of that kind").

Given the unsettling ramifications of a disparate impact theory, it is not surprising that we eventually reached the point where we could no longer extend the reasoning of *Griffin* and *Douglas*. For instance, in *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974), decided just three years before *Bounds*, we declined to extend *Douglas* to require States to provide indigents with counsel in discretionary state appeals or in seeking discretionary review in this Court. We explained in *Ross* that "the *Fourteenth Amendment* 'does not require absolute equality or precisely equal advantages,'" 417 U.S. at 612 (quoting *Rodriguez*, 411 U.S. at 24), and that it "does [not] require the State to 'equalize economic conditions,'" 417 U.S. at 612 (quoting *Griffin*, 351 U.S. at 23 [***635] (Frankfurter, J., concurring in judgment)). We again declined to extend *Douglas* in *Pennsylvania v. Finley*, 481 U.S. at 555, where we rejected a claim that the Constitution requires the States to provide counsel in state postconviction proceedings. And we found *Ross* and *Finley* controlling in *Murray v. Giarratano*, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989), where we held that defendants sentenced to death, like all other defendants, have no right to state-appointed counsel in state collateral proceedings. See also *United States v. MacCollom*, 426 U.S. 317, 48 L. Ed. 2d 666, 96 S. Ct. 2086 (1976) (federal habeas statute permitting district judge to deny free transcript to indigent petitioner raising frivolous claim does not

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violate the Constitution).

In sum, the *Bounds* Court's reliance on our transcript and fee cases was misplaced in two significant respects. First, [*378] those cases did not stand for the proposition for which *Bounds* cited them: They were about *equal* access, not access *per se*. Second, the constitutional basis for *Griffin* and its progeny had been seriously undermined in the years preceding *Bounds*. Thus, even to the extent that *Bounds* intended to rely on those cases for the propositions for which they actually stood, their underlying rationale had been largely discredited. These cases, rooted in largely obsolete theories of equal protection, do not support the right to law libraries and legal assistance recognized in *Bounds*. Our repeated holdings declining to extend these decisions only confirm this conclusion.

2

The *Bounds* Court relied on a second line of cases in announcing the right to state-financed law libraries or legal assistance for prisoners. These cases, beginning with our decision in *Ex parte Hull*, prevent the States from imposing arbitrary obstacles to attempts by prisoners to file claims asserting federal constitutional rights. Although this line deals with access in its own right, and not equal access as in *Griffin* and *Douglas*, these cases do not impose any affirmative obligations on the States to improve the prisoners' chances of success.

Bounds identified *Ex parte Hull* as the first case to "recognize" a "constitutional right of access to the courts." 430 U.S. at 821-822. In *Ex parte Hull*, we considered a prison regulation that required prisoners to submit their habeas corpus petitions to a prison administrator before filing them with the court. Only if the administrator determined that a petition was "properly drawn" could the prisoner submit it in a federal court. 312 U.S. at 548-549 (quoting regulation). We invalidated the regulation, but the right we acknowledged in doing so bears no resemblance to the right generated in *Bounds*.

Our reasoning in *Ex parte Hull* consists of a straightforward, and rather limited, principle:

[*379] "The state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ

of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions [***636] for that court alone to determine." 312 U.S. at 549.

The "right of access" to the courts articulated in *Ex parte Hull* thus imposed no affirmative obligations on the States; we stated only that a State may not "abridge or impair" a [**2194] prisoner's ability to file a habeas petition in federal court.⁷ *Ex parte Hull* thus provides an extraordinarily weak starting point for concluding that the Constitution requires States to fund and otherwise assist prisoner legal research by providing law libraries or legal assistance.

7 The Court's rationale appears to have been motivated more by notions of federalism and the power of the federal courts than with the rights of prisoners. Our citation of three nonhabeas cases which held that a state court's determination on a matter of federal law is not binding on the Supreme Court supports this conclusion. See *Ex parte Hull*, 312 U.S. at 549, citing *First Nat. Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 346, 70 L. Ed. 295, 46 S. Ct. 135 (1926) (the power of the Supreme Court to review independently state court determinations of claims "grounded on the Constitution or a law of the United States" is "general, and is a necessary element of this Court's power to review judgments of state courts in cases involving the application and enforcement of federal laws"); *Erie R. Co. v. Purdy*, 185 U.S. 148, 152, 46 L. Ed. 847, 22 S. Ct. 605 (1902) ("The question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State") (citation omitted); *Carter v. Texas*, 177 U.S. 442, 447, 44 L. Ed. 839, 20 S. Ct. 687 (1900) (same).

Two subsequent decisions of this Court worked a moderate expansion of *Ex parte Hull*. The first, *Johnson v. Avery*, 393 U.S. 483, 21 L. Ed. 2d 718, 89 S. Ct. 747 (1969), invalidated a Tennessee prison regulation that prohibited inmates from advising or assisting one another

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in the preparation of habeas corpus petitions. In striking down the regulation, the Court twice quoted *Ex parte Hull*'s holding that a State may not "abridge or impair" a petitioner's efforts to file a petition for a writ of habeas corpus. See 393 U.S. at 486-487, 488. In contrast to *Ex parte Hull*, however, *Johnson* focused not on the respective institutional roles of state prisons and the federal courts but on "the fundamental importance of the writ of habeas corpus in our constitutional scheme." 393 U.S. at 485. Still, the Court did not hold that the Constitution places an affirmative obligation on the States to facilitate the filing of habeas petitions. The Court held only that a State may not "deny or obstruct" a prisoner's ability to file a habeas petition. *Ibid.* We extended the holding of *Johnson* in *Wolff v. McDonnell*, 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), where we struck down a similar regulation that prevented inmates from assisting one another in the preparation of civil rights complaints. We held that the "right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.*, at 579. Again, the right was framed exclusively in the negative. See *ibid.* (opportunity to file a civil rights action may not be "denied"). Thus, prior to *Bounds*, "if a prisoner incarcerated pursuant to a final judgment of conviction [was] not prevented from physical access to the federal [***637] courts in order that he may file therein petitions for relief which Congress has authorized those courts to grant, he had been accorded the only constitutional right of access to the courts that our cases had articulated in a reasoned way." *Bounds*, 430 U.S. at 839-840 (REHNQUIST, J., dissenting) (citing *Ex parte Hull*).

C

That *Ex parte Hull*, *Johnson*, and *Wolff* were decided on different constitutional grounds from *Griffin* and *Douglas* is clear enough. According to *Bounds*, however, "essentially the same standards of access were applied" in all of these [*381] cases. 430 U.S. at 823. This observation was wrong, but the equation of these two lines of cases allowed the *Bounds* Court to preserve the "affirmative obligations" element of the equal access cases, the rationale of which had largely been undermined prior to *Bounds*, by linking it with *Ex parte Hull*, which had not been undermined by later cases but which imposed no affirmative obligations. In the process,

Bounds forged a right with no basis in precedent or constitutional [**2195] text: a right to have the State "shoulder affirmative obligations" in the form of law libraries or legal assistance to ensure that prisoners can file meaningful lawsuits. By detaching *Griffin*'s right to equal access and *Ex parte Hull*'s right to physical access from the reasoning on which each of these rights was based, the *Bounds* Court created a virtually limitless right. And though the right was framed in terms of law libraries and legal assistance in that case, the reasoning is much broader, and this Court should have been prepared under the *Bounds* rationale to require the appointment of capable state-financed counsel for any inmate who wishes to file a lawsuit. See *Bounds*, *supra*, at 841 (REHNQUIST, J., dissenting) (observing that "the logical destination of the Court's reasoning" in *Bounds* is "lawyers appointed at the expense of the State"). See also *ante*, at 354. We have not, however, extended *Bounds* to its logical conclusion. And though we have not overruled *Bounds*, we have undoubtedly repudiated its reasoning in our consistent rejection of the proposition that the States must provide counsel beyond the trial and first appeal as of right. See *Ross*, 417 U.S. at 612; *Finley*, 481 U.S. at 555; *Giarratano*, 492 U.S. at 3-4 (plurality opinion).

In the end, I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right, rooted in the Due Process Clause and the principle articulated in *Ex parte Hull*, is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court. The State, however, is not constitutionally [*382] required to finance or otherwise assist the prisoner's efforts, either through law libraries or other legal assistance. Whether to expend state resources to facilitate prisoner lawsuits is a question of policy and one that the Constitution leaves to the discretion of the States.

There is no basis in history or tradition for the proposition that the State's constitutional obligation is any broader. Although the historical record is relatively thin, those who have explored the development of state-sponsored legal assistance for [***638] prisoners agree that, until very recently, law libraries in prisons were "nearly nonexistent." A. Flores, *Werner's Manual for Prison Law Libraries* 1 (2d ed. 1990). Prior to *Bounds*, prison library collections (to the extent prisons had libraries) commonly reflected the correctional goals that a State wished to advance, whether religious, educational, or rehabilitative. Although some institutions

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may have begun to acquire a minimal collection of legal materials in the early part of this century, law books generally were not included in prison libraries prior to the 1950's. See W. Coyle, *Libraries in Prisons* 54-55 (1987). The exclusion of law books was consistent with the recommendation of the American Prison Association, which advised prison administrators nationwide to omit federal and state law books from prison library collections. See American Prison Association, *Objectives and Standards for Libraries in Adult Prisons and Reformatories*, in *Library Manual for Correctional Institutions* 101, 106-107 (1950). The rise of the prison law library and other legal assistance programs is a recent phenomenon, and one generated largely by the federal courts. See Coyle, *supra*, at 54-55; B. Vogel, *Down for the Count: A Prison Library Handbook* 87-89 (1995). See also Ihrig, *Providing Legal Access*, in *Libraries Inside: A Practical Guide for Prison Librarians* 195 (R. Rubin & D. Suvak eds. 1995) (establishment of law libraries and legal service programs due to "inmate victories in the courts within the last two decades"). Thus, far from recognizing a long tradition [*383] of state-sponsored legal assistance for prisoners, *Bounds* was in fact a major "disruption to traditional prison operation." Vogel, *supra*, at 87.

The idea that prisoners have a legal right to the assistance that they were traditionally denied is also of recent vintage. The traditional, pre-*Bounds* view of the law with regard to the State's obligation to facilitate prisoner lawsuits by providing law libraries and legal assistance was articulated in *Hatfield v. Bailleaux*, 290 F.2d 632 (CA9), cert. denied, 368 U.S. 862, 7 L. Ed. 2d 59, 82 S. Ct. 105 (1961):

"State authorities have no obligation under the federal Constitution to provide library [**2196] facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform. All inmates are presumed to be confined under valid judgments and sentences. If an inmate believes he has a meritorious reason for attacking his, he must be given an opportunity to do so. But he has no due process right to spend his prison time or utilize prison facilities in an effort to

discover a ground for overturning a presumptively valid judgment.

"Inmates have the constitutional right to waive counsel and act as their own lawyers, but this does not mean that a non-lawyer must be given the opportunity to acquire a legal education. One question which an inmate must decide in determining if he should represent himself is whether in view of his own competency and general prison regulations he can do so adequately. He must make the decision in the light of the circumstances [***639] existing. The state has no duty to alter the circumstances to conform with his decision." 290 F.2d, at 640-641.

Consistent with the traditional view, the lower courts understood the Constitution only to guarantee prisoners a right [*384] to be free from state interference in filing papers with the courts:

"Access to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Id.*, at 637.

See also *Oaks v. Wainwright*, 430 F.2d 241, 242 (CA5 1970) (affirming dismissal of prisoner's complaint alleging denial of access to library and legal materials on ground that prisoner had not alleged that "he has in any way been denied access to the courts . . . , that he has ever lost the right to commence, prosecute or appeal in any court, or that he has been substantially delayed in obtaining a judicial determination in any proceeding"). Thus, while courts held that a prisoner is entitled to attack his sentence without state interference, they also consistently held that "prison regulations are not required to provide prisoners with the time, the correspondence privileges, the materials or other facilities they desire for the special purpose of trying to find some way of making attack upon the presumptively valid judgments against

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them." *Lee v. Tahash*, 352 F.2d 970, 973 (CA8 1965). "If the purpose was not to hamper inmates in gaining reasonable access to the courts with regard to their respective criminal matters, and if the regulations and practices do not interfere with such reasonable access," the inquiry was at an end. *Hatfield*, 290 F.2d, at 640. That access could have been facilitated without impairing effective prison administration was considered "immaterial." *Ibid*.

Quite simply, there is no basis in constitutional text, pre-Bounds precedent, history, or tradition for the conclusion that the constitutional right of access imposes affirmative [*385] obligations on the States to finance and support prisoner litigation.

II

A

Even when compared to the federal judicial overreaching to which we have now become accustomed, this is truly a remarkable case. The District Court's order vividly demonstrates the danger of continuing to afford federal judges the virtually unbridled equitable power that we have for too long sanctioned. We have here yet another example of a federal judge attempting to "direct or manage the reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations on [his] authority." *Missouri v. Jenkins*, 515 U.S. at 126 (THOMAS, J., concurring). And we will continue to see cases like this unless we take more serious steps to curtail the use of equitable power by the federal courts.

[**2197] Principles of federalism and separation of powers impose stringent limitations on the equitable power of [***640] federal courts. When these principles are accorded their proper respect, Article III cannot be understood to authorize the federal judiciary to take control of core state institutions like prisons, schools, and hospitals, and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make. See *id.*, at 131-133. Broad remedial decrees strip state administrators of their authority to set long-term goals for the institutions they manage and of the flexibility necessary to make reasonable judgments on short notice under difficult circumstances. See *Sandin v. Conner*, 515 U.S. 472, 482-483, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995). At the state level, such decrees override the

"State's discretionary authority over its own program and budgets and force state officials to reallocate state resources and funds to the [district court's] plan at the expense of other citizens, other government programs, and other institutions [*386] not represented in court." *Jenkins*, 515 U.S. at 131 (THOMAS, J., concurring). The federal judiciary is ill equipped to make these types of judgments, and the Framers never imagined that federal judges would displace state executive officials and state legislatures in charting state policy.

Though we have sometimes closed our eyes to federal judicial overreaching, as in the context of school desegregation, see *id.*, at 124-125, we have been vigilant in opposing sweeping remedial decrees in the context of prison administration. "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973). In this area, perhaps more than any other, we have been faithful to the principles of federalism and separation of powers that limit the Federal Judiciary's exercise of its equitable powers in all instances.

Procunier v. Martinez, 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974), articulated the governing principles:

"Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in

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America [*387] are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. [***641] For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Id.*, at 404-405 (footnotes omitted).⁸

[**2198] State prisons should be run by the state officials with the expertise and the primary authority for running such institutions. Absent the most "extraordinary circumstances," *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 137, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977) (Burger, C. J., concurring), federal courts should refrain from meddling in such affairs. Prison administrators have a difficult enough job without federal court intervention. An overbroad remedial decree can make an already daunting task virtually impossible.⁹

⁸ *Martinez* was overruled on other grounds in *Thornburgh v. Abbott*, 490 U.S. 401, 413-414, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989). We have consistently reaffirmed *Martinez*, however, in all respects relevant to this case, namely, that "the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management" and that prison administrators are entitled to "considerable deference." 490 U.S. at 407-408. See also *Turner v. Safley*, 482 U.S. 78, 84-85, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987) (relying on *Martinez* for the principle that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform") (citation omitted).

⁹ The constitutional and practical concerns identified in *Martinez* have also resulted in a more deferential standard of review for prisoner claims of constitutional violations. In *Turner v. Safley*,

we held that a prison regulation is valid if it is "reasonably related to legitimate penological interests," even when it "impinges on inmates' constitutional rights." 482 U.S. at 89. A deferential standard was deemed necessary to keep the courts out of the day-to-day business of prison administration, which "would seriously hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Ibid.* A more stringent standard of review "would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration.'" *Ibid.* (quoting *Martinez*, 416 U.S. at 407).

[*388] I realize that judges, "no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination." *Bell v. Wolfish*, 441 U.S. 520, 562, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). But judges occupy a unique and limited role, one that does not allow them to substitute their views for those in the executive and legislative branches of the various States, who have the constitutional authority and institutional expertise to make these uniquely nonjudicial decisions and who are ultimately accountable for these decisions. Though the temptation may be great, we must not succumb. The Constitution is not a license for federal judges to further social policy goals that prison administrators, in their discretion, have declined to advance.

[***642] B

The District Court's opinion and order demonstrate little respect for the principles of federalism, separation of powers, and judicial restraint that have traditionally governed federal judicial power in this area. In a striking arrogation of power, the District Court sought to micromanage every aspect of Arizona's "court access

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program" in all institutions statewide, dictating standard operating procedures and subjecting the state system to ongoing federal supervision. A [*389] sweeping remedial order of this nature would be inappropriate in any case. That the violation sought to be remedied was so minimal, to the extent there was any violation at all, makes this case all the more alarming.

The District Court cited only one instance of a prison inmate having a case dismissed due to the State's alleged failure to provide sufficient assistance, and one instance of another inmate who was unable to file an action. See *834 F. Supp. 1553, 1558*, and nn. 37-38 (Ariz. 1992). All of the other alleged "violations" found by the District Court related not to court access, but to library facilities and legal assistance. Many of the found violations were trivial, such as a missing pocket part to a small number of volumes in just a few institutions. *Id., at 1562*. And though every facility in the Arizona system already contained law libraries that greatly exceeded prisoner needs,¹⁰ the District Court [*2199] found the State to be in violation because some of its prison libraries lacked Pacific Second Reporters. *Ibid.* The District Court also struck down regulations that clearly pass muster under *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), such as restrictions at some facilities on "browsing the shelves," *834 F. Supp., at 1555*, the physical exclusion from the library of "lockdown" inmates, who are the most dangerous and disobedient [*390] prisoners in the prison population, *id., at 1556*, and the allowance of phone calls only for "legitimate pressing legal issues," *id., at 1564*.

¹⁰ The Arizona prison system had already adopted a policy of statewide compliance with an injunction that the same District Judge in this case imposed on a single institution in an earlier case. In compliance with that decree, which the District Court termed the "Muecke list," *834 F. Supp., at 1561*, every facility in the Arizona correctional system had at least one library containing, at a minimum, the following volumes: United States Code Annotated; Supreme Court Reporter; Federal Reporter Second; Federal Supplement; Shepard's U.S. Citations; Shepard's Federal Citations; Local Rules for the Federal District Court; Modern Federal Practice Digests; Federal Practice Digest (Second); Arizona Code Annotated; Arizona Reports; Shepard's Arizona Citations; Arizona Appeals Reports; Arizona Law

of Evidence (Udall); ADC Policy Manual; 108 Institutional Management Procedures; Federal Practice and Procedure (Wright); Corpus Juris Secundum; and Arizona Digest. *Id., at 1561-1562*.

To remedy these and similar "violations," the District Court imposed a sweeping, indiscriminate, and systemwide decree. The microscopically detailed order leaves no stone unturned. It covers everything from training in legal research to the ratio of typewriters to prisoners in each facility. It dictates the hours of operation for all prison libraries statewide, without regard to inmate use, staffing, or cost. It guarantees each prisoner a minimum two-hour visit to the library per trip, and allows the prisoner, not prison officials, to determine which reading room he will use. The order tells ADOC the types of forms it must use to take and respond to prisoner requests [***643] for materials. It requires all librarians to have an advanced degree in library science, law, or paralegal studies. If the State wishes to remove a prisoner from the law library for disciplinary reasons, the order requires that the prisoner be provided written notice of the reasons and factual basis for the decision within 48 hours of removal. The order goes so far as to dictate permissible noise levels in law library reading rooms and requires the State to "take all necessary steps, and correct any structural or acoustical problems." App. to Pet. for Cert. 68a.

The order also creates a "legal assistance program," imposing rules for the selection and retention of prisoner legal assistants. *Id., at 69a*. It requires the State to provide all inmates with a 30-40 hour videotaped legal research course, covering everything from habeas corpus and claims under 42 U.S.C. § 1983 to torts, immigration, and family law. Prisoner legal assistants are required to have an additional 20 hours of live instruction. Prisoners are also entitled to a minimum of three 20-minute phone calls each week to an attorney or legal organization, without regard to the purpose for the call; the order expressly requires Arizona to install extra phones to accommodate the increased use. Of course, [*391] legal supplies are covered under the order, which even provides for "ko-rec-type" to correct typographical errors. A Special Master retains ongoing supervisory power to ensure that the order is followed.

The District Court even usurped authority over the prison administrator's core responsibility: institutional

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security and discipline. See *Bell v. Wolfish*, 441 U.S. at 546 ("Maintaining institutional security and preserving internal order and discipline" are the central goals of prison administration). Apparently undeterred by this Court's repeated admonitions that security concerns are to be handled by prison administrators, see, e. g., *ibid.*, the District Court decreed that "ADOC prisoners in all . . . custody levels shall be provided regular and comparable visits to the law library." App. to Pet. for Cert. 61a (emphasis added). Only if prison administrators can "document" an individual prisoner's "inability to use the law library without creating a threat to safety or security" may a potentially dangerous prisoner be kept out of the library, *ibid.*, and even then the decision must be reported to the Special Master. And since, in the District Court's view, "[a] prisoner cannot adequately use the law library under restraint, including handcuffs and shackles," *id.*, at 67a, the State is apparently powerless to take steps to ensure that inmates known to be violent do not injure other inmates or prison guards while in the law library "researching" their claims. This "one free bite" approach conflicts both [**2200] with our case law, see *Hewitt v. Helms*, 459 U.S. 460, 474, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983), and with basic common sense. The District Court apparently misunderstood that a prison is neither a law firm nor a legal aid bureau. Prisons are inherently dangerous institutions, and decisions concerning safety, order, and discipline must be, and always have been, left to the sound discretion of prison administrators.

Like the remedial decree in *Jenkins*, the District Court's order suffers from flaws characteristic of [***644] overly broad remedial decrees. First, "the District Court retained jurisdiction [*392] over the implementation and modification of the remedial decree, instead of terminating its involvement after issuing its remedy." 515 U.S. at 134 (THOMAS, J., concurring). Arizona correctional officials must continually report to a Special Master on matters of internal prison administration, and the District Court retained discretion to change the rules of the game if, at some unspecified point in the future, it feels that Arizona has not done enough to facilitate court access. Thus, the District Court has "injected the judiciary into the day-to-day management of institutions and local policies -- a function that lies outside of our Article III competence." *Id.*, at 135. The District Court also "failed to target its equitable remedies in this case specifically to cure the harm suffered by the victims" of unconstitutional conduct. *Id.*, at 136. We reaffirmed in *Jenkins* that "the

nature of the [equitable] remedy is to be determined by the nature and scope of the constitutional violation." *Id.*, at 88 (majority opinion) (citation and internal quotation marks omitted). Yet, in this case, when the District Court found the law library at a handful of institutions to be deficient, it subjected the entire system to the requirements of the decree and to ongoing federal supervision. And once it found that lockdown inmates experienced delays in receiving law books in some institutions, the District Court required all facilities statewide to provide physical access to all inmates, regardless of custody level. And again, when it found that some prisoners in some facilities were untrained in legal research, the District Court required the State to provide all inmates in all institutions with a 30-40 hour videotaped course in legal research. The remedy far exceeded the scope of any violation, and the District Court far exceeded the scope of its authority.

The District Court's order cannot stand under any circumstances. It is a stark example of what a district court should *not* do when it finds that a state institution has violated the Constitution. Systemwide relief is never appropriate [*393] in the absence of a systemwide violation, and even then should be no broader and last no longer than necessary to remedy the discrete constitutional violation.

DISSENT BY: STEVENS; SOUTER (In Part)

DISSENT

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in part, dissenting in part, and concurring in the judgment.

I agree with the Court on certain, fundamental points: The case before us involves an injunction whose scope has not yet been justified by the factual findings of the District Court, *ante*, at 359-360, one that was imposed through a "process that failed to give adequate consideration to the views of state prison authorities," *ante*, at 362, and that does not reflect the deference we accord to state prison officials under *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), *ante*, at 361. Although I therefore concur in the judgment and in portions of the Court's opinion, reservations about the Court's treatment of standing [***645] doctrine and about certain points unnecessary to the decision lead me to write separately.

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I

The question accepted for review was a broadside challenge to the scope of the District Court's order of systemic or classwide relief, issued in reliance on *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977), not whether proof of actual injury is necessary to establish standing to litigate a *Bounds* claim. The parties' discussions of actual injury, in their petition for certiorari, in their briefs, and during oral argument, focused upon the ultimate finding of liability and the scope of the injunction. Indeed, [**2201] petitioners specifically stated that "although the lack of a showing of injury means that Respondents are not entitled to any relief, the State does not contend that the Respondents lacked standing to raise these claims in the first instance. Respondents clearly met the threshold of an actual case or controversy pursuant to Article III of the United States Constitution. They simply failed to prove [*394] the existence of a constitutional violation, including causation of injury, that would entitle them to relief." Brief for Petitioners 33, n. 23.¹

¹ Moreover, the issue of actual injury, even as framed by the parties, received relatively short shrift; only small portions of the parties' briefs addressed the issue, see Brief for Petitioners 30-33; Reply Brief for Petitioners 11-13; Brief for Respondents 25-30, and a significant portion of that discussion concentrated upon whether the issue should even be addressed by the Court, Reply Brief for Petitioners 12-13; Brief for Respondents 25-27.

While we are certainly free ourselves to raise an issue of standing as going to Article III jurisdiction, and must do so when we would lack jurisdiction to deal with the merits, see *Mount Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 278, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), there is no apparent question that the standing of at least one of the class-action plaintiffs suffices for our jurisdiction and no dispute that standing doctrine does not address the principal issue in the case. We may thus adequately dispose of the basic issue simply by referring to the evidentiary record. That is what I would do, for my review of the cases from the Courts of Appeals either treating or bearing on the subject of *Bounds* standing convinces me that there is enough reason for debate about its appropriate elements that we should reach no final conclusions about it. That is especially true since we have

not had the "benefit of briefing and argument informed by an appreciation of the potential breadth of the ruling." *Missouri v. Jenkins*, 515 U.S. 70, 139, 132 L. Ed. 2d 63, 115 S. Ct. 2038 (1995) (SOUTER, J., dissenting). Addressing issues of standing may not amount to the significant breakdown in our process of orderly adjudication represented by *Missouri v. Jenkins*, but the Court does reach out to address a difficult conceptual question that is unnecessary to resolution of this case, was never addressed by the District Court or Court of Appeals, and divides what would otherwise presumably have been a unanimous Court.

[*395] That said, I cannot say that I am convinced that the Court has fallen into any error by invoking standing to deal with the District Court's orders addressing claims by and on behalf of non-English speakers and prisoners in lockdown. While it is true that the demise of these prisoners' [***646] *Bounds* claims could be expressed as a failure of proof on the merits (and I would so express it), it would be equally correct to see these plaintiffs as losing on standing. "A determination even at the end of trial that the court is not prepared to award any remedy that would benefit the plaintiff[s] may be expressed as a conclusion that the plaintiff[s] lack standing." 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531.6, p. 478 (2d ed. 1984) (Wright & Miller).

Although application of standing doctrine may for our purposes dispose of the challenge to remedial orders insofar as they touch non-English speakers and lockdown prisoners, standing principles cannot do the same job in reviewing challenges to the orders aimed at providing court access for the illiterate prisoners. One class representative has standing, as the Court concedes, and with the right to sue thus established, standing doctrine has no further part to play in considering the illiterate prisoners' claims. More specifically, the propriety of awarding classwide relief (in this case, affecting the entire prison system) does not require a demonstration that some or all of the unnamed class could themselves satisfy the standing requirements for named plaintiffs.

"[Unnamed plaintiffs] need not make any individual showing of standing [in order to obtain relief], because the standing issue focuses on whether the plaintiff is properly before the court, not

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whether represented parties or absent class members are properly before the court. Whether or not the named plaintiff who meets individual standing requirements may assert the [**2202] rights of absent class members is neither a standing issue nor an Article III case or controversy issue but depends [*396] rather on meeting the prerequisites of *Rule 23* governing class actions." 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 2.07, pp. 2-40 to 2-41 (3d ed. 1992).

See also 7B Wright & Miller § 1785.1, at 141 ("As long as the representative parties have a direct and substantial interest, they have standing; the question whether they may be allowed to present claims on behalf of others . . . depends not on standing, but on an assessment of typicality and adequacy of representation"). This analysis is confirmed by our treatment of standing when the case of a named class-action plaintiff protesting a durational residence requirement becomes moot during litigation because the requirement becomes satisfied; even then the question is not whether suit can proceed on the standing of some unnamed members of the class, but whether "the named representative [can continue] to 'fairly and adequately protect the interests of the class.'" *Sosna v. Iowa*, 419 U.S. 393, 403, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975) (quoting *Fed. Rule Civ. Proc. 23(a)*).

JUSTICE SCALIA says that he is not applying a standing rule when he concludes (as I also do) that systemic relief is inappropriate here. *Ante*, at 360-361, n. 7. I accept his assurance. But he also makes it clear, by the same footnote, that he does not rest his conclusion (as I rest mine) solely on the failure to prove that in every Arizona prison, or even in many of them, the State denied court access to illiterate [***647] prisoners, a point on which I take it every Member of the Court agrees. Instead, he explains that a failure to prove that more than two illiterate prisoners suffered prejudice to nonfrivolous claims is (at least in part) the reason for reversal. Since he does not intend to be applying his standing rule in so saying, I assume he is applying a class-action rule (requiring a denial of classwide relief when trial evidence does not show the existence of a class of injured claimants). But that route is just as unnecessary and complicating as the route through standing. (Indeed, the distinction between standing and class-action rules might be practically irrelevant [*397] in this case, however

important as precedent for other cases.)

While the propriety of the order of systemic relief for illiterate prisoners does not turn on the standing of class members, and certainly need not turn on class-action rules, it clearly does turn on the respondents' failure to prove that denials of access to illiterate prisoners pervaded the State's prison system. Leaving aside the question whether that failure of proof might have been dealt with by reconsidering the class certification, see *Fed. Rule Civ. Proc. 23(c)(1)*; *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982); 7B Wright & Miller § 1785, at 128-136, the state of the evidence simply left the District Court without an adequate basis for the exercise of its equitable discretion in issuing an order covering the entire system.

The injunction, for example, imposed detailed rules and requirements upon each of the State's prison libraries, including rules about library hours, supervision of prisoners within the facilities, request forms, educational and training requirements for librarians and their staff members, prisoners' access to the stacks, and inventory. Had the findings shown libraries in shambles throughout the prison system, this degree of intrusion might have been reasonable. But the findings included the specific acknowledgment that "generally, the facilities appear to have complete libraries." 834 F. Supp. 1553, 1568 (*Ariz. 1992*). The District Court found only that certain of the prison libraries did not allow inmates to browse the shelves, only that some of the volumes in some of the libraries lacked pocket parts, only that certain librarians at some of the libraries lacked law or library science degrees, and only that some prison staff members have no training in legal research. Given that adequately stocked libraries go far in satisfying the *Bounds* requirements, it was an abuse of discretion for the District Court to aggregate discrete, small-bore problems in individual prisons and to treat them as if [**2203] each prevailed throughout the prison system, [*398] for the purpose of justifying a broad remedial order covering virtually every aspect of each prison library.

Other elements of the injunction were simply unsupported by any factual finding. The District Court, for example, made no factual findings about problems prisoners may have encountered with noise in any library, let alone any findings that noise violations interfered with prisoners' access to the courts. Yet it imposed a

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requirement across the board that the State correct all "structural or acoustical problems." App. to Pet. for Cert. 68a. It is this overreaching of the evidentiary record, [***648] not the application of standing or even class-action rules, that calls for the judgment to be reversed.

Finally, even with regard to the portions of the injunction based upon much stronger evidence of a *Bounds* violation, I would remand simply because the District Court failed to provide the State with an ample opportunity to participate in the process of fashioning a remedy and because it seems not to have considered the implications that *Turner* holds for this case. For example, while the District Court was correct to conclude that prisoners who experience delays in receiving books and receive only a limited number of books at the end of that delay have been denied access to the courts, it is unlikely that a proper application of *Turner* would have justified its decision to order the State to grant lockdown prisoners physical access to the stacks, given the significance of the State's safety interest in maintaining the lockdown system and the existence of an alternative, an improved paging system, acceptable to the respondents. Brief for Respondents 39.

II

Even if I were to reach the standing question, however, I would not adopt the standard the Court has established. In describing the injury requirement for standing, we have spoken of it as essential to an Article III case or controversy that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as [*399] capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968). We ask a plaintiff to prove "actual or threatened injury" to ensure that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982).

I do not disagree with the Court that in order to meet these standards (in a case that does not involve substantial systemic deprivation of access), a prisoner suing under *Bounds* must assert something more than an abstract desire to have an adequate library or some other

access mechanism. Nevertheless, while I believe that a prisoner must generally have some underlying claim or grievance for which he seeks judicial relief, I cannot endorse the standing requirement the Court now imposes.

On the Court's view, a district court may be required to examine the merits of each plaintiff's underlying claim in order to determine whether he has standing to litigate a *Bounds* claim. *Ante*, at 353, n. 3. The Court would require a determination that the claim is "nonfrivolous," *ante*, at 353, in the legal sense that it states a claim for relief that is at least arguable in law and in fact. I, in contrast, would go no further than to require that a prisoner have some concrete grievance or gripe about the conditions of his confinement, the validity of his conviction, or perhaps some other problem for which he would seek legal redress, see Part III-B, *infra* (even though a claim based on that grievance might well fail sooner or later in the judicial process).

There are three reasons supporting [***649] this as a sufficient standard. First, it is the existence of an underlying grievance, not its ultimate legal merit, that gives a prisoner a concrete interest in the litigation and will thus assure the serious and adversarial treatment of the *Bounds* claim. [*400] Second, *Bounds* recognized a right of access for those who seek adjudication, not just for sure winners [**2204] or likely winners or possible winners. See *Bounds*, 430 U.S. at 824, 825, 828 (describing the constitutional right of access without limiting the right to prisoners with meritorious claims); see also *ante*, at 354 (describing the right of access even before *Bounds* as covering "a grievance that the inmate wished to present . . ." (citations omitted)). Finally, insistence on a "nonfrivolous claim" rather than a "concrete grievance" as a standing requirement will do no more than guarantee a lot of preliminary litigation over nothing. There is no prison system so blessed as to lack prisoners with nonfrivolous complaints. They will always turn up, or be turned up, and one way or the other the *Bounds* litigation will occur.

That last point may be, as the Court says, the answer to any suggestion that there need be no underlying claim requirement for a *Bounds* claim of complete and systemic denial of all means of court access. But in view of the Courts of Appeals that have seen the issue otherwise,² I would certainly [*401] reserve that issue for the day it might actually be addressed by the parties in a case

before us.

2 See, e. g., *Jenkins v. Lane*, 977 F.2d 266, 268-269 (CA7 1992) (waiving the requirement that a prisoner prove prejudice "where the prisoner alleges a direct, substantial and continuous, rather than a 'minor and indirect,' limit on legal materials" on the ground that "a prisoner without any access to materials cannot determine the pleading requirements of his case, including the necessity of pleading prejudice"); cf. *Strickler v. Waters*, 989 F.2d 1375, 1385, n. 16 (CA4 1993) (acknowledging the possibility that injury may be presumed in some situations, e. g., total denial of access to a library), cert. denied, 510 U.S. 949, 126 L. Ed. 2d 341, 114 S. Ct. 393 (1993); *Sowell v. Vose*, 941 F.2d 32, 35 (CA1 1991) (acknowledging that a prisoner may not need to prove prejudice when he alleges "an absolute deprivation of access to all legal materials" (emphases in original)). Dispensing with any underlying claim requirement in such instances would be consistent with the rule of equity dealing with threatened injury. See, e. g., *Farmer v. Brennan*, 511 U.S. 825, 845, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994) (holding that a prisoner need not suffer physical injury before obtaining relief because "one does not have to await the consummation of threatened injury to obtain preventive relief" (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 67 L. Ed. 1117, 43 S. Ct. 658 (1923))); *Helling v. McKinney*, 509 U.S. 25, 33, 125 L. Ed. 2d 22, 113 S. Ct. 2475 (1993) (observing that prisoners may obtain relief "even though it was not alleged that the likely harm would occur immediately and even though the possible [harm] might not affect all of those [at risk]" (discussing *Hutto v. Finney*, 437 U.S. 678, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978))). If the State denies prisoners all access to the courts, it is hardly implausible for a prisoner to claim a protected stake in opening some channel of access.

In sum, I would go no further than to hold (in a case not involving substantial, systemic deprivation of access to court) that Article III requirements will normally be satisfied if a prisoner demonstrates that (1) he has a complaint or grievance, meritorious or not,³ about the prison system [***650] or the validity of his conviction⁴

that he would raise if his library research (or advice, or judicial review of a form complaint, or other means of "access" chosen by the State) were to indicate that he had an actionable claim; and (2) that the access scheme provided by the prison is so inadequate that he cannot research, consult about, file, or litigate the claim, as the case may be.

3 See *Harris v. Young*, 718 F.2d 620, 622 (CA4 1983) ("It is unfair to force an inmate to prove that he has a meritorious claim which will require access until after he has had an opportunity to see just what his rights are"); see also *Magee v. Waters*, 810 F.2d 451, 452 (CA4 1987) (suggesting that a prisoner must identify the "specific problem he wishe[s] to research"); cf. *Vandelft v. Moses*, 31 F.3d 794, 798 (CA9 1994) (dismissing a *Bounds* claim in part because the prisoner "simply failed to show that the restrictions on library access had any effect on his access to the court relative to his personal restraint petition" (emphases in original)), cert. denied, 516 U.S. 825, 133 L. Ed. 2d 47, 116 S. Ct. 91 (1995); *Casteel v. Pieschek*, 3 F.3d 1050, 1056 (CA7 1993) (it is enough if the prisoner merely "identif[ies] the constitutional right the defendant allegedly violated and the specific facts constituting the deprivation"); *Chandler v. Baird*, 926 F.2d 1057, 1063 (CA11 1991) ("There was no allegation in the complaint or in plaintiff's deposition that he was contemplating a challenge at that time [of the deprivation] to the conditions of his confinement"); *Martin v. Tyson*, 845 F.2d 1451, 1456 (CA7) (dismissing a claim in part because the prisoner "does not point to any claim that he was unable to pursue"), cert. denied, 488 U.S. 863, 102 L. Ed. 2d 133, 109 S. Ct. 162 (1988).

4 I do not foreclose the possibility of certain other complaints, see text accompanying n. 2, *supra*, and Part III-B, *infra*.

[*402] While a more stringent standing requirement would, of course, serve to curb courts [**2205] from interference with prison administration, that legitimate object is adequately served by two rules of existing law. *Bounds* itself makes it clear that the means of providing access is subject to the State's own choice. If, for example, a State wishes to avoid judicial review of its library standards and the adequacy of library services,

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it can choose a means of access involving use of the complaint-form procedure mentioned by the Court today. *Ante*, at 352. And any judicial remedy, whatever the chosen means of court access, must be consistent with the rule in *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), that prison restrictions are valid if reasonably related to valid penological interests. *Turner's* level of scrutiny surely serves to limit undue intrusions and thus obviates the need for further protection. In the absence of evidence that the *Turner* framework does not adequately channel the discretion of federal courts, there would be no reason to toughen standing doctrine to provide an additional, and perhaps unnecessary, protection against this danger.

But instead of relying on these reasonable and existing safeguards against interference, the Court's resolution of this case forces a district court to engage in extensive and, I believe, needless enquiries into the underlying merit of prisoners' claims during the initial and final stages of a trial, and renders properly certified classes vulnerable to constant challenges throughout the course of litigation. The risk is that district courts will simply conclude that prisoner class actions are unmanageable. What, at the least, the Court overlooks is that a class action lending itself to a systemwide order of relief consistent with *Turner* avoids the multiplicity of separate suits and remedial orders that undermine the efficiency of a United States District Court just as surely as it can exhaust the legal resources of a much-sued state prison system.

[*403] III

A

There are, finally, two additional [***651] points on which I disagree with the Court. First, I cannot concur in the suggestion that *Bounds* should be overruled to the extent that it requires States choosing to provide law libraries for court access to make them available for a prisoner's use in the period between filing a complaint and its final disposition. *Ante*, at 354. *Bounds* stated the obvious reasons for making libraries available for these purposes, 430 U.S. at 825-826, and developments since *Bounds* have confirmed its reasoning. With respect to habeas claims, for example, the need for some form of legal assistance is even more obvious now than it was then, because the restrictions developed since *Bounds* have created a "substantial risk" that prisoners proceeding without legal assistance will never be able to obtain

review of the merits of their claims. See *McFarland v. Scott*, 512 U.S. 849, 129 L. Ed. 2d 666, 114 S. Ct. 2568 (1994) (discussing these developments). Nor should discouragement from the number of frivolous prison suits lead us to doubt the practical justifiability of providing assistance to a *pro se* prisoner during trial. In the past few years alone, we have considered the petitions of several prisoners who represented themselves at trial and on appeal, and who ultimately prevailed. See, e. g., *Farmer v. Brennan*, 511 U.S. 825, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994); *Helling v. McKinney*, 509 U.S. 25, 125 L. Ed. 2d 22, 113 S. Ct. 2475 (1993); *Hudson v. McMillian*, 503 U.S. 1, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992).

B

Second, I see no reason at this point to accept the Court's view that the *Bounds* right of access is necessarily restricted to attacks on sentences or challenges to conditions of confinement. See *ante*, at 354-355. It is not clear to me that a State may force a prisoner to abandon all opportunities to vindicate rights outside these two categories no matter how significant. We have already held that prisoners do not entirely [*404] forfeit certain fundamental rights, including the right to marry, *Turner v. Safley*, 482 U.S. at 95; the right to free speech, *Thornburgh v. Abbott*, 490 U.S. 401, 407, 104 L. Ed. 2d 459, 109 S. Ct. 1874 [**2206] (1989); and the right to free exercise of religion, see *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987). One can imagine others that would arguably entitle a prisoner to some limited right of access to court. See, e. g., *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981) (parental rights); *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971) (divorce); cf. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50, 94 L. Ed. 616, 70 S. Ct. 445 (1950) (deportation). This case does not require us to consider whether, as a matter of constitutional principle, a prisoner's opportunities to vindicate rights in these spheres may be foreclosed, and I would not address such issues here.

IV

I therefore concur in Parts I and III of the Court's opinion, dissent from Part II, and concur in the judgment.

JUSTICE STEVENS, dissenting.

The *Fourteenth Amendment* prohibits [***652] the

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States from depriving any person of life, liberty, or property without due process of law. While at least one 19th-century court characterized the prison inmate as a mere "slave of the State," *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871), in recent decades this Court has repeatedly held that the convicted felon's loss of liberty is not total. See *Turner v. Safley*, 482 U.S. 78, 84, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987); e. g., *Cruz v. Beto*, 405 U.S. 319, 321, 31 L. Ed. 2d 263, 92 S. Ct. 1079 (1972). "Prison walls do not . . . separate . . . inmates from the protections of the Constitution," *Turner*, 482 U.S. at 84, and even convicted criminals retain some of the liberties enjoyed by all who live outside those walls in communities to which most prisoners will some day return.

Within the residuum of liberty retained by prisoners are freedoms identified in the *First Amendment to the Constitution*: [*405] freedom to worship according to the dictates of their own conscience, e. g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987); *Cruz*, 405 U.S. at 321, freedom to communicate with the outside world, e. g., *Thornburgh v. Abbott*, 490 U.S. 401, 411-412, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989), and the freedom to petition their government for a redress of grievances, e. g., *Johnson v. Avery*, 393 U.S. 483, 485, 21 L. Ed. 2d 718, 89 S. Ct. 747 (1969). While the exercise of these freedoms may of course be regulated and constrained by their custodians, they may not be obliterated either actively or passively. Indeed, our cases make it clear that the States must take certain affirmative steps to protect some of the essential aspects of liberty that might not otherwise survive in the controlled prison environment.

The "well-established" right of access to the courts, *ante*, at 350, is one of these aspects of liberty that States must affirmatively protect. Where States provide for appellate review of criminal convictions, for example, they have an affirmative duty to make transcripts available to indigent prisoners free of charge. *Griffin v. Illinois*, 351 U.S. 12, 19-20, 100 L. Ed. 891, 76 S. Ct. 585 (1956) (requiring States to waive transcript fees for indigent inmates); see also *Burns v. Ohio*, 360 U.S. 252, 257-258, 3 L. Ed. 2d 1209, 79 S. Ct. 1164 (1959) (requiring States to waive filing fees for indigent prisoners). It also protects an inmate's right to file complaints, whether meritorious or not, see *Ex parte Hull*, 312 U.S. 546, 85 L. Ed. 1034, 61 S. Ct. 640 (1941) (affirming right to file habeas petitions even if prison

officials deem them meritless, in case in which petition at issue was meritless), and an inmate's right to have access to fellow inmates who are able to assist an inmate in preparing, "with reasonable adequacy," such complaints. *Johnson*, 393 U.S. at 489; *Wolff v. McDonnell*, 418 U.S. 539, 580, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974).¹ And for almost two [**2207] decades, it has explicitly [*406] included [***653] the right of prisoners to have access to "adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977). As the Court points out, States are free to "experiment" with the types of legal assistance that they provide to inmates, *ante*, at 352 -- as long as the experiment provides adequate access.

1 See also *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition. See *Johnson v. Avery*, 393 U.S. 483, 485, 21 L. Ed. 2d 718, 89 S. Ct. 747; *Ex parte Hull*, 312 U.S. 546, 549, 85 L. Ed. 1034, 61 S. Ct. 640"); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983) ("The right of access to the courts is an aspect of the *First Amendment* right to petition the Government for redress of grievances"); *id.*, at 743.

The right to claim a violation of a constitutional provision in a manner that will be recognized by the courts is also embedded in those rights recognized by the Constitution's text and our interpretations of it. Without the ability to access the courts and draw their attention to constitutionally improper behavior, all of us -- prisoners and free citizens alike -- would be deprived of the first -- and often the only -- "line of defense" against constitutional violations. *Bounds v. Smith*, 430 U.S. 817, 828, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977); see *Wolff v. McDonnell*, 418 U.S. 539, 579, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974) (recognition of constitutional rights "would be diluted if inmates, often 'totally or functionally illiterate,' were unable to articulate their complaints to the courts"); cf. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971) (allowing plaintiff alleging

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violation of *Fourth Amendment* rights access to the courts through a cause of action directly under the Constitution).

The constitutional violations alleged in this case are similar to those that the District Court previously found in one of Arizona's nine prisons. See *Gluth v. Kangas*, 773 F. Supp. 1309 (Ariz. 1988), aff'd, 951 F.2d 1504 (CA9 1991). The complaint in this case was filed in 1990 by 22 prisoners on behalf of a class including all inmates in the Arizona prison system. The prisoners alleged that the State's institutions provided inadequate access to legal materials or other assistance, App. 31-33, and that as a result, "prisoners are harmed by the denial of meaningful access to the courts." *Id.*, at 32. The District Court agreed, concluding that the State had failed, throughout its prison system, to provide adequate access to legal materials, particularly for those in administrative segregation, [*407] or "lockdown," and that the State had failed to provide adequate legal assistance to illiterate and non-English speaking inmates. After giving all the parties an opportunity to participate in the process of drafting the remedy, the court entered a detailed (and I agree excessively so, see *infra*, at 409) order to correct the State's violations.

As I understand the record, the State has not argued that the right of effective access to the courts, as articulated in *Bounds*, should be limited in any way. It has not challenged the standing of the named plaintiffs to represent the class, nor has it questioned the propriety of the District Court's order allowing the case to proceed as a class action. I am also unaware of any objection having been made in the District Court to the plaintiffs' constitutional standing in this case, and the State appears to have conceded standing with respect to most claims in the Court of Appeals.² Yet the majority chooses to address these issues unnecessarily and, in some instances, incorrectly.

² See Opening Brief for Appellant in No. 93-17169 (CA9), pp. 29-30; Reply Brief for Defendant/Appellants in No. 93-17169 (CA9), p. 14, n. 20. The State directly questioned constitutional standing only with respect to two narrow classes of claims: the standard for indigency (a claim on which the State was successful below) and, in its reply brief, photocopying.

[***654] For example, although injury in fact

certainly is a jurisdictional issue into which we inquire absent objection from the parties, even the majority finds on the record that at least two of the plaintiffs had standing in this case, *ante*, at 356,³ [*408] which should be sufficient [**2208] to satisfy any constitutional concerns.⁴ Yet the Court spends 10 pages disagreeing.

³ In all likelihood, the District Court's failure to articulate additional specific examples of missing claims was due more to the fact that the State did not challenge the constitutional standing of the prisoners in the District Court than to a lack of actual evidence relating to such lost claims. Now that the District Court and prisoners are on notice that standing is a matter of specific concern, it is free on remand to investigate the record or other evidence that the parties could make available regarding other claims that have been lost because of inadequate facilities.

⁴ If named class plaintiffs have standing, the standing of the class members is satisfied by the requirements for class certification. 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 2.01, p. 2-3 (3d ed. 1992); *ante*, at 395-396 (SOUTER, J., concurring in part, dissenting in part, and concurring in judgment). Because the State did not challenge that certification, it is rather late in the game to now give it the advantage of a conclusion that the class was improper (even if it is -- although illiterate inmates, it seems to me, are not positioned much differently with respect to English language legal materials than are non-English speaking prisoners).

Even if we had reason to delve into standing requirements in this case, the Court's view of those requirements is excessively strict. I think it perfectly clear that the prisoners had standing, even absent the specific examples of failed complaints. There is a constitutional right to effective access, and if a prisoner alleges that he personally has been denied that right, he has standing to sue.⁵ One of our first cases to address directly the right of access to the courts illustrates this principle particularly well. In *Ex parte Hull*, we reviewed the constitutionality of a state prison's rule that impeded an inmate's access to the courts. The rule authorized corrections officers to intercept mail addressed to a court and refer it to the legal investigator for the parole board to determine whether there was sufficient merit in the claim to justify its submission to a court. Meritless claims

518 U.S. 343, *408; 116 S. Ct. 2174, **2208;
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were simply not delivered. Petitioner Hull succeeded in smuggling papers to his father, who in turn delivered them to this Court. Although we held that the smuggled petition had insufficient merit even to require an answer from the [*409] State, 312 U.S. at 551, we nevertheless held that the regulation was invalid for the simple and sufficient reason that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for writ of habeas corpus." *Id.*, at 549.

5 Although a prisoner would lose on the merits if he alleged that the deprivation of that right occurred because the State, for example, did not provide him with access to on-line computer databases, he would also certainly have "standing" to make his claim. The Court's argument to the contrary with respect to most of the prisoners in this case, it seems to me, is not as much an explication of the principles of standing, but the creation of a new rule requiring prisoners making *Bounds* claims to demonstrate prejudice flowing from the lack of access.

At first glance, the novel approach adopted by the Court today suggests that only those prisoners who have been refused the opportunity to file claims later found to have arguable merit should be able to challenge a rule as clearly unconstitutional as [***655] the one addressed in *Hull*. Perhaps the standard is somewhat lower than it appears in the first instance; using *Hull* as an example, the Court suggests that even facially meritless petitions can provide a sufficient basis for standing. See *ante*, at 352, n. 2. Nonetheless, because prisoners are uniquely subject to the control of the State, and because unconstitutional restrictions on the right of access to the courts -- whether through nearly absolute bars like that in *Hull* or through inadequate legal resources -- frustrate the ability of prisoners to identify, articulate, and present to courts injuries flowing from that control, I believe that any prisoner who claims to be impeded by such barriers has alleged constitutionally sufficient injury in fact.

My disagreement with the Court is not complete: I am persuaded -- as respondents' counsel essentially has conceded -- that the relief ordered by the District Court was broader than necessary to redress the constitutional violations identified in the District Court's findings. I therefore agree that the case should be remanded. I cannot agree, however, with the Court's decision to use the case as an opportunity to meander through the laws of

standing and access to the courts, expanding standing requirements here and limiting rights there, ⁶ when the most obvious [**2209] concern in [*410] the case is with the simple disjunct between the limited scope of the injuries articulated in the District Court's findings and the remedy it ordered as a result. Because most or all of petitioners' concerns regarding the order could be addressed with a simple remand, I see no need to resolve the other constitutional issues that the Court reaches out to address.

6 In addition to the Court's discussion of "standing," the opinion unnecessarily enters into discussion about at least two other aspects of the scope of the *Bounds* right. First, the Court concludes that the *Bounds* right does not extend to any claims beyond attacks on sentences and conditions of confinement. *Ante*, at 355. But given its subsequent finding that only two plaintiffs have met its newly conjured rule of standing, see *ibid.*, its conclusion regarding the scope of the right is purely dicta. Second, the Court argues that the *Bounds* right does not extend to the right to "discover" grievances, or to "litigate effectively" once in court. *Ante*, at 354 (emphasis omitted). This statement is also largely unnecessary given the Court's emphasis in Part III on the need for the District Court both to tailor its remedy to the constitutional violations it has discovered and the requirement that it remain respectful of the difficult job faced by state prison administrators.

Moreover, I note that the State has not asked for these limitations on *Bounds*. While I doubt that Arizona will object to its unexpected wind-fall, its briefs in the District Court, Court of Appeals, and this Court have argued that the District Court order simply went further than was necessary given the injuries identified in its own opinion. See Brief for Petitioners 13-16. By agreeing with that proposition but nonetheless going on to extend unrequested relief, the Court oversteps the scope of the debate presented in this case. Whenever we take such a step, we venture unnecessarily onto dangerous ground.

The Court is well aware that much of its discussion preceding Part III is unnecessary to the decision. Reflecting on its view that the District Court railroad

518 U.S. 343, *410; 116 S. Ct. 2174, **2209;
135 L. Ed. 2d 606, ***655; 1996 U.S. LEXIS 4220

the State into accepting its order lock, stock, and barrel, the Court concludes on the last page of its decision that "the State was entitled to far more than an opportunity for rebuttal, and on that ground alone this order would have to be set aside." *Ante*, at 363. To the extent that the majority suggests that the order in this case is flawed because of a breakdown [***656] in the process of court-supervised negotiation that should generally precede systemic relief, I agree with it. I also agree that the failure in that process "alone" would justify a remand [*411] in this case. I emphatically disagree, however, with the Court's characterization of who is most to blame for the objectionable character of the final order. Much of the blame for its breadth, I propose, can be placed squarely in the lap of the State.

A fair evaluation of the procedures followed in this case must begin with a reference to *Gluth*, the earlier case in which the same District Judge found petitioners guilty of a systemic constitutional violation in one facility. In that case the District Court expressly found that the state officials had demonstrated "a callous unwillingness to face the issues" and had pursued "diversionary tactics" that "forced [the court] to take extraordinary measures." 773 F. Supp., at 1312, 1314. Despite the Court's request that they propose an appropriate remedy, the officials refused to do so. It is apparent that these defense tactics played an important role in the court's decision to appoint a special master to assist in the fashioning of the remedy that was ordered in *Gluth*. Only after that order had been affirmed by the Court of Appeals did respondents commence this action seeking to obtain similar relief for the entire inmate population.

After a trial that lasted for 11 days over the course of two months, the District Court found that several of petitioners' policies denied illiterate and non-English-speaking prisoners meaningful access to the courts. Given the precedent established in *Gluth*, the express approval of that plan by the Court of Appeals, and the District Court's evaluation of the State's conclusions regarding the likelihood of voluntary remedial schemes, particularly in view of the State's unwillingness to play a constructive role in the remedy stage of that case, the District Court not unreasonably entered an order appointing the same Special Master and directing him to propose a similar remedy in this case. Although the District Court instructed the parties to submit specific objections to the remedial template derived from *Gluth*, see App. to Pet. for Cert. 89a,

nothing in the court's order prevented the [*412] State from submitting its own proposals without waiving its right to challenge the findings on the liability issues or its right to object to any remedial proposals by either the master or the respondents. The District Court also told the parties that it would consider settlement offers, and instructed the master to provide "such guidance and counsel as either of the parties may [**2210] request to effect such a settlement." *Id.*, at 95a.

In response to these invitations to participate in the remedial process, the State filed only four half-hearted sets of written objections over the course of the six months during which the Special Master was evaluating the court's proposed order. See App. 218-221, 225-228, 231-238, and 239-240. Although the master rejected about half of these narrow objections, he accepted about an equal number, noting that the State's limited formal participation had been "important" and "very helpful." Proposed Order (Permanent Injunction) in No. CIV 90-0054 (D. Ariz.), p. iii. After the master released his proposed order, the [***657] State offered another round of objections. See App. 243-250. Although the District Court informed the master that the objections could be considered, they did not have to be; the court reasonably noted that the State had been aware for six months about the potential scope of the order, and that it could have mounted the same objections prior to the deadline that the court had set at the beginning of the process. *Id.*, at 251-253.

One might have imagined that the State, faced with the potential of this "inordinately -- indeed, wildly -- intrusive" remedial scheme, *ante*, at 362, would have taken more care to protect its interests before the District Court and the Special Master, particularly given the express willingness of both to consider the State's objections. Having failed to zealously represent its interests in the District Court, the State's present complaints seem rather belated; the Court has generally been less than solicitous to claims that have [*413] not been adequately pressed below. Cf., e. g., *McCleskey v. Zant*, 499 U.S. 467, 488-489, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991); compare *ante*, at 363-364, n. 8 (State made boilerplate reservation of rights in each set of objections), with *Gray v. Netherland*, *ante*, at 163 ("It is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court").

518 U.S. 343, *413; 116 S. Ct. 2174, **2210;
135 L. Ed. 2d 606, ***657; 1996 U.S. LEXIS 4220

The State's lack of interest in representing its interests is clear not only from the sparse objections in the District Court, but from proceedings both here and in the Court of Appeals. In argument before both courts, counsel for the prisoners have conceded that certain aspects of the consent decree exceeded the necessary relief. See, e. g., *43 F.3d 1261, 1271 (CA9 1994)* (prisoners agree that typewriters are not required); Tr. of Oral Arg. 31 (provisions regarding noise in library are unnecessary). This flexibility further suggests that the State could have sought relief from aspects of the plan through negotiation. Indeed, at oral argument in the Ninth Circuit, the parties for both sides suggested that they were willing to settle the case, and the court deferred submission of the case for 30 days to enable a settlement. "However, before the settlement process had even begun, [the State] declined to mediate." *43 F.3d, at 1265, n. 1*. Notably, this is the only comment made by the appellate court regarding the process that led to the fashioning of the remedy in this case.

A fair reading of the record, therefore, reveals that the State had more than six months within which it could have initiated settlement discussions, presented more ambitious objections to the proposed decree reflecting the concerns it has raised before this Court, or offered up its own plan for the review of the plaintiffs and the Special Master. It took none of these steps. Instead, it settled for piecemeal and belated challenges to the scope of the proposed plan.

The Court implies that the District Court's decision to use the decree entered in *Gluth* as the starting point for fashioning [*414] the relief to be ordered was unfair to petitioners and should not be repeated in comparable

circumstances. The browbeaten State, the Court suggests, was "entitled to far more than an opportunity for rebuttal." *Ante*, at 363. I strongly disagree [***658] with this characterization of the process. Whether this Court now approves or disapproves of the contents of the *Gluth* decree, the Court of Appeals had affirmed it in its entirety when this case was tried, and it was surely appropriate for the District Court to use it as a starting-point for its remedial task in this [**2211] case. Petitioners were represented by competent counsel who could have advanced their own proposals for relief if they had thought it expedient to do so. By going further than necessary to correct the excesses of the order, the Court's decision rewards the State for the uncooperative posture it has assumed throughout the long period of litigating both *Gluth* and this case. See *ante*, at 354-355; *Gluth*, 773 *F. Supp.*, at 1312-1316. Although the State's approach has proven sound as a matter of tactics, allowing it to prevail in a forum that is not as inhibited by precedent as are other federal courts, the Court's decision undermines the authority and equitable powers of not only this District Court, but District Courts throughout the Nation. It is quite wrong, in my judgment, for this Court to suggest that the District Court denied the State a fair opportunity to be heard, and entirely unnecessary for it to dispose of the smorgasbord of constitutional issues that it consumes in Part II.

Accordingly, while I agree that a remand is appropriate, I cannot join the Court's opinion.

REFERENCES

APPENDIX 29



LOVING ET UX. v. VIRGINIA

No. 395

SUPREME COURT OF THE UNITED STATES

388 U.S. 1; 87 S. Ct. 1817; 18 L. Ed. 2d 1010; 1967 U.S. LEXIS 1082

April 10, 1967, Argued

June 12, 1967, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

protection and the *due process clauses of the Fourteenth Amendment.*

DISPOSITION: 206 Va. 924, 147 S. E. 2d 78, reversed.

Stewart, J., concurred in the judgment on the ground that a state law making the criminality of an act depend upon the race of the actor is invalid.

SUMMARY:

The issue presented in the instant case concerned the validity of the Virginia antimiscegenation statutes, the central features of which are the absolute prohibition of a "white person" marrying any person other than a "white person."

A husband, a "white person," and his wife, a "colored person," within the meanings given those terms by a Virginia statute, both residents of Virginia, were married in the District of Columbia pursuant to its laws, and shortly thereafter returned to Virginia, where, upon their plea of guilty, they were sentenced, in a Virginia state court, to one year in jail for violating Virginia's ban on interracial marriages. Their motion to vacate the sentences on the ground of the unconstitutionality of these statutes was denied by the trial court. The Virginia Supreme Court of Appeals affirmed. (206 Va 924, 147 SE2d 78.)

On appeal, the Supreme Court of the United States reversed the conviction. In an opinion by Warren, Ch. J., expressing the view of eight members of the court, it was held that the Virginia statutes violated both the equal

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

RIGHTS §4.5

LAW §528.5

miscegenation statutes --

Headnote:[1A][1B]

A state statutory scheme to prevent marriages between persons solely on the basis of racial classification violates the *Fourteenth Amendment's equal protection clause* and its *due process clause*, which guarantees the freedom to marry.

[***LEdHN2]

MARRIAGE §2

state regulation --

Headnote:[2]

While marriage is a social relation subject to the

state's police power, such power is limited by the commands of the *Fourteenth Amendment*.

[***LEdHN3]

RIGHTS §4.5

miscegenation statute -- analysis --

Headnote:[3]

The mere fact of equal application of a miscegenation statute to whites and Negroes does not mean that the Supreme Court's analysis of the statute should follow the approach the court has taken in cases involving no racial discrimination; the fact of equal application does not immunize a statute containing racial classifications from the very heavy burden of justification which the *Fourteenth Amendment* has traditionally required of state statutes drawn according to race.

[***LEdHN4]

LAW §17

Fourteenth Amendment -- history --

Headnote:[4]

Although the legislative history as to the adoption of the *Fourteenth Amendment* casts some light on its construction, statements made by the framers of the amendment are not sufficient to resolve a problem of racial discrimination, and at best they are inconclusive.

[***LEdHN5]

LAW §317

classification --

Headnote:[5]

The *equal protection clause* requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.

[***LEdHN6]

RIGHTS §4.5

Fourteenth Amendment -- purpose --

Headnote:[6]

The clear and central purpose of the *Fourteenth Amendment* is to eliminate all official state sources of invidious racial discrimination in the states.

[***LEdHN7]

RIGHTS §4.5

distinctions because of ancestry --

Headnote:[7]

Distinctions between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality.

[***LEdHN8]

RIGHTS §4.5

equal protection -- racial classifications --

Headnote:[8]

The *equal protection clause of the Fourteenth Amendment* demands that racial classifications, especially suspect in criminal statutes, be subjected to the most rigid scrutiny, and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the *Fourteenth Amendment* to eliminate.

[***LEdHN9]

RIGHTS §4.5

racial discrimination --

Headnote:[9]

The Supreme Court has consistently denied the constitutionality of measures which restrict the rights of citizens on account of race; restricting the freedom to marry solely because of racial classification violates the central meaning of the *equal protection clause*.

[***LEdHN10]

LAW §525

liberty to marry --

Headnote:[10]

The freedom to marry is one of the vital personal rights protected by the *due process clause of the Fourteenth Amendment* as essential to the orderly pursuit of happiness by free men.

[***LEdHN11]

MARRIAGE §1

basic right --

Headnote:[11]

Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.

[***LEdHN12]

RIGHTS §4.5

marriage -- freedom of choice --

Headnote:[12]

The *Fourteenth Amendment* requires that the freedom of choice to marry not be restricted by invidious racial discriminations; the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the state.

SYLLABUS

Virginia's statutory scheme to prevent marriages between persons solely on the basis of racial classifications held to violate the Equal Protection and *Due Process Clauses of the Fourteenth Amendment*. Pp. 4-12.

COUNSEL: Bernard S. Cohen and Philip J. Hirschkop argued the cause and filed a brief for appellants. Mr. Hirschkop argued pro hac vice, by special leave of Court.

R. D. McIlwaine III, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were Robert Y. Button, Attorney General, and Kenneth C. Patty, Assistant Attorney General.

William M. Marutani, by special leave of Court, argued the cause for the Japanese American Citizens League, as amicus curiae, urging reversal.

Briefs of amici curiae, urging reversal, were filed by William M. Lewers and William B. Ball for the National Catholic Conference for Interracial Justice et al.; by Robert L. Carter and Andrew D. Weinberger for the National Association for the Advancement of Colored People, and by Jack Greenberg, James M. Nabrit III and Michael Meltsner for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.

T. W. Bruton, Attorney General, and Ralph Moody, Deputy Attorney General, filed a brief for the State of North Carolina, as amicus curiae, urging affirmance.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

OPINION BY: WARREN

OPINION

[*2] [***1012] [**1818] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

[***LEdHR1A] [1A]This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and *Due Process Clauses of the Fourteenth Amendment*.¹ For reasons [**1819] which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the *Fourteenth Amendment*.

1 *Section 1 of the Fourteenth Amendment* provides:

"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."

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white [***1013] man, were married in the District of Columbia

388 U.S. 1, *2; 87 S. Ct. 1817, **1819;
18 L. Ed. 2d 1010, ***1013; 1967 U.S. LEXIS 1082

pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court [*3] of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the *Fourteenth Amendment*. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after [*4] modifying the sentence, affirmed the convictions.² The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U.S. 986.

2 206 Va. 924, 147 S. E. 2d 78 (1966).

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing

interracial marriages. The Lovings were convicted of violating § 20-58 of the Virginia Code:

"*Leaving State to evade law.* -- If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

Section 20-59, which defines the penalty for miscegenation, provides:

"*Punishment for marriage.* -- If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary [**1820] for not less than one nor more than five years."

[**1014] Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding,³ and §§ 20-54 and 1-14 which, [*5] respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions.⁴ The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

3 Section 20-57 of the Virginia Code provides:

"*Marriages void without decree.* -- All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Va. Code Ann. § 20-57 (1960 Repl. Vol.).

4 Section 20-54 of the Virginia Code provides:

"*Intermarriage prohibited; meaning of term 'white persons.'* -- It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term

388 U.S. 1, *5; 87 S. Ct. 1817, **1820;
18 L. Ed. 2d 1010, ***1014; 1967 U.S. LEXIS 1082

'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter." Va. Code Ann. § 20-54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas . . ." Plecker, *The New Family and Race Improvement*, 17 Va. Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925), cited in Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1202, n. 93 (1966).

Section 1-14 of the Virginia Code provides:

"*Colored persons and Indians defined.* -- Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians." Va. Code Ann. § 1-14 (1960 Repl. Vol.).

[*6] Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.⁵ Penalties [**1821] for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial [***1015] period.⁶ The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white

person" marrying other than another "white person,"⁷ a prohibition against issuing marriage licenses until the issuing official is satisfied that [*7] the applicants' statements as to their race are correct,⁸ certificates of "racial composition" to be kept by both local and state registrars,⁹ and the carrying forward of earlier prohibitions against racial intermarriage.¹⁰

5 After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, *Ala. Const., Art. 4, § 102*, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55-104 (1947); Delaware, *Del. Code Ann., Tit. 13, § 101* (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, Ga. Code Ann. § 53-106 (1961); Kentucky, *Ky. Rev. Stat. Ann. § 402.020* (Supp. 1966); Louisiana, *La. Rev. Stat. § 14:79* (1950); Mississippi, *Miss. Const., Art. 14, § 263*, Miss. Code Ann. § 459 (1956); Missouri, *Mo. Rev. Stat. § 451.020* (Supp. 1966); North Carolina, N. C. Const., Art. XIV, § 8, *N. C. Gen. Stat. § 14-181* (1953); Oklahoma, *Okla. Stat., Tit. 43, § 12* (Supp. 1965); South Carolina, *S. C. Const., Art. 3, § 33*, S. C. Code Ann. § 20-7 (1962); Tennessee, *Tenn. Const., Art. 11, § 14*, Tenn. Code Ann. § 36-402 (1955); Texas, *Tex. Pen. Code, Art. 492* (1952); West Virginia, W. Va. Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the *Equal Protection Clause* was the Supreme Court of California. *Perez v. Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

6 For a historical discussion of Virginia's miscegenation statutes, see Wadlington, *supra*, n. 4.

7 Va. Code Ann. § 20-54 (1960 Repl. Vol.).

8 Va. Code Ann. § 20-53 (1960 Repl. Vol.).

9 Va. Code Ann. § 20-50 (1960 Repl. Vol.).

10 Va. Code Ann. § 20-54 (1960 Repl. Vol.).

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, 197 Va. 80, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. *Id.*, at 90, 87 S. E. 2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the *Tenth Amendment*.

[**LEdHR2] [2] While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill*, 125 U.S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the *Fourteenth Amendment*. Nor could it do so in light of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Instead, the State argues that the meaning of the *Equal Protection Clause*, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element [*8] as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the *Equal Protection Clause* does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, [***1016] the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature

in adopting its policy of discouraging interracial marriages.

[**1822] [***LEdHR3] [3] Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the *Fourteenth Amendment's* proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the *Equal Protection Clause* has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the *Fourteenth Amendment* has traditionally required of state statutes drawn according to race.

[***LEdHR4] [4] The State argues that statements in the Thirty-ninth Congress about the time of the passage of the *Fourteenth Amendment* indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the *Fourteenth Amendment*, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the *Fourteenth Amendment*, we have said in connection with a related problem, that although these historical sources

388 U.S. 1, *9; 87 S. Ct. 1817, **1822;
18 L. Ed. 2d 1010, ***LEdHR4; 1967 U.S. LEXIS 1082

"cast some light" they are not sufficient to resolve the problem; "[at] best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." *Brown v. Board of Education*, 347 U.S. 483, 489 (1954). See also *Strauder* [*10] v. *West Virginia*, 100 U.S. 303, 310 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the *Fourteenth Amendment* supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications [***1017] so long as white and Negro participants in the offense were similarly punished. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

[***LEdHR5] [5] [***LEdHR6] [6]The State finds support for its "equal application" theory in the decision of the Court in *Pace v. Alabama*, 106 U.S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned [**1823] that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the *Equal Protection Clause* which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin v. Florida*, *supra*, at 188. As we there demonstrated, the *Equal Protection Clause* requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the *Fourteenth Amendment* was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases*, 16 Wall. 36, 71 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880); *Ex parte Virginia*, 100 U.S. 339, 344-345 (1880); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

[*11] [***LEdHR7] [7] [***LEdHR8] [8]There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "distinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). At the very least, the *Equal Protection Clause* demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States*, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the *Fourteenth Amendment* to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin v. Florida*, *supra*, at 198 (STEWART, J., joined by DOUGLAS, J., concurring).

[***LEdHR9] [9]There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed [***1018] to maintain White Supremacy.¹¹ We have consistently denied [*12] the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the *Equal Protection Clause*.

¹¹ Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and

388 U.S. 1, *; 87 S. Ct. 1817, **1823;
18 L. Ed. 2d 1010, ***1018; 1967 U.S. LEXIS 1082

unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention because we find the racial classifications in these statutes repugnant to the *Fourteenth Amendment*, even assuming an even-handed state purpose to protect the "integrity" of all races.

II.

[**1824] [***LEdHR10] [10]These statutes also deprive the Lovings of liberty without due process of law in violation of the *Due Process Clause of the Fourteenth Amendment*. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

[***LEdHR1B] [1B] [***LEdHR11] [11] [***LEdHR12] [12]Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). See also *Maynard v. Hill*, 125 U.S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the *Fourteenth Amendment*, is surely to deprive all the State's citizens of liberty without due process of law. The *Fourteenth Amendment* requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the

individual and cannot be infringed by the State.

These convictions must be reversed.

It is so ordered.

CONCUR BY: STEWART

CONCUR

[*13] MR. JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin v. Florida*, 379 U.S. 184, 198 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

REFERENCES

Am Jur, Miscegenation (1st ed 3)

US Digest Anno, Civil Rights 4.5

ALR Digests, Marriage 29

L ed Index to Anno, Civil Rights

ALR Quick Index, Marriage

Annotation References:

Recognition of foreign marriage as affected by local miscegenation law. 3 ALR2d 240.

APPENDIX 30



LUGAR v. EDMONDSON OIL CO., INC., ET AL.

No. 80-1730

SUPREME COURT OF THE UNITED STATES

457 U.S. 922; 102 S. Ct. 2744; 73 L. Ed. 2d 482; 1982 U.S. LEXIS 140

December 8, 1981, Argued

June 25, 1982, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: 639 F.2d 1058, affirmed in part, reversed in part, and remanded.

DECISION:

Complaint against private creditor's prejudgment attachment, held to state cause of action under 42 USCS 1983 where state statute authorizing it is alleged to be procedurally defective.

SUMMARY:

A supplier of a lessee-operator of a truck stop indebted to the supplier sued on the debt in state court. Ancillary to that action and pursuant to state law, the supplier sought prejudgment attachment of certain of the operator's property. The prejudgment attachment procedure required only that the creditor allege, in an ex parte petition, a belief that the debtor was disposing of or might dispose of his property in order to defeat his creditors. Acting upon the petition, a clerk of the state court issued a writ of attachment, which was then executed by the county sheriff which effectively sequestered the debtor's property, although it was left in his possession. Pursuant to the statute, a hearing on the propriety of the attachment and levy was later conducted. Thirty-four days after the levy, a state trial judge ordered

the attachment dismissed because the creditor had failed to establish the statutory grounds for attachment alleged in the petition. The debtor subsequently brought an action under 42 USCS 1983 in the United States District Court for the Western District of Virginia against the creditor, alleging that in attaching his property the creditor had acted jointly with the state to deprive him of his property without due process of law. The District Court, construing the complaint as alleging a due process violation both from a misuse of the state procedure and from the statutory procedure itself, held that the alleged actions of the creditor did not constitute state action as required by the *Fourteenth Amendment* and that the complaint therefore did not state a claim upon which relief could be granted under 1983. The United States Court of Appeals for the Fourth Circuit affirmed, holding that a private party acts under color of state law within the meaning of 1983 only when there is a usurpation or corruption of official power by the private litigant or surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree (639 F2d 1058).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by White, J., joined by Brennan, Marshall, Blackmun, and Stevens JJ., it was held that (1) the constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor

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in securing the property in dispute and if the challenged conduct of the creditor constitutes state action, then that conduct is also action under color of state law and would support a suit under 1983, and that (2) the allegation of the debtor that deprivation of his property resulted from the creditor's misuse or abuse of state law did not state a cause of action under 1983 but only challenged a private action, but the allegation that the deprivation of property resulted from a state statute that was procedurally defective under the due process clause stated a cause of action under 42 USCS 1983 since the statutory scheme was a product of state action, as a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the *Fourteenth Amendment*.

Burger, Ch. J., dissenting, expressed the view that the inquiry for dealing with suits under 1983 or suits brought pursuant to the *Fourteenth Amendment* is whether the claimed infringement of a federal right is fairly attributable to the state and, applying this standard, it cannot be said that the actions of the creditor here are fairly attributable to the state.

Powell, J., joined by Rehnquist and O'Connor, JJ., dissented, expressing the view that private "joint participants" with state officials do not themselves necessarily become state actors and, even when the inquiry is whether an action occurred under color of law, the "joint participation" standard is not satisfied when a private citizen does no more than provoke a presumptively valid judicial process in pursuit only of legitimate private ends.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

RIGHTS §12.5

LAW §799

due process -- prejudgment attachment -- state action -- color of state law --

Headnote:[1A][1B]

The constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor in securing the property in dispute and if the challenged

conduct of the creditor constitutes state action, then that conduct is also action under color of state law and will support a suit under 42 USCS 1983.

[***LEdHN2]

RIGHTS §12.5

prejudgment deprivation of property -- color of state law --

Headnote:[2A][2B]

Joint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a claim under 42 USCS 1983.

[***LEdHN3]

RIGHTS §12.5

LAW §520

due process state action -- color of state law --

Headnote:[3]

In an action under 42 USCS 1983 brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the *Fourteenth Amendment* are identical.

[***LEdHN4]

RIGHTS §12.5

LAW §520

due process -- state action -- relationship to action under color of state law --

Headnote:[4A][4B]

The two elements, state action and action under color of state law, denote two separate areas of inquiry since all conduct that satisfies the action under color of state law requirement of 42 USCS 1983 would not necessarily satisfy the *Fourteenth Amendment* requirement of state action, and since 1983 is applicable to other constitutional provisions and statutory provisions that contain no state action requirement, where such a federal right is at issue, the statutory concept of action under

color of state law would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right.

[***LEdHN5]

LAW §520

due process -- state action -- fair attribution of conduct to state --

Headnote:[5]

As a matter of substantive constitutional law, the state action requirement of the *Fourteenth Amendment* reflects judicial recognition of the fact that most rights secured by the constitution are protected only against infringements by governments and, accordingly, the conduct allegedly causing deprivation of a federal right must fairly be attributable to the state; in determining the question of "fair attribution" a two-part approach is used, requiring that (1) the deprivation be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible, and (2) the party charged with the deprivation be a person who may fairly be said to be a state actor.

[***LEdHN6]

RIGHTS §12.5

statutory attachment procedures -- liability for due process violations -- stating cause of action --

Headnote:[6]

An allegation by a debtor that a creditor's misuse or abuse of a state's garnishment and prejudgment attachment procedures deprived him of property without due process in violation of the *Fourteenth Amendment* fails to state a cause of action under 42 USCS 1983, the debtor only challenging private action, but an allegation by the debtor that the state statute deprived him of property without due process states a cause of action under 1983, the statutory scheme being a product of state action and the creditor's joint participation with state officials in the seizure of property being sufficient to characterize the creditor as a "state actor" for purposes of the *Fourteenth Amendment*, so that the creditor is acting under color of state law in participating in the deprivation of property. (Burger, Ch. J., and Powell, Rehnquist, and

O'Connor, JJ., dissented from this holding.)

SYLLABUS

This case concerns the relationship between the requirement of "state action" to establish a violation of the *Fourteenth Amendment*, and the requirement of action "under color of state law" to establish a right to recover under 42 U. S. C. § 1983, which provides a remedy for deprivation of constitutional rights when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage" of a State. Respondents filed suit in Virginia state court on a debt owed by petitioner, and sought prejudgment attachment of certain of petitioner's property. Pursuant to Virginia law, respondents alleged, in an *ex parte* petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors; acting upon that petition, a Clerk of the state court issued a writ of attachment, which was executed by the County Sheriff; a hearing on the propriety of the attachment was later conducted; and 34 days after the levy the trial judge dismissed the attachment for respondents' failure to establish the alleged statutory grounds for attachment. Petitioner then brought this action in Federal District Court under § 1983, alleging that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law. The District Court held that the alleged actions of the respondents did not constitute state action as required by the *Fourteenth Amendment*, and that the complaint therefore did not state a valid claim under § 1983. The Court of Appeals affirmed, but on the basis that the complaint failed to allege conduct under color of state law for purposes of § 1983 because there was neither usurpation or corruption of official power by a private litigant nor a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer was compromised to a significant degree.

Held:

1. Constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever state officers act jointly with a private creditor in securing the property in dispute. *Sniadach v. Family Finance Corp.*, 395 U.S. 337. And if the challenged conduct of the creditor constitutes state action as delimited by this Court's prior decisions, then that

457 U.S. 922, *; 102 S. Ct. 2744, **;
73 L. Ed. 2d 482, ***; 1982 U.S. LEXIS 140

conduct is also action under color of state law and will support a suit under § 1983. Pp. 926-935.

2. Conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be fairly attributable to the State. In determining the question of "fair attribution," (a) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Pp. 936-939.

3. Insofar as petitioner alleged only misuse or abuse by respondents of Virginia law, he did not state a cause of action under § 1983, but challenged only private action. Such challenged conduct could not be ascribed to any governmental decision, nor did respondents have the authority of state officials to put the weight of the State behind their private decision. However, insofar as petitioner's complaint challenged the state statute as being procedurally defective under the Due Process Clause, he did present a valid cause of action under § 1983. The statutory scheme obviously is the product of state action, and a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the *Fourteenth Amendment*. Respondents were, therefore, acting under color of state law in participating in the deprivation of petitioner's property. Pp. 939-942.

COUNSEL: Robert L. Morrison, Jr., argued the cause and filed a brief for petitioner.

James W. Haskins argued the cause for respondents. With him on the brief was H. Victor Millner, Jr.

JUDGES: WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, post, p. 943. POWELL, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, post, p. 944.

OPINION BY: WHITE

OPINION

[*923] [***486] [**2746] JUSTICE WHITE delivered the opinion of the Court.

The *Fourteenth Amendment of the Constitution* provides in part:

[***487] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the [*924] United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person [**2747] within its jurisdiction the equal protection of the laws."

Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as "state action."

[***LEdHR1A] [1A]Title 42 U. S. C. § 1983 provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" ¹ This case concerns the relationship between the § 1983 requirement of action under color of state law and the *Fourteenth Amendment* requirement of state action.

1 Title 42 U. S. C. § 1983, at the time in question, provided in full:

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

I

In 1977, petitioner, a lessee-operator of a truckstop in Virginia, was indebted to his supplier, Edmondson Oil Co., Inc. Edmondson sued on the debt in Virginia state court. Ancillary to that action and pursuant to state law, Edmondson sought prejudgment attachment of certain of petitioner's property. *Va. Code* § 8.01-533 (1977). ² The prejudgment attachment procedure required only that Edmondson allege, in an *ex parte* petition, a belief that

petitioner was disposing of or might dispose of his property in order to defeat his creditors. Acting upon that petition, a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff. This effectively sequestered petitioner's [*925] property, although it was left in his possession. Pursuant to the statute, a hearing on the propriety of the attachment and levy was later conducted. Thirty-four days after the levy, a state trial judge ordered the attachment dismissed because Edmondson had failed to establish the statutory grounds for attachment alleged in the petition.³

2 At the time of the attachment in question, this section was codified as Va. Code § 8-519 (1973).

3 The principal action then proceeded to the entry of judgment on the debt in favor of Edmondson and some of petitioner's property was sold in execution of the judgment.

Petitioner subsequently brought this action under 42 U. S. C. § 1983 against Edmondson and its president. His complaint alleged that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law. The lower courts construed the complaint as alleging a due process violation both from a misuse of the Virginia procedure and from the [***488] statutory procedure itself.⁴ He sought compensatory and punitive damages for specified financial loss allegedly caused by the improvident attachment.

4 In his answer to respondents' motion to dismiss on abstention grounds petitioner stated that "[no] question of the constitutional validity of the State statutes is made." Plaintiff's Memorandum in Opposition to Motion to Dismiss 3. The District Court responded to this as follows: "[Despite] plaintiff's protests to the contrary . . . the complaint can only be read as challenging the constitutionality of Virginia's attachment statute." App. to Pet. for Cert. 38. The Court of Appeals agreed. 639 F.2d 1058, 1060, n. 1 (CA4 1981).

Relying on *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), the District Court held that the alleged actions of the respondents did not constitute state action as required by the *Fourteenth Amendment* and that the complaint therefore did not state a claim upon which relief could be granted under § 1983. Petitioner appealed; the Court of Appeals for the Fourth Circuit, sitting en banc, affirmed, with three dissenters.⁵ 639 F.2d 1058

(1981).

5 The case was originally argued before a three-judge panel. The Court of Appeals, however, acting *sua sponte*, set the matter for a rehearing en banc.

[*926] [**2748] The Court of Appeals rejected the District Court's reliance on *Flagg Brothers* in finding that the requisite state action was missing in this case. The participation of state officers in executing the levy sufficiently distinguished this case from *Flagg Brothers*. The Court of Appeals stated the issue as follows:

"[Whether] the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within contemplation of § 1983." 639 F.2d, at 1061-1062 (footnote omitted).

The court distinguished between the acts directly chargeable to respondents and the larger context within which those acts occurred, including the direct levy by state officials on petitioner's property. While the latter no doubt amounted to state action, the former was not so clearly action under color of state law. The court held that a private party acts under color of state law within the meaning of § 1983 only when there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree. Because the court thought none of these elements was present here, the complaint failed to allege conduct under color of state law.

Because this construction of the under-color-of-state-law requirement appears to be inconsistent with prior decisions of this Court, we granted certiorari. 452 U.S. 937 (1981).

II

[***LEdHR2A] [2A]Although the Court of Appeals correctly perceived the importance of *Flagg Brothers* to a proper resolution of this case, [*927] it misread

457 U.S. 922, *927; 102 S. Ct. 2744, **2748;
73 L. Ed. 2d 482, ***489; 1982 U.S. LEXIS 140

[***489] that case.⁶ It also failed to give sufficient weight to that line of cases, beginning with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), in which the Court considered constitutional due process requirements in the context of garnishment actions and prejudgment attachments. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Each of these cases involved a finding of state action as an implicit predicate of the application of due process standards. *Flagg Brothers* distinguished them on the ground that in each there was overt, official involvement in the property deprivation; there was no such overt action by a state officer in *Flagg Brothers*. 436 U.S., at 157. Although this case falls on the *Sniadach*, and not the *Flagg Brothers*, side of this distinction, the Court of Appeals thought the garnishment and attachment cases to be irrelevant because none but *Fuentes* arose under 42 U. S. C. § 1983 and because *Fuentes* was [**2749] distinguishable.⁷ [*928] It determined that it could ignore all of them because the issue in this case was not whether there was state action, but rather whether respondents acted under color of state law.

[**LEdHR2B] [2B]

6 JUSTICE POWELL suggests that our opinion is not "consistent with the mode of inquiry prescribed by our cases." *Post*, at 946. We believe the situation to be just the opposite. We rely precisely upon the ground that the majority itself put forth in *Flagg Brothers* to distinguish that case from the earlier prejudgment attachment cases: "This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies." 436 U.S., at 157. JUSTICE POWELL at no point mentions this aspect of the *Flagg Brothers* decision. The method of inquiry we adopt is that suggested by *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), and seemingly approved in *Flagg Brothers*: Joint action with a state official to accomplish a prejudgment deprivation of a constitutionally protected property interest will support a § 1983 claim against a private party.

7 The Court of Appeals held *Fuentes v. Shevin* not to be relevant because the defendants in that case included the State Attorney General, as well

as the private creditor. In the court's view, the presence of a state official made the "private party defendant . . . merely a nominal party to the action for injunctive relief." 639 F.2d, at 1068, n. 22. Judge Butzner, in dissent, found *Fuentes* to be directly controlling.

As we see it, however, the two concepts cannot be so easily disentangled. Whether they are identical or not, the state-action and the under-color-of-state-law requirements are obviously related.⁸ Indeed, until recently this Court did not distinguish between the two requirements at all.

8 The Court of Appeals itself recognized this when it stated that in two of three basic patterns of § 1983 litigation -- that in which the defendant is a public official and that in which he is a private party -- there is no distinction between state action and action under color of state law. Only when there is joint action by private parties and state officials, the court stated, could a distinction arise between these two requirements.

A

In *United States v. Price*, 383 U.S. 787, 794, n. 7 (1966), we explicitly stated that the requirements were identical: "In cases under § 1983, 'under color' of law has consistently been [***490] treated as the same thing as the 'state action' required under the *Fourteenth Amendment*."⁹ In support of this proposition the Court cited *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953).¹⁰ In both of these [*929] cases black voters in Texas challenged their exclusion from party primaries as a violation of the *Fifteenth Amendment* and sought relief under 8 U. S. C. § 43 (1946 ed.).¹¹ In each case, the Court understood the problem before it to be whether the discriminatory policy of a private political association could be characterized as "state action within the meaning of the *Fifteenth Amendment*." *Smith, supra*, at 664.¹² Having found state action under the Constitution, there was no further inquiry into whether the action of the political associations also met the statutory requirement of action "under color of state law."

9 We also stated that if an indictment "[alleges] conduct on the part of the 'private' defendants which constitutes 'state action,' [it alleges] action 'under color' of law within [18 U. S. C.] § 242."

457 U.S. 922, *929; 102 S. Ct. 2744, **2749;
73 L. Ed. 2d 482, ***490; 1982 U.S. LEXIS 140

383 U.S., at 794, n. 7. In *Monroe v. Pape*, 365 U.S. 167, 185 (1961), the Court held that "under color of law" has the same meaning in 18 U. S. C. § 242 as it does in § 1983.

10 Besides these two Supreme Court cases, the Court cited a number of lower court cases in support of the proposition that the constitutional concept of state action satisfies the statutory requirement of action under color of state law. *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (CA4 1963); *Smith v. Holiday Inns*, 336 F.2d 630 (CA6 1964); *Hampton v. City of Jacksonville*, 304 F.2d 320 (CA5 1962); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (CA5 1960); *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (CA4 1945). Each of these cases involved litigation between private parties in which the plaintiffs alleged unconstitutional discrimination. In each case, the only inquiry was whether the private-party defendant met the state-action requirement of the *Fourteenth Amendment*. Once that requirement was met, the courts granted the relief sought.

11 Title 8 U. S. C. § 43 (1946 ed.) was reclassified as 42 U. S. C. § 1983 in 1952.

12 There was no opinion for the Court in *Terry v. Adams*. All three opinions in support of the reversal of the lower court decision pose the question as to whether the action of the private political association in question, the Jaybird Democratic Association, constituted state action for purposes of the *Fifteenth Amendment*. None suggests that a *Fifteenth Amendment* violation by the private association might not support a cause of action because of a failure to prove action under color of state law.

[***LEdHR3] [3]Similarly, it is clear that in a § 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the *Fourteenth Amendment* are identical. The Court's conclusion in *United States v. Classic*, 313 U.S. 299, 326 [**2750] (1941), that "[misuse] of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law,'" was founded on the rule announced in *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880), that

the actions of a state officer who exceeds the limits of his authority constitute state action for purposes of the *Fourteenth Amendment*.¹³

13 *United States v. Classic* did not involve § 1983 directly; rather, it interpreted 18 U. S. C. § 242 (then 18 U. S. C. § 52 (1940 ed.)), which is the criminal counterpart of 42 U. S. C. § 1983. See n. 9, *supra*, on the relationship between 18 U. S. C. § 242 and 42 U. S. C. § 1983.

[*930] The [***491] decision of the Court of Appeals rests on a misreading of *Flagg Brothers*. In that case the Court distinguished two elements of a § 1983 action:

"[Plaintiffs] are first bound to show that they have been deprived of a right 'secured by the Constitution and the laws' of the United States. They must secondly show that *Flagg Brothers* deprived them of this right acting 'under color of any statute' of the State of New York. It is clear that these two elements denote two separate areas of inquiry. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970)." 436 U.S., at 155-156.

Plaintiffs' case foundered on the first requirement. Because a due process violation was alleged and because the Due Process Clause protects individuals only from governmental and not from private action, plaintiffs had to demonstrate that the sale of their goods was accomplished by state action. The Court concluded that the sale, although authorized by state law, did not amount to state action under the *Fourteenth Amendment*, and therefore set aside the Court of Appeals' contrary judgment.

There was no reason in *Flagg Brothers* to address the question whether there was action under color of state law. The Court expressly eschewed deciding whether that requirement was satisfied by private action authorized by state law. *Id.*, at 156. Although the state-action and under-color-of-state-law requirements are "separate areas of inquiry," *Flagg Brothers* did not hold nor suggest that state action, if present, might not satisfy the § 1983 requirement of conduct under color of state law. Nevertheless, the Court of Appeals relied on *Flagg Brothers* to conclude in this case that state action under the *Fourteenth Amendment* is not necessarily action under color of state law for purposes of § 1983. We do

not agree.

The two-part approach to a § 1983 cause of action, referred to in *Flagg Brothers*, was derived from *Adickes v. [**931] S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). *Adickes* was a § 1983 action brought against a private party, based on a claim of racial discrimination in violation of the *Equal Protection Clause of the Fourteenth Amendment*. Although stating that the § 1983 plaintiff must show both that he has been deprived "of a right secured by the 'Constitution and laws' of the United States" and that the defendant acted "under color of any statute . . . of any State," *ibid.*, we held that the private party's joint participation with a state official in a conspiracy to discriminate would constitute both "state action essential to show a direct violation of petitioner's *Fourteenth Amendment* equal protection rights" and action "'under color' of law for purposes of the statute." *Id.*, at 152.¹⁴ In [*932] support of our [***492] conclusion [**2751] that a private party held to have violated the *Fourteenth Amendment* "can be liable under § 1983," *ibid.*, we cited that part of *United States v. Price*, 383 U.S., at 794, n. 7, in which we had concluded that state action and action under color of state law are the same (quoted *supra*, at 928). *Adickes* provides no support for the Court of Appeals' novel construction of § 1983.¹⁵

14 The *Adickes* opinion contained the following statement, 398 U.S., at 162, n. 23: "Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute." This statement obviously was meant neither to establish the definition of action under color of state law, nor to establish a distinction between this statutory requirement and the constitutional standard of state action. The statement was made in response to an argument that the discrimination by the private party was pursuant to the state trespass statute and that this would satisfy the requirements of § 1983. The Court rejected this because there had been no factual showing that the defendants had acted with knowledge of, or pursuant to, this statute. It was in this context, that this statement was made.

JUSTICE BRENNAN, writing separately, did suggest in *Adickes* that "when a private party

acts alone, more must be shown . . . to establish that he acts 'under color of' a state statute or other authority than is needed to show that his action constitutes state action." *Id.*, at 210 (footnote omitted). Even in his view, however, when a private party acts in conjunction with a state official, whatever satisfies the state-action requirement of the *Fourteenth Amendment* satisfies the under-color-of-state-law requirement of the statute. JUSTICE BRENNAN's position rested, at least in part, on a much less strict standard of what would constitute "state action" in the area of racial discrimination than that adopted by the majority. In any case, the position he articulated there has never been adopted by the Court.

15 JUSTICE POWELL's discussion of *Adickes* confuses the two counts of the complaint in that case. There was a conspiracy count which alleged that respondent -- a private party -- and a police officer had conspired "(1) 'to deprive [petitioner] of her right to enjoy equal treatment and service in a place of public accommodation'; and (2) to cause her arrest 'on the false charge of vagrancy.'" *Id.*, at 149-150. It was with respect to this count, which did not allege any unconstitutional statute or custom, that the Court held that joint action of the private party and the police officer was sufficient to support a § 1983 suit against that party. The other count of her complaint was a substantive count in which she alleged that the private act of discrimination was pursuant to a "custom of the community to segregate the races in public eating places." Here the Court did not rely on any "joint action" theory, but held that "petitioner would show an abridgment of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom." *Id.*, at 171, 173. JUSTICE POWELL is wrong when he summarizes *Adickes* as holding that "a private party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity." *Post*, at 954-955. This is to confuse the conspiracy and the substantive counts at issue in *Adickes*. Unless one argues that the state vagrancy law was unconstitutional -- an argument no one made in *Adickes* -- the joint action count of *Adickes* did not involve a state law, whether

457 U.S. 922, *932; 102 S. Ct. 2744, **2751;
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"plainly unconstitutional" or not.

B

[**LEdHR1B] [1B]The decision of the Court of Appeals is difficult to reconcile with the Court's garnishment and prejudgment attachment cases and with the congressional purpose in enacting § 1983.

Beginning with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), the Court has consistently held that constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers [*933] of the State act jointly with a creditor in securing the property in dispute. *Sniadach* and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), involved state-created garnishment procedures; *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), [***493] involved execution of a vendor's lien to secure disputed property. In each of these cases state agents aided the creditor in securing the disputed property; but in each case the federal issue arose in litigation between creditor and debtor in the state courts and no state official was named as a party. Nevertheless, in each case the Court entertained and adjudicated the defendant-debtor's claim that the procedure under which the private creditor secured the disputed property violated federal constitutional standards of due process. Necessary to that conclusion is the holding that private use of the challenged state procedures with the help of state officials constitutes state action for purposes of the *Fourteenth Amendment*.

Fuentes v. Shevin, 407 U.S. 67 (1972), was a § 1983 [**2752] action brought against both a private creditor and the State Attorney General. The plaintiff sought declaratory and injunctive relief, on due process grounds, from continued enforcement of state statutes authorizing prejudgment replevin. The plaintiff prevailed; if the Court of Appeals were correct in this case, there would have been no § 1983 cause of action against the private parties. Yet they remained parties, and judgment ran against them in this Court.¹⁶

16 We thus find incomprehensible JUSTICE POWELL's statement that we cite no cases in which a private decision to invoke a presumptively valid state legal process has been held to be state action. *Post*, at 950. Likewise, his discussion of these cases, *post*, at 952-953, steadfastly ignores the predicate for the holding in

each case that the debtor could challenge the constitutional adequacy of the private creditor's seizure of his property. That predicate was necessarily the principle that a private party's invocation of a seemingly valid prejudgment remedy statute, coupled with the aid of a state official, satisfies the state-action requirement of the *Fourteenth Amendment* and warrants relief against the private party.

[*934] If a defendant debtor in state-court debt collection proceedings can successfully challenge, on federal due process grounds, the plaintiff creditor's resort to the procedures authorized by a state statute, it is difficult to understand why that same behavior by the state-court plaintiff should not provide a cause of action under § 1983. If the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, § 1983, designed to provide judicial redress for just such constitutional violations.

To read the "under color of any statute" language of the Act in such a way as to impose a limit on those *Fourteenth Amendment* violations that may be redressed by the § 1983 cause of action would be wholly inconsistent with the purpose of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, from which § 1983 is derived. The Act was passed "for the express purpose of [enforcing] the Provisions of the *Fourteenth Amendment*." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972). The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the *Fourteenth Amendment* affords the individual. Perhaps the most direct statement [***494] of this was that of Senator Edmunds, the manager of the bill in the Senate: "[Section 1 is] so very simple and really [reenacts] the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871). Representative Bingham similarly stated that the bill's purpose was "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed to him by the Constitution." *Id.*, App. 81.¹⁷

17 In fact, throughout the congressional debate over the 1871 Act, the bill was officially described as a bill "to enforce the provisions of the *fourteenth amendment to the Constitution of*

457 U.S. 922, *934; 102 S. Ct. 2744, **2752;
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the United States, and for other purposes." See also, *e. g.*, remarks of Senator Trumbull in describing the purpose of the House in passing the Act: "[As] the bill passed the House of Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guaranteed to them by the Constitution and laws of the United States," Cong. Globe, 42d Cong., 1st Sess., 579 (1871); and remarks of Representative Shellabarger on the relationship between § 1 of the bill and the *Fourteenth Amendment*, *id.*, App. 68.

[*935] [***LEdHR4A] [4A]In sum, the line drawn by the Court of Appeals is inconsistent with our prior cases and would substantially undercut the congressional purpose in providing the § 1983 cause of action. If the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983.¹⁸

[***LEdHR4B] [4B]

¹⁸ Our conclusion in this case is not inconsistent with the statement in *Flagg Brothers* that "these two elements [state action and action under color of state law] denote two separate areas of inquiry." 436 U.S., at 155-156. First, although we hold that conduct satisfying the state-action requirement of the *Fourteenth Amendment* satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the *Fourteenth Amendment* requirement of state action. If action under color of state law means nothing more than that the individual act "with the knowledge of and pursuant to that statute," *Adickes v. S. H. Kress & Co.*, 398 U.S., at 162, n. 23, then clearly under *Flagg Brothers* that would not, in itself, satisfy the state-action requirement of the *Fourteenth Amendment*. Second, although we hold in this case that the under-color-of-state-law requirement does not add anything not already included within the state-action requirement of the *Fourteenth Amendment*, § 1983 is applicable to other

constitutional provisions and statutory provisions that contain no state-action requirement. Where such a federal right is at issue, the statutory concept of action under color of state law would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right.

Nor is our decision today inconsistent with *Polk County v. Dodson*, 454 U.S. 312 (1981). In *Polk County*, we held that a public defender's actions, when performing a lawyer's traditional functions as counsel in a state criminal proceeding, would not support a § 1983 suit. Although we analyzed the public defender's conduct in light of the requirement of action "under color of state law," we specifically stated that it was not necessary in that case to consider whether that requirement was identical to the "state action" requirement of the *Fourteenth Amendment*: "Although this Court has sometimes treated the questions as if they were identical, see *United States v. Price*, 383 U.S. 787, 794, and n. 7 (1966), we need not consider their relationship in order to decide this case." *Id.*, at 322, n. 12. We concluded there that a public defender, although a state employee, in the day-to-day defense of his client, acts under canons of professional ethics in a role adversarial to the State. Accordingly, although state employment is generally sufficient to render the defendant a state actor under our analysis, *infra*, at 937, it was "peculiarly difficult" to detect any action of the State in the circumstances of that case. 454 U.S., at 320. In *Polk County*, we also rejected respondent's claims against governmental agencies because he "failed to allege any policy that arguably violated his rights under the *Sixth*, *Eighth*, or *Fourteenth Amendments*." *Id.*, at 326. Because respondent failed to challenge any rule of conduct or decision for which the State was responsible, his allegations would not support a claim of state action under the analysis proposed below. *Infra*, at 937. Thus, our decision today does not suggest a different outcome in *Polk County*.

[*936] [**2753] III

457 U.S. 922, *936; 102 S. Ct. 2744, **2753;
73 L. Ed. 2d 482, ***LEdHR4B; 1982 U.S. LEXIS 140

[***495] [***LEdHR5] [5]As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that "most rights secured by the Constitution are protected only against infringement by governments," *Flagg Brothers*, 436 U.S., at 156. As the Court said in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974):

"In 1883, this Court in the *Civil Rights Cases*, 109 U.S. 3, affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the *Fourteenth Amendment* offers no shield."

Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of [*937] their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. In *Sniadach*, *Fuentes*, *W. T. Grant*, and *North Georgia*, for example, a state statute provided the right to garnish or to [*2754] obtain prejudgment attachment, as well as the procedure by which the rights could be exercised. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Although related, these two principles are not the same. They collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions. See *Monroe v. Pape*, 365 U.S. 167, 172 (1961). The two principles diverge when the constitutional claim is directed against a [***496] party without such apparent authority, *i. e.*, against a private party. The difference between the two inquiries is well illustrated by comparing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), with *Flagg Brothers*, *supra*.

In *Moose Lodge*, the Court held that the discriminatory practices of the appellant did not violate the *Equal Protection Clause* because those practices did not constitute "state action." The Court focused primarily on the question of [*938] whether the admittedly discriminatory policy could in any way be ascribed to a governmental decision.¹⁹ The inquiry, therefore, looked to those policies adopted by the State that were applied to appellant. The Court concluded as follows:

"We therefore hold, that with the exception hereafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to . . . make the latter 'state action' within the ambit of the *Equal Protection Clause of the Fourteenth Amendment*." 407 U.S., at 177.

In other words, the decision to discriminate could not be ascribed to any governmental decision; those governmental decisions that did affect Moose Lodge were unconnected with its discriminatory policies.²⁰

19 There are elements of the other state-action inquiry in the opinion as well. This is found primarily in the effort to distinguish the relationship of Moose Lodge and the State from that between the State and the restaurant considered in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). See 407 U.S., at 175.

20 The "one exception" further illustrates this point. The Court enjoined enforcement of a state rule requiring Moose Lodge to comply with its own constitution and bylaws insofar as they contained racially discriminatory provisions.

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State enforcement of this rule, either judicially or administratively, would, under the circumstances, amount to a governmental decision to adopt a racially discriminatory policy.

Flagg Brothers focused on the other component of the state-action principle. In that case, the warehouseman proceeded under New York *Uniform Commercial Code*, § 7-210, and the debtor challenged the constitutionality of that provision on the grounds that it violated the Due Process and *Equal Protection Clauses of the Fourteenth Amendment*. Undoubtedly the State was responsible for the statute. The response of the Court, however, focused not on the terms of the statute but on the character of the defendant to the § 1983 [*939] suit: Action by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a "state actor." The Court suggested that that "something more" which would convert the private party into a state actor might vary with the circumstances of the case. This was simply a recognition that the Court has articulated a number of different factors or tests in different contexts: *e. g.*, the "public function" test, see *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 [**2755] (1946); the "state compulsion" test, see *Adickes v. S. H. Kress & Co.*, 398 U.S., at 170; the "nexus" test, see *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 [***497] (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); and, in the case of prejudgment attachments, a "joint action test," *Flagg Brothers*, 436 U.S., at 157.²¹ Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here. See *Burton*, *supra*, at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance").

²¹ Contrary to the suggestion of JUSTICE POWELL's dissent, we do not hold today that "a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the § 1983 requirement of action under color of law." *Post*, at 951. The holding today, as the above analysis makes clear, is limited to the particular context of prejudgment attachment.

IV

[***LEdHR6] [6]Turning to this case, the first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as "state actors."

[*940] Both the District Court and the Court of Appeals noted the ambiguous scope of petitioner's contentions: "There has been considerable confusion throughout the litigation on the question whether Lugar's ultimate claim of unconstitutional deprivation was directed at the Virginia statute itself or only at its erroneous application to him." 639 F.2d, at 1060, n. 1. Both courts held that resolution of this ambiguity was not necessary to their disposition of the case: both resolved it, in any case, in favor of the view that petitioner was attacking the constitutionality of the statute as well as its misapplication. In our view, resolution of this issue is essential to the proper disposition of the case.

Petitioner presented three counts in his complaint. Count three was a pendent claim based on state tort law; counts one and two claimed violations of the Due Process Clause. Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, oppressive [*sic*], [and] unlawful acts." By "unlawful," petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, *i. e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe v. Pape*, 365 U.S. 167 (1961). That respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.

Count one is a different matter. That count describes the procedures [***498] followed by respondents in obtaining the prejudgment attachment as well as the fact that the state court subsequently ordered the attachment dismissed because respondents had not met their burden under state law. Petitioner [*941] then summarily states that this sequence of events deprived him of his property

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without due process. Although it is not clear whether petitioner is referring to the state-created procedure or the misuse of that procedure by respondents, we agree with the lower courts that the better reading of the complaint is that petitioner challenges the state statute as procedurally [**2756] defective under the *Fourteenth Amendment*.²²

22 This confusion in the nature of petitioner's allegations continued in oral argument in this Court. Although at various times counsel for petitioner seemed to deny that petitioner challenged the constitutionality of the statute, see, e. g., Tr. of Oral Arg. 11, he also stated that

"[the] claim is that the action as taken, even if it were just line by line in accordance with Virginia law -- whether or not they did it right, the claim is that it was in violation of Lugar's constitutional rights." *Id.*, at 19.

While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well.

As is clear from the discussion in Part II, we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the *Fourteenth Amendment*. The rule in these cases is the same as that articulated in *Adickes v. S. H. Kress & Co.*, *supra*, at 152, in the context of an equal protection deprivation:

"Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," quoting *United States v. Price*, 383 U.S., at 794.

[*942] The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of state-created attachment procedures. That holding is

contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.

In summary, petitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation. Petitioner did present a valid cause of action under § 1983 insofar as he challenged the constitutionality of [***499] the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute.²³

23 JUSTICE POWELL is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture. What we said in *Adickes*, 398 U.S., at 174, n. 44, when confronted with this question is just as applicable today: "We intimate no views concerning the relief that might be appropriate if a violation is shown. The parties have not briefed these remedial issues, and if a violation is proved they are best explored in the first instance below in light of the new record that will be developed on remand. Nor do we mean to determine at this juncture whether there are any defenses available to defendants in § 1983 actions like the one at hand. Cf. *Pierson v. Ray*, 386 U.S. 547 (1967)" (citations omitted).

The judgment is reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

DISSENT BY: BURGER; POWELL

DISSENT

[*943] CHIEF JUSTICE BURGER, dissenting.

Whether we are dealing with suits under § 1983 or suits brought pursuant to the *Fourteenth Amendment*, in my view the inquiry is the same: is the claimed infringement [**2757] of a federal right fairly attributable to the State. *Rendell-Baker v. Kohn, ante*, at 838. Applying this standard, it cannot be said that the actions of the named respondents are fairly attributable to the State. * Respondents did no more than invoke a presumptively valid state prejudgment attachment procedure available to all. Relying on a dubious "but for" analysis, the Court erroneously concludes that the subsequent procedural steps taken by the State in attaching a putative debtor's property in some way transforms respondents' acts into actions of the State. This case is no different from the situation in which a private party commences a lawsuit and secures injunctive relief which, even if temporary, may cause significant injury to the defendant. Invoking a judicial process, of course, implicates the State and its officers but does not transform essentially private conduct into actions of the State. *Dennis v. Sparks, 449 U.S. 24 (1980)*. Similarly, one who practices a trade or profession, drives an automobile, or builds a house under a state license is not engaging in acts fairly attributable to the state. In both *Dennis* and the instant case petitioner's remedy lies in private suits for damages such as malicious prosecution. The Court's opinion expands the reach of the statute beyond anything intended by Congress. It may well be a consequence of too casually falling into a [***500] semantical trap because of the figurative use of the term "color of state law."

* The pleadings in this case amply demonstrate that the challenged conduct was directed solely at respondents' acts. The unlawful actions alleged were that respondents made "conclusory allegations," App. 5, respondents lacked a "factual basis" for attachment, *id.*, at 10, and respondents lacked "good cause to believe facts which would support" attachment. *Id.*, at 19. There is no allegation of collusion or conspiracy with state actors.

[*944] JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

Today's decision is a disquieting example of how expansive judicial decisionmaking can ensnare a person who had every reason to believe he was acting in strict accordance with law. The case began nearly five years ago as the outgrowth of a simple suit on a debt in a Virginia state court. Respondent -- a small wholesale oil dealer in Southside, Va. -- brought suit against petitioner Lugar, a truckstop owner who had failed to pay a debt.¹ The suit was to collect this indebtedness. Fearful that petitioner might dissipate his assets before the debt was collected, respondent also filed a petition in state court seeking sequestration of certain of Lugar's assets. He did so under a Virginia statute, traceable at least to 1819, that permits creditors to seek prejudgment attachment of property in the possession of debtors.² No court had questioned the validity of the statute, and it remains presumptively valid. The Clerk of the state court duly issued a writ of attachment, and the County Sheriff then executed it. There is no allegation that respondent conspired with the state officials to deny petitioner the fair protection of state or federal law.

1 The state action, filed in the name of the Edmondson Oil Co., alleged that Lugar owed \$ 41,983 for products and merchandise previously delivered. App. 22. In the present suit Lugar has named as defendants both the Edmondson Oil Co. and its president, Ronald Barbour. As the respondent Barbour is the sole stockholder of Edmondson Oil Co., *id.*, at 2, and appears to have directed all its actions in this litigation, see *id.*, at 26, I refer throughout to Barbour as if he were the sole respondent.

2 See *Va. Code § 8.01-533 et seq.* (1977). At the time of the attachment in this case, the applicable provisions were *Va. Code § 8-519 et seq.* (1973). The Virginia attachment provisions have remained essentially in their present form despite numerous recodifications since 1819. See *Va. Code § 8-519 et seq.* (1950); *Va. Code § 6378 et seq.* (1919); *Va. Code § 2959 et seq.* (1887); *Va. Code, ch. 151 (1849)*; *Va. Code, ch. 123 (1819)*.

[*945] Respondent ultimately prevailed in his lawsuit. The petitioner Lugar was ordered by a court to pay his debt. A state court did find, however, that Lugar's assets [**2758] should not have been attached prior to a judgment on the underlying action.

Following this decision Lugar instituted legal action

457 U.S. 922, *945; 102 S. Ct. 2744, **2758;
73 L. Ed. 2d 482, ***500; 1982 U.S. LEXIS 140

in the United States District Court for the Western District of Virginia. Suing under a federal statute, 42 U. S. C. § 1983, Lugar alleged that the respondent -- by filing a petition in state court -- had acted "under color of law" and had caused the deprivation of constitutional rights under the *Fourteenth Amendment* -- an Amendment that does not create rights enforceable against private citizens, such as one would have assumed respondent to be, but only against the States. *Rendell-Baker v. Kohn*, ante, at 837; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Civil Rights Cases*, 109 U.S. 3, 11 (1883).³ [***501] Both the District Court and the Court of Appeals agreed that petitioner had no cause of action under § 1983. They sensibly found that respondent could not be held responsible for any deprivation of constitutional rights and that the suit did not belong in federal court.

3 Title 42 U. S. C. § 1983, at the time in question, provided:

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

This Court today reverses the judgment of those lower courts. It holds that respondent, a private citizen who did no more than commence a legal action of a kind traditionally initiated by private parties, thereby engaged in "state action." This decision is as unprecedented as it is implausible. It is plainly unjust to the respondent, and the Court makes no [*946] argument to the contrary. Respondent, who was represented by counsel, could have had no notion that his filing of a petition in state court, in the effort to secure payment of a private debt, made him a "state actor" liable in damages for allegedly unconstitutional action by the Commonwealth of Virginia. Nor is the Court's analysis consistent with the mode of inquiry prescribed by our cases. On the contrary, the Court undermines fundamental distinctions between the common-sense categories of state and private conduct and between the legal concepts of "state

action" and private action "under color of law."

I

The plain language of 42 U. S. C. § 1983 establishes that a plaintiff must satisfy two jurisdictional requisites to state an actionable claim. First, he must allege the violation of a right "secured by the Constitution and laws" of the United States. Because "most rights secured by the Constitution are protected only against infringement by governments," *Flagg Bros., Inc. v. Brooks*, 436 U.S., at 156, this requirement compels an inquiry into the presence of state action. Second, a § 1983 plaintiff must show that the alleged deprivation was caused by a person acting "under color" of law. In *Flagg Bros.*, this Court affirmed that "these two elements denote two separate areas of inquiry." *Id.*, at 155-156. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

This case demonstrates why separate inquiries are required. Here it is not disputed that the Virginia Sheriff and Clerk of Court, the state officials who sequestered petitioner's property in the manner provided by Virginia law, engaged in state action. Yet the petitioner, while alleging constitutional injury from this action by state officials, did not sue the State or its agents. In these circumstances the Court of Appeals correctly stated that the relevant inquiry was the second identified in *Flagg Bros.*: whether the respondent, a private citizen whose only action was to invoke a presumptively valid state attachment process, [**2759] had acted under color of state law in "causing" the State to deprive petitioner [*947] of alleged constitutional [***502] rights.⁴ Consistently with past decisions of this Court, the Court of Appeals concluded that respondent's private conduct had not occurred under color of law.

4 Judge Phillips' excellent opinion for the en banc Court of Appeals correctly defined the question presented as "whether the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within the contemplation of § 1983." 639 F.2d 1058, 1061-1062 (CA4 1981) (footnote omitted).

457 U.S. 922, *947; 102 S. Ct. 2744, **2759;
73 L. Ed. 2d 482, ***502; 1982 U.S. LEXIS 140

Rejecting the reasoning of the Court of Appeals, the Court opinion inexplicably conflates the two inquiries mandated by *Flagg Bros.* Ignoring that this case involves two sets of actions -- one by respondent, who merely filed a suit and accompanying sequestration petition; another by the state officials, who issued the writ and executed the lien -- it wrongly frames the question before the Court, not as whether the private respondent acted under color of law in filing the petition, but as "whether . . . respondents, who are private parties, may be appropriately characterized as 'state actors.'" *Ante*, at 939. It then concludes that they may, on the theory that a private party who invokes "the aid of state officials to take advantage of state-created attachment procedures" is a "joint participant" with the State and therefore a "state actor." "The rule," the Court asserts, is as follows:

"Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in a joint activity with the State or its agents." *Ante*, at 941, quoting *Adickes v. S. H. Kress & Co.*, *supra*, at 152, in turn quoting *United States v. Price*, 383 U.S. 787, 794 (1966).

[*948] There are at least two fallacies in the Court's conclusion. First, as is apparent from the quotation, our cases have *not* established that private "joint participants" with state officials themselves necessarily become state actors. Where private citizens interact with state officials in the pursuit of merely private ends, the appropriate inquiry generally is whether the private parties have acted "under color of law." Second, even when the inquiry is whether an action occurred under color of law, our cases make clear that the "joint participation" standard is not satisfied when a private citizen does no more than invoke a presumptively valid judicial process in pursuit only of legitimate private ends.

II

As this Court recognized in *Monroe v. Pape*, 365 U.S. 167, 172 (1961), the historic purpose of § 1983 was to prevent state officials from using the cloak of their authority under state law to violate rights protected against state infringement by the [***503] *Fourteenth Amendment*.⁵ The Court accordingly is correct that an important inquiry in a § 1983 suit against a private party

is whether there is an allegation of wrongful [**2760] "conduct that can be attributed to the State." *Ante*, at 941. This is the first question referred to in *Flagg Bros.* But there still remains the second *Flagg Bros.* question: whether this state action fairly can be attributed to the respondent, whose [*949] only action was to invoke a presumptively valid attachment statute. This question, unasked by the Court, reveals the fallacy of its conclusion that respondent may be held accountable for the attachment of property because he was a "state actor."⁶ From the occurrence of state action taken by the Sheriff who sequestered petitioner's property, it does not follow that respondent became a "state actor" simply because the Sheriff was. This Court, until today, has never endorsed this non sequitur.

5 State officials acting in their official capacities, even if in abuse of their lawful authority, generally are held to act "under color" of law. *E. g.*, *Monroe v. Pape*, 365 U.S., at 171-172; *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880). This is because such officials are "clothed with the authority" of state law, which gives them power to perpetrate the very wrongs that Congress intended § 1983 to prevent. *United States v. Classic*, 313 U.S. 299, 326 (1941); *Ex parte Virginia*, *supra*, at 346-347. Cf. *Polk County v. Dodson*, 454 U.S. 312 (1981) (a public defender, representing an indigent client in a criminal proceeding, performs a function for which the authority of his state office is not needed, and therefore does not act under color of state law when engaged in a defense attorney's traditionally private roles).

6 The Court, *ante*, at 928, quotes *United States v. Price*, 383 U.S. 787, 794, n. 7 (1966), as establishing that "[in] cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the *Fourteenth Amendment*." In *Price*, however, the *same* conduct by the same actors constituted both "state action" and the action "under color" of law. See 383 U.S., at 794, n. 7 (if an indictment alleges "conduct on the part of the 'private' defendants which constitutes 'state action,' [it also alleges] action 'under color of law' . . ."). The situation in this case is quite different. The present case involves "state action" by the Sheriff -- action that also was "under color of law" under *Price*. But the real question here is whether the conduct of

457 U.S. 922, *949; 102 S. Ct. 2744, **2760;
73 L. Ed. 2d 482, ***503; 1982 U.S. LEXIS 140

the private respondent constituted *either* state action or action under color of law. The *Price* quotation plainly does not resolve this question. And the cases cited in *Price*, on which the Court also relies, are similarly inapposite.

It of course is true that respondent's private action was *followed* by state action, and that the private and the state actions were not unconnected. But "[that] the State responds to [private] actions by [taking action of its own] does not render it *responsible* for those [private] actions." *Blum v. Yaretsky*, *post*, at 1005. See *Flagg Bros.*, 436 U.S., at 164-165; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974). And where the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered "state action" within the meaning of our cases. See, e. g., *Blum v. Yaretsky*, *post*, at 1004-1005; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-173 (1972). As in *Jackson v. Metropolitan Edison Co.*, *supra*, "[respondent's] exercise of the choice allowed by state law where [*950] the initiative comes from it and not from the State, does not make its action in [***504] doing so 'state action' for purposes of the *Fourteenth Amendment*." 419 U.S., at 357 (footnote omitted).

This Court of course has held that private parties are amenable to suit under § 1983 when "jointly engaged" with state officials in the violation of constitutional rights. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).⁷ Yet the Court, in advancing its "joint participation" theory, does not cite a single case in which a private decision to invoke a presumptively valid state legal process has been held to constitute state action. Even the quotation on which the Court principally relies for its statement of the applicable "rule," *ante*, at 941, does not refer to state action. Rather, it states explicitly that "[private] persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."

⁷ In *Adickes* the term "jointly engaged" appears to have been used specifically to connote engagement in a "conspiracy." See 398 U.S., at 152-153.

As illustrated by this quotation, our cases have recognized a distinction between "state action" and private action under "color of law." This distinction is sound in principle. It also is consistent with and supportive of the distinction between "private" conduct

and government action that is subject to the procedural limitations of the *Due Process Clause of the Fourteenth Amendment*. As the Court itself notes: "Careful adherence to the [**2761] 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Ante*, at 936.

A "color of law" inquiry acknowledges that private individuals, engaged in unlawful joint behavior with state officials, may be *personally* responsible for wrongs that they cause to occur. But it does not confuse private actors with the [*951] State -- the fallacy of the analysis adopted today by the Court. In this case involving the private action of the respondent in petitioning the state courts of Virginia, the appropriate inquiry as to respondent's liability is not whether he was a state actor, but whether he acted under color of law. It is to this question that I therefore turn.

III

Contrary to the position of the Court, our cases do not establish that a private party's mere invocation of state legal procedures constitutes "joint participation" or "conspiracy" with state officials satisfying the § 1983 requirement of action under color of law. In *Dennis v. Sparks*, 449 U.S. 24 (1980), we held that private parties acted under color of law when corruptly conspiring with a state judge in a joint scheme to defraud. In so holding, however, we explicitly stated that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.*, at 28. This conclusion is reinforced by our more recent decision in *Polk County v. Dodson*, 454 U.S. 312 (1981). As we held [***505] to be true with respect to the defense of a criminal defendant, invocation of state legal process is "essentially a private function . . . for which state office and authority are not needed." *Id.*, at 319. These recent decisions make clear that independent, private decisions made in the context of litigation cannot be said to occur under color of law.⁸ The Court nevertheless advances two principal grounds for its holding to the contrary.

⁸ The Court avers that its holding "is limited to the particular context of prejudgment attachment." *Ante*, at 939, n. 21. However welcome, this limitation lacks a principled basis. It is unclear

457 U.S. 922, *951; 102 S. Ct. 2744, **2761;
73 L. Ed. 2d 482, ***505; 1982 U.S. LEXIS 140

why a private party engages in state action when filing papers seeking an attachment of property, but not when seeking other relief (*e. g.*, an injunction), or when summoning police to investigate a suspected crime.

[*952] A

The Court argues that petitioner's action under § 1983 is supported by cases in which this Court has applied due process standards to state garnishment and prejudgment attachment procedures. The Court relies specifically on *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). According to the Court, these cases establish that a private party acts "under color" of law when seeking the attachment of property under an unconstitutional state statute.⁹ In fact, a careful reading demonstrates that they provide no authority for this proposition.

9 At one stage in the litigation the respondent averred that his lawsuit raised "[no] question of the constitutional validity of the State statutes." Plaintiff's Memorandum in Opposition to Motion to Dismiss 3. The District Court nevertheless concluded that "the complaint can only be read as challenging the constitutionality of Virginia's attachment statute." App. to Pet. for Cert. 38. The Court of Appeals agreed. 639 F.2d, at 1060, and n. 1.

Of the cases cited by the Court, *Sniadach*, *Mitchell*, and *Di-Chem* all involved attacks on the validity of state attachment or garnishment statutes. None of the cases alleged that the private creditor was a joint actor with the State, and none involved a claim for damages against the [**2762] creditor. Each case involved a state suit, not a federal action under § 1983. It therefore was unnecessary in any of these cases for this Court to consider whether the creditor, by virtue of instituting the attachment or garnishment, became a state actor or acted under color of state law. There is not one word in any of these cases that so characterizes the private creditor.¹⁰ In *Fuentes* [***506] *v. Shevin*, the Court did consider a [*953] § 1983 action against a private creditor as well as the State Attorney General.¹¹ Again, however, the only question before this Court was the validity of a state statute. No claim was made that the creditor was a joint actor with

the State or had acted under color of law. No damages were sought from the creditor. Again, there was no occasion for this Court to consider the status under § 1983 of the private party, and there is not a word in the opinion that discusses this. As with *Sniadach*, *Mitchell*, and *Di-Chem*, *Fuentes* thus fails to establish that a private party's mere invocation of state attachment or garnishment procedures represents action under color of law -- even in a case in which those procedures are subsequently held to be unconstitutional.

10 The Court finds support for its contrary view only by reading these cases as implicitly embracing the same fallacy as the Court does today. In *Sniadach*, *Mitchell*, and *Di-Chem* -- as in this case -- there was no question that state action had occurred. There, as here, some official of the State -- an undisputed state actor -- had undertaken either to attach property or garnish wages. For the Court, the occurrence of state action by these state officials *ipso facto* establishes that the private plaintiffs also must have been viewed as state actors. Given the presence of state action by the state officials, however, there was no need to inquire whether the private parties also were state actors. It is plain from the opinions that the Court did not do so. Nor, in cases arising in state court, was there any need to consider whether the private defendants had acted under color of law within the meaning of § 1983.

11 *Fuentes* was consolidated with a case involving similar facts, *Epps v. Cortese*, 326 F.Supp. 127 (ED Pa. 1971).

B

In addition to relying on cases involving the constitutionality of state attachment and garnishment statutes, the Court advances a "joint participation" theory based on *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). In *Adickes* the plaintiff sued a private restaurant under § 1983, alleging a *conspiracy* between the restaurant and local police to deprive her of the right to equal treatment in a place of public accommodation. *Id.*, at 152, 153. Reversing the decision below, this Court upheld the cause of action. It found that the private defendant, in "conspiring" with local police to obtain official enforcement of a state custom of racial segregation, engaged in a "joint activity with the State or

457 U.S. 922, *953; 102 S. Ct. 2744, **2762;
73 L. Ed. 2d 482, ***506; 1982 U.S. LEXIS 140

its agents" [*954] and therefore acted under color of law within the meaning of § 1983. *Id.*, at 152 (quoting *United States v. Price*, 383 U.S., at 794).

Contrary to the suggestion of the Court, however, Justice Harlan's Court opinion in *Adickes* did not purport to define the term "under color of law." Attending closely to the facts presented, the Court observed that "[whatever] else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute." 398 U.S., at 162, n. 23 (emphasis added). As indicated by this choice of language, the Court clearly seems to have contemplated some limiting principle. A citizen summoning the police to enforce the law ordinarily would not be considered to have engaged in a "conspiracy." Nor, presumably, would such a citizen be characterized as acting under color of law and thereby risking amenability to suit for constitutional violations that subsequently might occur. Surely there is nothing in *Adickes* to indicate that the Court would have found action under color of law in cases of this kind.

Although *Adickes* is distinguishable from these hypotheticals, the current case [**2763] is not. The conduct in *Adickes* occurred in 1964, 10 years after *Brown v. Board of Education*, 347 U.S. 483 (1954), [***507] and after the decade of publicized litigation that followed in its wake. In view of the intense national focus on issues of racial discrimination, it is virtually inconceivable that a private citizen then could have acted in the innocent belief that the state law and customs involved in *Adickes* still were presumptively valid. As Justice Harlan wrote, "[few] principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage segregation." 398 U.S., at 150-152. Construed as resting on this basis, *Adickes* establishes that a private [*955] party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity. In such a context, the private party *could* be characterized as hiding behind the authority of law and as engaging in "joint participation" with the State in the deprivation of constitutional rights.¹² Here, however, petitioner has alleged no conspiracy. Nor has he even alleged that respondent was invoking the aid of a law he should have

known to be constitutionally invalid.¹³ Finally, there is no allegation that respondent's decision to invoke legal process was in any way [*956] compelled by the law or custom of the State in which he lived. In this context *Adickes* simply is inapposite.

12 Arguing that the patent unconstitutionality of racial discrimination was irrelevant to the "conspiracy" count in *Adickes*, the Court charges that this discussion confuses the conspiracy and the substantive causes of action. *Ante*, at 932, n. 15. The Court's view is difficult to understand. In *Adickes* the private defendant allegedly conspired with the police to "deprive plaintiff of her right to enjoy equal treatment and service in a place of public accommodation," 398 U.S., at 150, n. 5, and apparently to cause her discriminatory and legally baseless arrest under a vagrancy statute. Because the vagrancy statute was not challenged as invalid on its face, the Court concludes that the "joint action" or "conspiracy" count "did not involve a state law, whether 'plainly unconstitutional' or not." *Ante*, at 932, n. 15. This conclusion is simply wrong. In the first place, the alleged "conspiracy" included an agreement to enforce a state law requiring racial segregation in restaurants. This law plainly was unconstitutional. Further, even the vagrancy statute certainly would have been unconstitutional as applied to enforce racial segregation. Presumably it was for these reasons that the Court agreed that the private defendant had "[conspired]" with the local police. 398 U.S., at 152. *Adickes* is entirely a different case from the one at bar.

13 At least one scholarly commentator has stated a cautious conclusion that the Virginia attachment provisions would satisfy the standards established by this Court's recent due process decisions. See Brabham, Sniadach Through Di-Chem and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes, 12 U. Rich. L. Rev. 157, 195-199 (1977). The correctness of this conclusion is not of course an issue in the present posture of the case, nor is it directly relevant to the case's proper resolution.

Today's decision therefore is as unprecedented as it is unjust.¹⁴

457 U.S. 922, *956; 102 S. Ct. 2744, **2763;
73 L. Ed. 2d 482, ***507; 1982 U.S. LEXIS 140

14 The Court suggests that respondent may be entitled to claim good-faith immunity from this suit for civil damages. *Ante*, at 942, n. 23. This is a positive suggestion with which I agree. A holding of immunity will mitigate the ultimate cost of this litigation. It would not, however, convert the Court's holding into a just one. This case already has been in litigation for nearly five years. It will now be remanded for further proceedings. Respondent, solely because he undertook to assert rights authorized by a presumptively valid state statute, will have been subjected to the expense, distractions, and hazards of a protracted litigation.

REFERENCES

6 Am Jur 2d, Attachment and Garnishment 5; 15 Am Jur 2d, Civil Rights 19

21 Federal Procedure, L Ed, Creditors' Provisional Remedies 21:15-21:25

2 Am Jur Pl & Pr Forms (Rev), Attachment and

Garnishment, Forms 141-162

12 Am Jur Trials 193, Collection Practice

42 USCS 1983; Constitution, 14th Amendment

US L Ed Digest, Civil Rights 12.5; Constitutional Law 799

L Ed Index to Annos, Attachment or Garnishment; Civil Rights; Due Process of Law

ALR Quick Index, Attachment or Garnishment; Discrimination; Due Process of Law

Federal Quick Index, Attachment and Garnishment; Civil Rights; Due Process of Law

Annotation References:

Supreme Court's construction of Civil Rights Act of 1871 (*42 USCS 1983*) providing private right of action for violation of federal rights. *43 L Ed 2d 833*.

Supreme Court's view as to applicability, to conduct of private person or entity, of equal protection and *due process clauses of the Fourteenth Amendment*. *42 L Ed 2d 922*.

APPENDIX 31



RONY MANN, Plaintiff, v. ROY G. LEVY, BERNARD BEYDA, LARRY SILVERSTEIN, STEVEN COHN and REPUBLIC FACTORS CORPORATION, Defendants

No. 91 Civ. 2792 (WK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

776 F. Supp. 808; 1991 U.S. Dist. LEXIS 15782

**November 1, 1991, Decided
November 1, 1991, Filed**

SUBSEQUENT HISTORY: As Corrected December 24, 1991.

JUDGES: **[**1]** Whitman Knapp, United States District Judge.

OPINION BY: KNAPP

OPINION

[*810] OPINION AND ORDER

WHITMAN KNAPP, UNITED STATES DISTRICT JUDGE

Invoking diversity jurisdiction, plaintiff brings this action to recover damages resulting from defendants allegedly fraudulently inducing it to invest in Genesis Marketing Corporation ("Genesis"), a clothing manufacturing company which became worthless one month after plaintiff purchased 49% of its common stock. Defendants Roy Levy, Larry Silverstein and Republic Factors Corporation ("Republic") move to dismiss the action on various grounds. Pursuant to *Fed. R. Civ. P. 12(b)* and *Rule 9(b)*, all three move to dismiss the complaint for failure to state a claim upon which relief

can be granted, for failure to allege fraud with particularity, and as barred by the statute of limitations. Levy and Silverstein also move pursuant to *Rule 19* to dismiss for failure to join an indispensable party, namely David Cohn. Pursuant to Local Rule 39 Republic and Levy also move for an order requiring plaintiff to file a bond for costs prior to proceeding with this action. For the reasons that follow these motions are granted in part and denied in part.

We address each of defendants' motions in turn. However, we note at the outset **[**2]** that although the complaint alleges several securities law violations, *see* First Count, Second Count, plaintiff now concedes that such claims are barred by the applicable statute of limitations. Accordingly only plaintiff's state law fraud claims are presently before us, specifically: common law fraud, aiding and abetting common law fraud, and fraudulent concealment. *See* Third Count; Fourth Count; Fifth Count. ¹

1 Counts Three and Five are asserted against all defendants, Count Four is asserted against Republic only.

Defendants' Motions to Dismiss

BACKGROUND

Accepting, as we must, all allegations as true, the facts are as follows.

In November 1987 defendant Bernard Beyda introduced plaintiff to David Cohn, and to defendants Steven Cohn and Roy Levy,² officers and directors of Genesis, for the purpose of discussing the possibility of plaintiff's investing in Genesis.³ During this initial meeting, defendants "made numerous unqualified representations and statements concerning [**3] the growth and future profit potential of Genesis." In particular, the complaint states that "David Cohn and the other individual defendants":

a) "depicted Genesis as a company with 'great potential' which had solved all of its financial difficulties and had 'turned the corner' toward financial success";

b) represented that "the financial difficulty Genesis had experienced in the past was due to an overstock of poor quality winter merchandise", and that Genesis "had solved this problem by discontinuing purchases from these particular manufacturers";

c) represented that much of Genesis' financial problems were also the result of the large operating expenses it had incurred from owning an overseas manufacturing plant which it intended to sell; and,

e) represented that Genesis was going to substantially alter its marketing strategy in the future.

Plaintiff at this time declined to invest in Genesis.

2 Levy is an attorney, and represented Genesis and its president, David Cohn in connection with the Stock Purchase Agreement at issue in this action.

[**4]

3 To date neither Bernard Beyda nor Steven Cohn has entered an appearance in this action.

[*811] Sometime prior to this meeting Republic, Genesis' sole factor since 1984, had notified it of an intention to cancel as of January 23, 1988 its factoring

agreement due to its poor financial condition. Plaintiff had no knowledge of this fact. On the contrary, several days after the November meeting, "at the specific request of the Genesis defendants" Republic phoned plaintiff's attorney in order to convince plaintiff that Genesis was still a good investment. During this call, Republic made numerous representations to the effect that:

a) "[it] had great 'confidence' in Genesis and viewed it as a company with tremendous potential for the future",

b)"David Cohn was a 'capable administrator", and

c) Republic was going to carefully monitor all aspects of Genesis' finances.

Approximately one month later, plaintiff was informed by David Cohn that defendants were in a position to offer a better deal, because he had arranged for Genesis to buy back [**5] shares from certain other shareholders which would enable him to offer plaintiff 49% of the stock in the company in return for his investment therein. In January 1988, plaintiff again met with David and Steven Cohn and Levy to discuss this matter, and at this time defendants "reaffirmed and reiterated their earlier representations regarding what a 'terrific company' Genesis was". More specifically, Levy and David Cohn stated that:

since their last meeting, they had been in contact with additional investors who were prepared to infuse capital in Genesis, and that they had initiated negotiations with Republic to provide Genesis with the necessary cash flow for its daily operating costs

At or about this time plaintiff was advised by his attorney that he should make this investment in the form of loans rather than capital. Thereafter plaintiff's attorney met with a representative of Mast Inc. ("Mast"), a company to which Genesis had in 1984 issued two promissory notes totalling more than \$ 3.4 million, to negotiate an agreement to subordinate these notes to any note Genesis might issue to plaintiff. At this [**6] meeting plaintiff was informed that the Mast notes were in default and was offered the option of purchasing them at a discount, namely for \$ 550,000. Later that day, Beyda, David Cohn and Levy phoned "and persuaded plaintiff to purchase [the Notes] by reducing the level of

cash required to purchase the 49% stock interest in Genesis".

In February plaintiff met with David Cohn, Republic, and Levy. Republic then represented to plaintiff that it "would resume [its] factoring agreement with Genesis so long as plaintiff provided [it] with additional security or collateral".

Sometime prior to February 3 plaintiff was provided with the financial statements of Genesis, which had been prepared by defendant Larry Silverstein, Genesis' chief financial officer. On February 3 plaintiff entered into an "Agreement of Purchase and Sale" ("Agreement") with David Cohn and Genesis, whereby plaintiff agreed to purchase 485 shares (approximately 49%) of the common stock of Genesis in exchange for \$ 500,000 in cash and loans to Genesis. Annexed to the Agreement were the financial statements of Genesis, prepared by Silverstein, which covered [**7] the period up to and including August 31, 1987. The Agreement contained the express representations that:

a) the financials "were prepared in accordance with generally accepted accounting principles and fairly reflected the current financial position of Genesis";

b) "as of the date of the closing . . . there had been no materially adverse change in the financial condition of Genesis as disclosed in the financial statements"; and c) "as of the date of the closing there had not been, nor would there be, any event or condition of any character which would have a material and adverse affect [*812] on the financial condition, business assets or prospects of Genesis".

The Agreement was contingent upon plaintiff establishing an irrevocable Standby Letter of Credit in the principle amount of \$ 750,000 with a bank for the benefit of Republic and his purchasing a promissory note in the principle amount of \$ 2,084,389.22 from Mast at the discounted price of \$ 550,000. On March 21 plaintiff established the letter of credit, and on March 23 he purchased the promissory note. On March 24 Republic drew down \$ 375,000 on [**8] the letter of credit, and notified Genesis that it would resume its factoring

agreement.

In May Levy phoned plaintiff's attorney and informed him that Republic had notified Genesis that it was again terminating its factoring agreement because Genesis had "unexpectedly" in a single week received \$ 2 million worth of returned merchandise. Republic then drew down the remaining \$ 375,000 of the letter of credit, and foreclosed on all of Genesis' assets. Shortly thereafter, Genesis ceased its operations.

The complaint alleges that "through an elaborate scheme of material misrepresentations and omissions, defendants induced plaintiff to invest a substantial sum of money into Genesis". More specifically it asserts that Levy and Silverstein "wilfully and intentionally [made] misrepresentations of material facts and/or omissions of material facts concerning the true financial condition and prospects of Genesis to plaintiff to induce [him] to enter into the Agreement", and pleads "upon information and belief" that defendants were aware of the \$ 2 million loss represented by the returned merchandise [**9] at the time they were negotiating with plaintiff but failed to disclose this information to him.

DISCUSSION

Silverstein

Silverstein prepared the financial statements which revealed the condition of Genesis up to and including August 31, 1987, and were annexed to the February Agreement. The complaint does not allege that Silverstein was either present at, or participated in, any direct conversation with plaintiff when alleged misrepresentations of facts by other defendants occurred, nor does it allege that the financial statements which he prepared were either false or misleading. Although the complaint does allege that the Agreement contained false or misleading representations relating to the financial statements, there is no allegation that Silverstein knew the financial statements would be used in this manner or that such warranties would be made.

Accordingly, we find that plaintiff has failed to state a cognizable claim for relief against Silverstein. See *Katara v. D.E. Jones Commodities, Inc.* (2d Cir. 1987) 835 F.2d 966 (to state a claim of fraud, plaintiff must plead, *inter alia*, a misrepresentation, [**10] concealment or nondisclosure of a material fact, and an intent to deceive on the part of the defendant). Although

we are cognizant of the fact that a cause of action should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief", *Conley v. Gibson* (1957) 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99, plaintiff has not suggested any reason to believe that additional discovery would alter our present analysis. We therefore grant Silverstein's motion to dismiss.

Republic

The allegations against Republic can be divided into two basic categories. First plaintiff contends that Republic affirmatively acted to deceive him when it represented that it had great confidence in Genesis and simultaneously failed to disclose the reasons which led to the subsequent discontinuance of its factoring agreement with Genesis, namely its knowledge of Genesis' poor financial condition. Second, plaintiff alleges "upon information and belief" that Republic had knowledge of [*813] the \$ 2 million in returned merchandise at the time plaintiff was negotiating investing [**11] in Genesis, but purposely concealed this information from plaintiff until all of the transactions had been completed.

In support of its motion to dismiss, Republic contends that its statement that it had confidence in Genesis is a mere statement of opinion which is not actionable, and that it had no duty affirmatively to disclose any information to plaintiff, including its knowledge of Genesis' financial condition. In addition, Republic contends that plaintiff has failed to allege sufficient facts from which one could infer that it had knowledge of the large amount of returned merchandise prior to May 1988.

Under New York law an expression of opinion may constitute actionable fraud where it is shown that the opinion or prediction is not honestly held at the time when made. See *Hutton v. Klabal* (S.D.N.Y. 1989) 726 F. Supp. 67, 71 ; cf. *Minpeco, S.A. v. ContiCommodity Services, Inc.* (S.D.N.Y. 1982) 552 F. Supp. 332, 335 ("even between parties who do not have a fiduciary or confidential relationship, a duty to speak does arise where defendants have engaged in 'some act or conduct which deceived plaintiffs'" (citation [**12] omitted)). Similarly, it is well settled that in pleading fraud "malice, intent, knowledge, and other condition of mind of a person may be averred generally". *Rule 9(b)*. Although we agree with Republic that the instant complaint is bare-boned,

viewing it as a whole we cannot say that there is no set of facts which plaintiff might be able to prove which would entitle him to relief. See *Conley, supra*. In particular, whether or not Republic had confidence in Genesis' potential at the time it asserted such confidence, and whether or not it knew of the return of \$ 2 million worth of Genesis' merchandise prior to May 1988, are questions which can be resolved only by evidence in Republic's possession. Accordingly, we find that a dismissal prior to giving plaintiff an opportunity for discovery would be inappropriate. See *Hospital Bldg. Co. v. Rex Hospital Trustees* (1975) 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 ; cf. *DiVittorio v. Equidyne Extractive Industries, Inc.* (2d Cir. 1987) 822 F.2d 1242, 1248 ("Where. . . much of the factual information needed to fill out plaintiff's complaint lies peculiarly within the opposing parties' knowledge, the general [**13] rule disfavoring allegations founded upon belief ought not to be rigidly enforced"). We therefore deny Republic's *Rule 12(b)* motion, but stay all discovery except such as may be necessary to answer these two questions. At the close of such discovery Republic may either abandon its motion or renew it. In the former event, the parties will proceed to prepare for trial. In the latter event plaintiff, if so advised, may file an amended complaint.

Levy

Our analysis of Levy's *Rule 12* motion is similar to that above set forth for Republic. Although we agree with Levy that the complaint does not allege sufficient facts to support its claim that he had knowledge of the \$ 2 million in returned merchandise at the time of the negotiations and that it fails to allege specifically that any of the statements made to plaintiff were "knowingly false" when made, we are persuaded that the facts necessary to perfect these pleadings are exclusively in the possession of defendants. We therefore find that discovery limited to these two questions should be permitted at this time. As to Levy's claim that the complaint's failure to attribute any of the alleged false statements directly to him renders it [**14] fatally flawed for *Rule 9(b)* purposes, we disagree. A primary intent of the particularity requirements of this rule is to provide defendant with fair notice of plaintiff's claim so to enable preparation of its defense. Where, as here, plaintiff alleges with particularity the content of the statements sued upon, the time and place at which they were made, and the fact that the speaker was one of at most five persons -- all of whom are alleged officers and directors of Genesis (or

a single representative of its factor) -- we find the requirements of *Rule 9(b)* have been met. See *Luce v. Edelstein* (2d Cir. 1986) 802 F.2d 49, 55 [*814] ("no specific connection between fraudulent representations in [an] Offering Memorandum and particular defendants is necessary where, as here, defendants are insiders or affiliates participating in the offer of the securities in question").

Defendant cites *DiVittorio, supra*, for the proposition that a further goal of the particularity requirements of *Rule 9* is to protect a defendant from harm to his reputation or goodwill, and argues that the instant complaint should be dismissed on this ground.⁴ However, an examination [**15] of *Divittorio*, which sustained the complaint as against some defendants and dismissed it as against others, discloses that none of the defendants dismissed were so closely identified with the alleged fraudulent statements as is Levy in the circumstances here alleged.

4 It is defendant Silverstein who makes this argument, however we accept it as if made by defendant Levy for purposes of this motion.

With respect to Levy's *Rule 19* motion,⁵ namely his contention that David Cohn is a necessary party to this action and that plaintiff's failure to name him as a defendant mandates dismissal of the complaint, we note only that the remaining claims against Levy, namely common law fraud and fraudulent concealment, are direct claims. As such Levy's liability, if any, is joint and several, and we are aware of no authority which would mandate that absent the inclusion of all possible defendants, plaintiff is not permitted to proceed with this action. See *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.* (D.C. Cir. 1981) 207 App. D.C. 375, 647 F.2d 200, 207, [**16] (Ginsburg, J.) (noting that where defendants are jointly and severally liable, plaintiff may sue as many or as few of the alleged wrongdoers as it chooses, and those left out of the lawsuit are not indispensable parties.); *Kerr v. Compagnie De Ultramar* (2d Cir. 1958) 250 F.2d 860, 863.⁶

5 Levy asserts that he moves pursuant to *Rule 19(b)*, however *Rule 19(b)* governs the standards to be applied in determining whether or not an action should be permitted to proceed for failure to join an indispensable party, or when joinder of an indispensable party is not feasible. Such a motion is necessarily predicate to a determination

of whether or not the proposed party is an indispensable party. Accordingly, we construe this motion as a *Rule 19(a)* motion, namely a request for a determination that David Cohn is a necessary party. Compare *Rule 19(b)* with *Rule 19(a)*.

6 To the extent that Levy asserts that he may need the testimony of David Cohn to present an adequate defense, see Levy Reply Mem. at 10, we agree with the Court of Appeals for the District of Columbia that:

The question of whether or not an entity or individual should be a party to an action is something quite different from the questions and problems associated with obtaining evidence from such an entity or individual. *Rule 19*. . . does not list the need to obtain evidence from an entity or individual as a factor bearing upon whether or not a party is necessary or indispensable to a just adjudication. . . [thus it is error to dismiss on this ground].

Costello Pub. Co. v. Rotelle (D.C.Cir. 1981) (Wald, J.) 216 App. D.C. 216, 670 F.2d 1035, 1044-45.

If the presence of David Cohn as a witness is deemed critical to the trial of this action, and if it is shown that he is not subject to the jurisdiction of this court, we would entertain a motion to dismiss for *forum non conveniens* conditioned on the movant's representation that he will accept service of process in any suit brought in a jurisdiction where David Cohn can be sued. Levy could then implead David Cohn should he wish so to do.

[**17] Accordingly, on the basis of the facts before us, we are unable presently to conclude that absent David Cohn as a party "complete relief cannot be accorded among those already parties", or that proceeding with the

instant action might adversely affect the interests of David Cohn, or leave Levy or the other parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. See Rule 16(a); cf. *Felix Cinamatografica S.r.l. v. Penthouse Intern. Ltd.* (S.D.N.Y. 1983) 99 F.R.D. 167, 169 (noting that it is "clear that under [Rule 19(b)] indispensability is to be determined on a pragmatic, case-by-case analysis based upon considerations of 'equity and good conscience'"). We therefore deny Levy's Rule 19 motion.

Defendants' Motion for a Bond for Costs

BACKGROUND

In early 1990 plaintiff commenced an action in a California state court against Republic, [*815] Levy, Steven Cohn, Genesis Marketing Corporation and others seeking the same relief it seeks in the instant suit. See *Rony Mann v. Genesis Marketing Corporation, etc., et al.* (Calif. Superior [**18] Court) Case No. 741870. By order dated May 31, 1990 that action was dismissed on grounds of *forum non conveniens*, and defendants were awarded costs. Pursuant to this order, Republic was awarded \$ 1,005.40. Plaintiff appealed this order, but did not pursue the appeal, and Republic subsequently made motions to dismiss the appeal and for sanctions against plaintiff for having brought a frivolous appeal. Both motions were granted, and plaintiff was directed to pay Republic an additional \$ 1,700 as sanctions. To date plaintiff has failed to make any payment to Republic.

On the basis of these facts Republic moved for a bond for costs in this action. At oral argument we informed the parties that we would permit any defendant to join in this motion. Since that time Republic has submitted a statement specifying that it requests an order requiring plaintiff to post a bond in an amount of at least \$ 10,000 as security for costs against it; Levy has moved for an order granting it identical relief; and plaintiff has

filed papers in opposition, arguing that the bond amounts sought by these defendants are punitive in nature.

DISCUSSION

Having reviewed [**19] all papers submitted, we grant both Republic's and Levy's motions as specified herein. Plaintiff's failure to pay Republic any portion of the \$ 2,705.40 which the California courts ordered it to do, coupled with its failure to provide any explanation for its refusal to meet this financial obligation, causes us to have serious doubts as to whether or not plaintiff will be willing to pay the instant defendants' costs should they prevail. Recognizing that the amount of the bond should not "seriously impede" plaintiff's ability to prosecute the action, in the exercise of our discretion, we direct plaintiff to post a single \$ 10,000 security bond running both to Republic and Levy. See *Atlantic Shipping Corp., Inc. v. Chemical Bank* (2d Cir. 1987) 818 F.2d 240, 251-252 (finding that requirement that plaintiff, a debtor in bankruptcy, post a \$ 10,000 bond for costs in order to proceed with its fraud claim was not an abuse of discretion).

CONCLUSION

The complaint as against Silverstein is dismissed with prejudice. Levy and Republic's Rule 12 motions are denied, and plaintiff is permitted limited discovery as setforth herein. Defendants may renew said motions at the close [**20] of this discovery and plaintiff may file an amended complaint in the interim, if so advised. Levy's Rule 19 motion is denied.

On the motion of defendants Levy and Republic, and pursuant to Local Rule 39, we order plaintiff to file an original secured bond for costs in the amount of \$ 10,000 prior to further proceeding with this action against either defendant.

APPENDIX 32



**WILLIAM MARBURY v. JAMES MADISON, SECRETARY OF STATE OF THE
UNITED STATES.**

SUPREME COURT OF THE UNITED STATES

5 U.S. 137; 2 L. Ed. 60; 1803 U.S. LEXIS 352; 1 Cranch 137

February 24, 1803, Decided

PRIOR HISTORY: [***1] AT the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general of the United States, severally moved the court for a rule to James Madison, secretary of state of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in the due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that [***2] their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given to that enquiry, either by the secretary of state or by any officer of the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and

consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to show cause on the 4th day of this term. This rule having been duly served,

DISPOSITION: The rule was discharged.

LAWYERS' EDITION HEADNOTES:

The Supreme Court of the United States has not power to issue a mandamus to a Secretary of State of the United States, it being an exercise of original jurisdiction not warranted by the constitution.

Congress has not power to give original jurisdiction to the Supreme Court in other cases than those described in the constitution.

An act of congress repugnant to the constitution cannot become a law.

The courts of the United States are bound to take notice of the constitution.

A commission is not necessary to the appointment of an officer by the executive; semb.

A commission is only evidence of an appointment.

Delivery is not necessary to the validity of letters patent.

The president cannot authorize a Secretary of State to omit the performance of those duties which are enjoined by law.

A justice of peace in the District of Columbia is not removable at the will of the president.

When a commission for an officer not holding his office at the will of the president, is by him signed and transmitted to the Secretary of State, to be sealed and recorded, it is irrevocable; the appointment is complete.

A mandamus is the proper remedy to compel a Secretary of State to deliver a commission to which the party is entitled.

SYLLABUS

REPORTER'S NOTES

The supreme court of the United States has not power to issue a mandamus to a secretary of state of the United States, it being an exercise of original jurisdiction not warranted by the constitution. Congress have not power to give original jurisdiction to the supreme court in other case than those described in the constitution. An act of congress repugnant to the constitution can not become a law. The courts of U. States are bound to take notice of the constitution. [***3] A commission is not necessary to the appointment of an officer by the executive -- Semb. A commission is only evidence of an appointment.

Delivery is not necessary to the validity of letters patent. The President cannot authorize a secretary of state to omit the performance of those duties which are enjoined by law.

A justice of peace in the district of Columbia is not removable at the will of the President. When a commission for an officer not holding his office at the will of the President, is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable; the appointment is complete. A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which the party is entitled.

COUNSEL: Mr. Lee, in support of the rule, observed that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an

appointment to an office no held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. [***4] Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate praying them to suffer their secretary to give extracts from their executive journals respecting the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have therefore been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31 January, 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state and not bound to disclose any facts relating to the business or transactions in the office.

Mr. Lee observed, that to show the propriety of examining these witnesses, he would make a few remarks on the nature [***5] of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the President. In the first his duty is to the United States or its citizens; in the other his duty is to the President; in the one he is an independent, and an accountable officer; in the other he is dependent upon the President, is his agent, and accountable to him alone. In the former capacity he is compellable by mandamus to do his duty; in the latter he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July, 1789, vol. 1. p. 359, entitled "an act for establishing an executive department, to be denominated the department of foreign affairs." The first section ascertains the duties of the secretary so far as he is considered as a mere executive agent. It is in these words, "Be it enacted, &c. that there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall [***6] perform and execute such duties as shall from time to time be enjoined on, or

instructed to him by the President of the United States, agreeable to the constitution, relative to correspondences, commissions or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken which is simply, "well and faithfully to execute the trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given and the duties imposed by this act, no mandamus will lie. The secretary [***7] is responsible only to the President. The other acts of congress respecting this department was passed at the same session of the 15th September 1789, vol. 1, p. 41, c. 14, and is entitled "An act to provide for the safe keeping of the acts and records, and seal of the United States, and for other purposes." The first section changes the name of the department and the secretary, calling the one the department and the other the secretary of state. The second section assigns new duties to the secretary, in the performance of which it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which he is not more responsible to the president than to any other citizen of the United States. It provides that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be [***8] provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they shall have been signed by the President. The fifth section provides for a seal of office, and that all copies of records and papers in his office,

authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The President has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office the President cannot take from his custody the seal of the United States, nor prevent him from recording, and affixing the seal to civil commissions of such officers as hold not their [***9] offices at the will of the President, after he has signed them and delivered them to the secretary for that purpose. By other laws he is to make out and record in his office patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the President; and if he neglects or refuses to perform them, he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States. The President is no party to this case. The secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are entrusted, and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform [***10] them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are undoubtedly facts, which may come to their knowledge by means of their connection with the secretary of state, respecting which they cannot be bound to answer. Such are the facts concerning foreign correspondences, and confidential communications between the head of the department and the President. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose I claim title to land under a patent from the United States. I demand a copy of it from the secretary of state. He refuses. Surely he may be compelled by mandamus to give it. But in

order to obtain a mandamus, I must show that the patent is recorded in his office. My case would be hard indeed if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit. It becomes necessary for me to have the use of that act in a court of law. I apply for a copy. I am refused. Shall I not be permitted, [***11] on a motion for a mandamus, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely it cannot be contended that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

The court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Wagner being examined under interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them justices of the peace. That Mr Marbury and Mr. Ramsey called on the secretary of state respecting their commissions. That the secretary referred them to him; he took them into another room and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question "who gave him that information;" and the [***12] court decided that he was not bound to answer it, because it was not pertinent to this cause. He further testified that some of the commissions of the justices, but he believed not all, were recorded. He did not know whether the commissions of the applicants were recorded, as he had not had recourse to the book for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace signed by Mr. Adams; but believed, and was almost certain, that Mr. Marbury's and Col. Hooe's commissions were made out,, and that Mr. Ramsay's was not; that he made out the list of names by which the clerk who filled up the commissions was guided; he believed that the name of Mr. Ramsey was premitted by mistake, but to the best of his knowledge it contained the names of the other two; he believed none of the commissions for justices of the

peace signed by Mr. Adams, were recorded. After the commissions of justices of peace were made out, he carried them to Mr. Adams for his signature. After being signed he carried them back to the secretary's office, where the seal of the United States was affixed [***13] to them. That commissions are not usually delivered out of the office before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.

Mr. Lincoln, attorney general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written were then read and handed to him. He repeated the ideas [***14] he had before suggested, and said his objections were of two kinds.

1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and

2d. He ought not to be compelled to answer any thing which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objections of Mr. Wagner and Mr. Brent. He stated that the duties of a secretary of state were two-fold. In discharging one part of those duties he acted as a public ministerial officer of the United States, totally independent of the President, and that as to any facts which came officially to his knowledge, while acting in that capacity, he was as much bound to answer as a marshal, a collector, or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as public ministerial officer, but in the capacity of an agent of the President, bound to obey his orders, and

accountable to him for his conduct. And that as to any facts which came officially to his knowledge in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln [***15] was not bound to disclose any thing which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every secretary of state should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

The court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

[***16] Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last which he did not think himself obliged to answer fully. The question was, what had been done with the commissions. He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the

present cause, what had been done with them by others.

To the other questions he answered that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect whether [***17] any of them constituted Mr. Marbury, Col. Hooe, or Col. Ramsay, justices of the peace; there were when he went into the office several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.

Mr. Lee then read the affidavit of James Marshall, who had been also summoned as a witness. It stated that on the 4th of March 1801, having been informed by some person from Alexandria that there was reason to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as many as 2, as he believed, commissions of justices for that county were delivered to him for which he gave a receipt, which he left in the office. That [***18] finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for colonel Hooe, and one for William Harper.

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule to three questions:

1st. Whether the supreme court can award the writ of mandamus in any case.

2d. Whether it will lie to a secretary of state in any case whatever.

3d. Whether in the present case the court may award a mandamus to James Madison, secretary of state.

The argument upon the 1st question is derived not only from the principles and practice of that country, from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States.

This is the supreme court, and by reason of its supremacy must have the superintendence of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and [***19] ministerial officer. From this principle alone the court of King's Bench in England derives the power of issuing the writs of mandamus and prohibition. 3 Inst. 70, 71. Shall it be said that the court of King's Bench has this power in consequence to its being the supreme court of judicature, and shall we deny it to this court which the constitution makes the supreme court? It is beneficial, and a necessary power; and it can never be applied where there is another adequate, specific, legal remedy.

The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction) with such exceptions, and under such regulations as congress shall make. The term "appellate jurisdiction" is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals.

Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. Com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury [***20] its proper redress. 3 Bl. Com. 109. There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must then be a jurisdiction some where competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blakstone, vol. 3, p. 110. says that a writ of mandamus is "a command issuing in the King's name from the court of King's Bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of most extensively remedial nature, and issues in all cases where

the party has a right to have any thing done, and has no other specific means of compelling its performance."

In the Federalist, vol. 2, p. 239, it is said, that the word "appellate" is not to be taken in its technical sense, as used in reference to appeals in the course of the civil law, but in its broadest sense, in which it [***21] denotes nothing more than the power of one tribunal to review the proceedings of another, either as to law or facts, or both. The writ of mandamus is in the nature of an appeal as to facts as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a mandamus to be one. But the power does not depend upon implication alone. It has been recognized by legislative provision as well as in judicial decisions in this court.

Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1. p. 58, § 13, have expressly given the supreme court the power of issuing writs of mandamus. The words are, "The supreme court shall also have appellate jurisdiction from the circuit courts, and the courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under [***22] the authority of the United States."

Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dal. Rep. 298.

This court has entertained jurisdiction on a mandamus in one case, and on a prohibition in another. In the case of the United States v. judge Lawrence, 3 Dal. Rep. 42, a mandamus was moved for by the attorney general at the instance of the French minister, to compel judge Lawrence to issue a warrant against captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case the power of the court to issue writs of mandamus, was taken for granted in the arguments of counsel on both sides, and seems to have been so considered by the court. The mandamus was refused, because the case in which it was required, was not a proper one to support the motion. In the case of the United States v. judge Peters a writ of prohibition was

granted, 3 Dal. Rep. 121, 129. This was the celebrated case of the French corvette the *Cassius*, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th Feb. 1794, a motion [***23] was made to the supreme court in behalf of one John Chandler, a citizen of Connecticut, for a mandamus to the secretary of war, commanding him to place Chandler on the invalid pension list. After argument, the court refused the mandamus, because the two acts of congress respecting invalids, did not support the case on which the applicant grounded his motion. The case of the *United States v. Hopkins*, at February term, 1794, was a motion for a mandamus to Hopkins, loan officer for the district of Virginia, to command him to admit a person to subscribe to the United States loan. Upon argument the mandamus was refused because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a mandamus ever denied. Hence it appears there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of that government.

2d. The second point is, can a mandamus go to a secretary of state in any case? It certainly cannot in all cases; nor to the President in any case. It may not be proper to mention this position; but I am compelled [***24] to do it. An idea has gone forth, that a mandamus to a secretary of state is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the President, he is not liable to a mandamus; but as a recorder of the laws of the United States; as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws. It is true he is a high officer, but is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, should be above the compulsion of law in the exercise of those duties. As a ministerial [***25] officer he is compellable to do his duty, and if he refuses, is liable to

indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of mandamus. If a mandamus can be awarded by this court in any case, it may issue to a secretary of state; for the act of congress expressly gives the power to award it, "in cases warranted by the principles and usages of law, to any persons holding offices under the authority of the United States."

Many cases may be supported, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress, vol. 1. p. 43, copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose the secretary refuses to give a copy, ought he not to be compelled? Suppose I am entitled to a patent for lands purchased of the United States; it is made out and signed by the President who gives a warrant to the secretary to affix [***26] the great seal to the patent; he refuses to do it; shall I not have a mandamus to compel him? Suppose the seal is affixed, but the secretary refuses to record it; shall he not be compelled? Suppose it recorded, and he refuses to deliver it; shall I have no remedy?

In this respect there is no difference between the patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge Patterson enquired of Mr. Lee whether he understood it to be the duty of the secretary to deliver a commission, unless ordered so to do by the President.

Mr. Lee replied, that after the President has signed a commission for an office not held at his will, and it comes to the secretary to be sealed, the President has done with it, and nothing remains, but that the secretary perform those ministerial acts which the law imposes upon him. It immediately becomes his duty to seal, record, and deliver it on demand. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

3d. The third point is, whether in the present case a writ of mandamus ought to be awarded to James [***27] Madison, secretary of state.

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of Congress passed the 27th of Feb. 1803, entitled "An act concerning the district of Columbia," ch. 86, § 11 and 4; page 271, 273. They are authorized to hold courts and have cognizance of personal demands of the value of 20 dollars. The act of May 3d, 1802, ch. 52, § 4, considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the President. The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it become irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In [***28] contemplation of law they are as if done.

These justices exercise part of the judicial power of the United States. They ought therefore to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district that the justices should be independent; almost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state. This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The [***29] citizens of this district have their fears excited by every stretch of power by a person so high in office as the secretary of state.

It only remains now to consider whether a mandamus to compel the delivery of a commission by a public ministerial officer, is one of "the cases warranted by the

principles and usages of law."

It is the general principle of law that a mandamus lies, if there be no other adequate, specific, legal remedy; 3 Burrow, 1067, King v. Barker, et al. This seems to be the result of a view of all the cases on the subject.

The case of Rex v. Borough of Midhurst, 1 Wils. 283, was a mandamus to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of Rex v. Dr. Hay, 1 W. Bl. Rep. 640, a mandamus issued to admit one to administer an estate.

A mandamus gives no right, but only puts the party in a way to try his right. Sid. 286.

It lies to compel a ministerial act which concerns the public. 1 Wilson, 283. 1 Bl. Rep. 640 -- although there be a more tedious remedy, Str. 1082. 4 Bur. 2188. 2 Bur. 1045; So if there be a legal right, and a remedy in equity, [***30] 3. Term. Rep. 652. A mandamus lies to obtain admission into a trading company. Rex v. Turkey Company, 2 Bur. 1000. Carthew 448. 5 Mod. 402; So it lies to put the corporate seal to an instrument. 4 Term. Rep. 699; to commissioners of the excise to grant a permit, 2 Term Rep. 381; to admit to an office, 3 Term. Rep. 575; to deliver papers which concern the public, 2 Sid. 31. A mandamus will sometimes lie in a doubtful case, 1 Levinz 123, to be further considered on the return, 2 Levinz, 14. 1 Siderfin, 169.

It lies to be admitted a member of a church, 3 Bur. 1265, 1043.

The process is as ancient as the time of Ed. 2d. 1 Levinz 23.

The first writ of mandamus is not peremptory, it only commands the officer to do the thing or show cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding, if not, a peremptory mandamus is then awarded.

It is said to be a writ of discretion. But the discretion of a court always means a sound, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man.

On a subsequent day, and before the court had given

[***31] an opinion, Mr. Lee read the affidavit of Hazen Kimball, who had been a clerk in the office of the Secretary of State, and has been to a distant part of the United States, but whose return was not known to the applicant till after the argument of the case.

It stated that on the third of March, 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the district of Columbia.

OPINION BY: MARSHALL

OPINION

[*153] [**66] Afterwards, on the 24th of February the following opinion of the court was delivered by the chief justice.

Opinion of the court.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a mandamus [*154] should not issue, directing him to deliver to William Marbury his commission as a justice of the peace of the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a mandamus. [***32] The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of enquiry is,

1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February, 1801, concerning the district of Columbia.

After dividing the district into two counties, the 11th section of this law, enacts, "that there shall be appointed in and for [***33] each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

[*155] It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution, declares, that "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not [***34] otherwise provided for."

The third section declares, that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the senate, or by the President alone; provided that the said seal shall not be

affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1st, The nomination. This is the sole act of the President, and is completely voluntary.

2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.

[*156] 3d. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers [***35] of the United States."

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent, by [**67] adverting to that provision in the second section of the second article of the constitution, which authorizes congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the constitution which requires the President to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power [***36] to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer, who has been appointed, remains the same as if in practice the President had commissioned officers appointed by an authority other than his will.

It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

[*157] This is an appointment by the President, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily [***37] the appointment; though conclusive evidence of it.

But at what state does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the President, must be completely evidenced, when it is shown that he has done every thing to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberations has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of [***38] time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the

constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed, converting the department [*158] of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the President:" "Provided that the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the President therefor."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It asserts, by an [***39] act supposed to be of public notoriety, the verity of the Presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this regard, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the [***40] commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and [*159] the commission is

valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured [**68] that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

This idea is founded on the supposition that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. [***41] But for the purpose of examining this objection fairly, let it be conceded, that the principle, claimed for its support, is established.

The appointment being, under the constitution, to be made by the President personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the President also. It is not necessary that the livery should be made personally to the grantee of the office: It never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission after it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences [*160] of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President, and the seal of the United States, are those solemnities. This [***42] objection therefore does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission, is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to enquire, whether the possession [***43] of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but, not that the original had been transmitted. If indeed it should appear that [*161] the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, [***44] although the manual labor of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees, to be paid by a person requiring a copy, are ascertained by law. Can a keeper of a public record, erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither [***45] the one, nor the other, is capable of rendering the appointment a non-entity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept the office, the successor is nominated in the place of the person who [*162] has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable

5 U.S. 137, *162; 2 L. Ed. 60, **68;
1803 U.S. LEXIS 352, ***45; 1 Cranch 137

at the will of the executive, the appointment is not revocable, and [***46] cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. [**69] But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second enquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

[*163] The very essence of civil liberty certainly consists in the right of every [***47] individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."

And afterwards, p. 109, of the same vol. he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for

that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

[***48] The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behooves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this enquiry the first question which presents itself is, whether this can be arranged [*164] with that class of cases which comes under the description of *damnum absque injuria* -- a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far [***49] as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case is not to be admitted.

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By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary of war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, [***50] the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. [*165] No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3. p. 255, says, "but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (vol. 3d. p. 299) the purchaser, on paying his purchase money, becomes completely entitled to the property [***51] purchased; and on producing to the secretary of state, the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

[**70] It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with certain important political [***52] powers, in the [*166] exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This office, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to [***53] perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us enquire how it applies to the case under the consideration of the court.

[*167] The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has [***54] exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumeable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal [***55] right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice [*168] of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of

state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for [***56] which the laws of his country afford him a remedy.

It remains to be enquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for, and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, "a command issued in the King's name from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench has previously determined, or at least supposed, to be consonant to right and justice."

Lord Mansfield, in 3d Burrows 1266, in the case of the King v. Baker, et al. states with much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge, "there [**71] is a right to execute an office, perform a service, or exercise a franchise (more specifically if it be in a matter of public concern, or attended with profit) and a person is kept out of the possession, [***57] or dispossessed of such right, and [*169] has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government." In the same case he says, "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines

that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render [***58] the mandamus a proper remedy, the officer to whom it is directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered [*170] by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained [***59] for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the

payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under the color of his office, by which an individual sustains an injury, it cannot [***60] be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is [*171] again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, [***61] or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken upon in this country.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the

pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but this question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal [***62] question, properly determinable in the courts, although the act of placing such persons on the list was to be preformed by the head of a department.

That this question might be properly settled, congress passed an act in February, 1793, making [**72] it the duty of the secretary of war, in conjunction with the attorney general, to take such measures, as might be necessary to obtain an adjudication of the supreme court of the United [*172] States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which [***63] an individual had a vested interest; but that a mandamus ought not to issue in that case -- the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment in that case, is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed

unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced, is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so [*173] appointed, he has a right to the commission which the secretary has received [***64] from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.

It was at first doubted whether the action of detinue was not a specified legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be enquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons [***65] holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is

precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present [*174] case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

[***66] It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it to the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial powers, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made [***67] in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them

or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

[*175] If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which [**73] might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and [***68] proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, [***69] therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for

the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to [*176] appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, [***70] is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited [*177] and acts allowed, are of equal obligation. [***71] It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be [***72] lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

[*178] So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of [**74] these conflicting rules governs the case. This is of the [***73] very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement [***74] on political institutions -- a written constitution -- would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

[*179] Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on

articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered [***75] in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that "no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the fame overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution [*180] contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly [***76] applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on the subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States."

Why does a judge swear to discharge his duties

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agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution [***77] itself is first mentioned; and not the laws of the United States generally, but those only which

shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

APPENDIX 33



MARTINEZ v. FOX VALLEY BUS LINES, Inc.

No. 45094

District Court, N.D. Illinois, E.D.

17 F. Supp. 576; 1936 U.S. Dist. LEXIS 1656

December 24, 1936

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant denied plaintiff's allegation of negligence against it and charged that plaintiff was an illegal alien who could not file suit against defendant. Plaintiff moved to strike the latter defense.

OVERVIEW: Plaintiff sought to recover for personal injuries resulting from the alleged negligence of defendant. Defendant denied that it was negligent and claimed that plaintiff could not file suit against defendant since plaintiff was an illegal alien. Plaintiff moved to strike the latter defense. The court rejected defendant's position that if an alien citizen of a friendly country was unlawfully in the country, he was without redress against one who had injured him. The court held that under 8 U.S.C.S. § 41, all persons within the jurisdiction of the United States have the same right to sue as citizens have. Therefore, the court held that one injured as a result of the negligence of another has a right of action against that party to recover damages. Accordingly, the court granted plaintiff's motion to strike the defense of plaintiff's

inability to file suit.

OUTCOME: The court granted plaintiff's motion to strike the defense of plaintiff's inability to file suit, holding that an alien of a friendly country has the protection of the laws with regard to his rights of person and property.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Constitutional Law > Equal Protection > Full & Equal Benefit

Governments > Federal Government > U.S. Congress

[HN1] It is within the exclusive jurisdiction of Congress to determine what aliens may enter this country and their rights and disabilities while here. Congress has legislated on these subjects, but at no time has it declared that any alien, either lawfully or unlawfully within this country, shall be debarred from access to the courts. On the

contrary, it has expressly provided by the Civil Rights Act, 8 U.S.C.S. § 41, that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, sue and be sued, 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.

Immigration Law > Duties & Rights of Aliens > General Overview

[HN2] One injured as a result of the negligence of another has right of action against that other to recover damages sustained by reason of such injury. That right of action is property. It is the general rule that aliens, other than enemy aliens, who are sui juris and who are not incapacitated by the laws of the place where the action is brought, may maintain suits in the proper courts to vindicate their rights and redress their wrongs.

Immigration Law > Duties & Rights of Aliens > General Overview

[HN3] While an alien is permitted by the government of the United States to remain in the country, he is entitled to the protection of the laws in regard to his rights of person and property.

OPINION BY: [1] HOLLY**

OPINION

[*577] HOLLY, District Judge.

Plaintiff sues to recover for personal injuries resulting from the alleged negligence of the defendant. Defendant set up two defenses, first, it denied the negligence charged in the complaint, and, secondly, it charged that the plaintiff was an alien whose entry into the United States was surreptitious, that he had not presented himself at any legal port of entry, or at any consular office or make application for an immigration visa, that no immigration visa was ever issued to him, that at the time of his entry he was likely to become a public charge, that he is unlawfully within this country, is subject to deportation, and therefore "is not entitled to bring any suit in the courts of the United States. * * *" Plaintiff has moved to strike this defense.

The position of the defendant is that if an alien, citizen of a friendly country, is unlawfully in the United

States he may be despoiled of his property, contracts with him may be breached, that he may be unlawfully assaulted and injured, and that he is without redress, except as the authorities may choose to prosecute criminally any one who, in his dealing with the alien, has violated [**2] some criminal law. I cannot agree with this contention.

[HN1] It is within the exclusive jurisdiction of Congress to determine what aliens may enter this country and their rights and disabilities while here. Congress has legislated on these subjects, but at no time has it declared that any alien, either lawfully or unlawfully within this country, shall be debarred from access to the courts. On the contrary, it has expressly provided (Civil Rights Act, U.S.C. title 8, § 41 [8 U.S.C.A. § 41]) that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, sue and be sued, 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. This act was a constitutional exercise of the power of Congress to enact appropriate legislation for the enforcement of the provisions of the *Fourteenth Amendment*. *Gibson v. Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075.

[HN2] One injured as a result of the negligence of another has right of action against that other to recover damages sustained by reason of such injury. That right of action [**3] is property. Kent's Commentaries (Comstock Ed. 2) 473; *Chicago, B. & Q.R.R. Co. v. Dunn*, 52 Ill. 260, 264, 4 Am.Rep. 606. It is the general rule that aliens, other than enemy aliens, who are sui juris and who are not incapacitated by the laws of the place where the action is brought, may maintain suits in the proper courts to vindicate their rights and redress their wrongs. *Taylor v. Carpenter* (C.C.Mass.) 23 Fed.Cas.No. 13,785, p. 744, *Janusis v. Long*, 284 Mass. 403, 188 N.E. 228, *Silosberg v. N.Y. Life Ins. Co.*, 244 N.Y. 482, 155 N.E. 749, *Lew You Ying v. Kay*, 174 Wash. 83, 24 P.(2d) 596.

[HN3] While an alien is permitted by the government of the United States to remain in the country, he is entitled to the protection of the laws in regard to his rights of person and property. *Fong Yue Ting v. United States*, 149 U.S. 698, 724, 13 S.Ct. 1016, 37 L.Ed. 905. He is entitled to the benefits of the *Fourteenth Amendment*, *Anton v. Van Winkle* (D.C.) 297 F. 340,

Colyer v. Skeffington (D.C.) 265 F. 17, including the right to earn a living by following the ordinary occupations of life, *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255.

Congress, had it seen fit so to do, might have [**4] provided that an alien making an illegal entry into the country should be denied all civil rights, and the protection of the *Fourteenth* and *Fifth Amendments*. Congress has not so acted. It was content to make an illegal entry a mere misdemeanor punishable by imprisonment for a period not to exceed one year, or a fine of not more than \$1,000, or both fine and imprisonment (U.S.C. title 8, § 180 (a) (8 U.S.C.A. § 180(a)). It is not for the court to add to these penalties by depriving him of his property, in this case the right to recover damages for the injury inflicted by defendant.

Counsel for the defendant argue that the case of an alien who has entered the [*578] country illegally is analogous to that of a foreign corporation doing business in a state without having received a license so to do. The argument does not impress me. Each state has a right to prescribe the terms upon which a foreign corporation may do business within its borders. The various states have passed laws regulating the admission of foreign

corporations, and provided that such a corporation doing business in that state without having qualified could not maintain an action in its courts. Congress [**5] has not so provided as to aliens who have entered illegally, and no case has been called to my attention in which it is held, in the absence of a statute to that effect, that a foreign corporation which had not qualified could be denied the right to maintain an action for the enforcement of its rights.

Defendant cites the case of *Coules v. Pharris*, 212 Wis. 558, 250 N.W. 404, in which an alien who had entered the country illegally was denied the right to maintain an action to recover wages earned by him. I cannot agree with the reasoning of that case. On the other hand in *Janusis v. Long*, 284 Mass. 403, 188 N.E. 228, such an alien was permitted to sue and recover judgment for personal injuries sustained by him as a result of defendant's negligence. To the same effect, is *Rodney v. Interborough Co.*, 149 Misc. 271, 267 N.Y.S. 86. I am in agreement with the doctrine of these cases.

The motion to strike the second defense will be allowed. An order will be entered accordingly on Thursday, December 24, 1936, at 10 a.m.

APPENDIX 34



**MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD, ET AL. v. ZENITH RADIO
CORP. ET AL.**

No. 83-2004

SUPREME COURT OF THE UNITED STATES

*475 U.S. 574; 106 S. Ct. 1348; 89 L. Ed. 2d 538; 1986 U.S. LEXIS 38; 54 U.S.L.W.
4319; 1986-1 Trade Cas. (CCH) P67,004; 4 Fed. R. Serv. 3d (Callaghan) 368*

November 12, 1985, Argued

March 26, 1986, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DISPOSITION: *723 F.2d 238*, reversed and remanded.

DECISION:

Evidence of alleged predatory pricing conspiracy by Japanese television manufacturers held insufficient to preclude summary judgment dismissing antitrust action.

SUMMARY:

American manufacturers of consumer electronic products, principally television sets, brought suit against a group of their Japanese competitors in the United States District Court for the Eastern District of Pennsylvania, alleging that these competitors had violated 1 and 2 of the Sherman Act (*15 USCS 1, 2*), 2(a) of the Robinson-Patman Act (*15 USCS 13(a)*), and other federal statutes. This lawsuit claimed that the Japanese companies had conspired since the 1950's to drive domestic firms from the American market, by maintaining artificially high prices for these products in Japan while selling them at a loss in the United States. In a series of decisions, the District Court excluded the bulk of the evidence on which the American companies had

relied. Finally, the District Court granted the Japanese companies' motion for summary judgment dismissing the Sherman Act and Robinson-Patman Act claims, stating that it found no significant probative evidence that the Japanese companies had entered into an agreement or acted in concert with respect to exports in any way that could have injured the American firms (*513 F Supp 1100*). The United States Court of Appeals for the Third Circuit reversed and remanded for further proceedings, overturning the District Court's evidentiary rulings and determining that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out domestic competitors, funded by excess profits obtained in the Japanese market. Pointing in part to evidence of an agreement among the Japanese companies and their government to set minimum export prices, of the companies' common practice of undercutting the minimum prices through rebate schemes which they concealed from the governments of both countries, and of a further agreement among the companies to limit the number of their American distributors, the Court of Appeals concluded that there was direct evidence of at least some kinds of concerted action by the companies, and that precedents restricting the inference of conspiracy from purely circumstantial evidence of conscious parallel conduct were therefore not dispositive in this case (*723 F2d 238*).

On certiorari, the United States Supreme Court reversed and remanded the case for further proceedings.

475 U.S. 574, *; 106 S. Ct. 1348, **;
89 L. Ed. 2d 538, ***; 1986 U.S. LEXIS 38

In an opinion by Powell, J., joined by Burger, Ch. J., and Marshall, Rehnquist, and O'Connor, JJ., it was held that the Court of Appeals had applied improper standards in evaluating the summary judgment, in that (1) the "direct evidence of concert of action" on which the Court of Appeals relied, consisting of evidence of other combinations among the Japanese companies, had little if any relevance to the alleged predatory pricing conspiracy, since a conspiracy to raise profits in one market did not tend to show a conspiracy to sustain losses in another and the remaining combinations showed a tendency to raise prices; and (2) the Court of Appeals had failed to consider the absence of a plausible motive for the Japanese companies to engage in such a conspiracy, which involved substantial profit losses and showed little likelihood of success.

White, J., joined by Brennan, Blackmun, and Stevens, JJ., dissented, expressing the view (1) that the Court of Appeals had relied on the evidence of combinations other than the alleged predatory pricing conspiracy not to support a finding of antitrust injury to the American companies, but simply and correctly as direct evidence of concert of action among the Japanese companies distinguishing this case from traditional "conscious parallelism" cases, and (2) that the Court of Appeals was not required to engage in academic discussions about the likelihood of predatory pricing, but properly determined that expert testimony presented by the American companies was sufficient to create a genuine factual issue regarding long-term, below-cost sales by the Japanese companies.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

APPEAL §1267

APPEAL §1750

RESTRAINTS OF TRADE, MONOPOLIES, AND
UNFAIR TRADE PRACTICES §10

SUMMARY JUDGMENT AND JUDGMENT ON
PLEADINGS §6

predatory pricing conspiracy -- irrelevant evidence
and absence of motive --

Headnote:[1A][1B][1C]

In an action by American manufacturers of consumer electronic products which accuse their Japanese competitors of a conspiracy to monopolize the American market through predatory pricing, in violation of 1 and 2 of the Sherman Act (15 USCS 1, 2) and 2(a) of the Robinson-Patman Act (15 USCS 13(a)), a federal Court of Appeals applies improper standards in overturning a summary judgment entered by a federal District Court in favor of the Japanese companies on these claims, where (1) the "direct evidence of concert of action" on which the Court of Appeals relies, consisting of evidence of other combinations among the Japanese companies to raise prices in Japan, fix minimum export prices, and limit the number of distributors of their products in the American market, has little if any relevance to the alleged predatory pricing conspiracy, since a conspiracy to raise profits in one market does not tend to show a conspiracy to sustain losses in another and the remaining combinations show a tendency to raise prices; and (2) the Court of Appeals fails to consider the absence of a plausible motive for the Japanese companies to engage in such a conspiracy, which involves substantial profit losses and shows little likelihood of success; on remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find the existence of such a conspiracy. (White, Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

[***LEdHN2]

APPEAL §1087.5

certiorari -- point not raised in petition

Headnote:[2A][2B]

The United States Supreme Court will not review a Court of Appeals decision, which reversed a summary judgment dismissing claims under a federal statute, where these claims are not mentioned in the questions presented in the petition for certiorari and have not been independently argued by the parties.

[***LEdHN3]

INTERNATIONAL LAW §6

RESTRAINTS OF TRADE, MONOPOLIES, AND
UNFAIR TRADE PRACTICES §21

acts in foreign countries -- application of antitrust

laws --

Headnote:[3A][3B]

American manufacturers cannot recover antitrust damages from Japanese competitors based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies; the Sherman Act (*15 USCS 1 et seq.*) reaches conduct outside the borders of the United States, but only when the conduct has an effect on American commerce.

[***LEdHN4]

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67

parties entitled to damages -- lack of injury from antitrust violation --

Headnote:[4]

American manufacturers cannot recover antitrust damages from Japanese competitors for any conspiracy by the latter to charge higher than competitive prices in the American market, as by setting minimum export prices in cooperation with the Japanese government, since, although such conduct would violate the Sherman Act (*15 USCS 1-7*), it could not injure the American companies; similarly, the American companies cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output, such as the agreement among the Japanese companies limiting the number of their American distributors, since such restrictions, though harmful to competition, actually benefit competitors by making supracompetitive pricing more attractive.

[***LEdHN5]

EVIDENCE §979

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10

antitrust conspiracy -- direct evidence -- actions not creating claim for damages --

Headnote:[5]

Since neither the alleged supracompetitive pricing by

Japanese manufacturers in Japan, as conduct not affecting American commerce, nor the agreements among these manufacturers to limit the number of their distributors in the United States and to set minimum export prices, as conduct not injurious to their American competitors, can by themselves give competing American manufacturers a cognizable claim against the Japanese companies for antitrust damages, it is improper to treat evidence of these alleged conspiracies as direct evidence of a further conspiracy that injured the American companies.

[***LEdHN6]

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67

parties entitled to damages -- cognizable injury --

Headnote:[6A][6B]

However one decides to describe the contours of an alleged conspiracy to violate the antitrust laws, parties suing for damages therefrom must show that the conspiracy caused them an injury for which the antitrust laws provide relief.

[***LEdHN7]

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67

predatory pricing -- requisites for antitrust injury --

Headnote:[7A][7B]

In an action under 1 of the Sherman Act (*15 USCS 1*) by American manufacturers who allege a predatory pricing conspiracy by their Japanese competitors, the American companies have not suffered an antitrust injury unless the Japanese companies have conspired to drive them out of the relevant markets by (1) pricing below the level necessary to sell their products, or (2) pricing below some appropriate measure of cost; they may not complain of conspiracies that set maximum prices above market levels, or that set minimum prices at any level. (White, Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

[***LEdHN8]

475 U.S. 574, *; 106 S. Ct. 1348, **;
89 L. Ed. 2d 538, ***LEdHN8; 1986 U.S. LEXIS 38

RESTRAINTS OF TRADE, MONOPOLIES, AND
UNFAIR TRADE PRACTICES §10

SUMMARY JUDGMENT AND JUDGMENT ON
PLEADINGS §4

antitrust conspiracy claim --

Headnote:[8]

In order for an action by American manufacturers, charging their Japanese competitors with a conspiracy to violate 1 and 2 of the Sherman Act (*15 USCS 1, 2*) and 2(a) of the Robinson-Patman Act (*15 USCS 13(a)*), to survive the Japanese companies' motion for summary judgment, the American companies must establish that there is a genuine issue of material fact as to whether the Japanese companies entered into an illegal conspiracy that caused the American companies to suffer a cognizable injury.

[***LEdHN9]

RESTRAINTS OF TRADE, MONOPOLIES, AND
UNFAIR TRADE PRACTICES §10

SUMMARY JUDGMENT AND JUDGMENT ON
PLEADINGS §4

antitrust conspiracy claim -- showing of injury --

Headnote:[9]

In order for an action by American manufacturers, charging their Japanese competitors with various conspiracies in restraint of trade, to survive the Japanese companies' motion for summary judgment, the American companies must not only show a conspiracy in violation of the antitrust laws, but must also show an injury to them resulting from the illegal conduct; since, except for an alleged conspiracy to monopolize the American market through predatory pricing, the alleged conspiracies could not have caused the American companies to suffer an antitrust injury because they actually tended to benefit them, evidence of these "other" conspiracies cannot defeat the motion for summary judgment unless, in context, it raises a genuine issue concerning the existence of a predatory pricing conspiracy.

[***LEdHN10]

SUMMARY JUDGMENT AND JUDGMENT ON
PLEADINGS §4

genuine issue of material fact --

Headnote:[10]

When a party moving for summary judgment has carried its burden under *Rule 56(c) of the Federal Rules of Civil Procedure* of demonstrating the absence of a genuine issue of material fact, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts; the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial; where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

[***LEdHN11]

RESTRAINTS OF TRADE, MONOPOLIES, AND
UNFAIR TRADE PRACTICES §10

RESTRAINTS OF TRADE, MONOPOLIES, AND
UNFAIR TRADE PRACTICES §36

SUMMARY JUDGMENT AND JUDGMENT ON
PLEADINGS §4

antitrust conspiracy claim -- implausibility --

Headnote:[11A][11B]

In an action by American manufacturers charging their Japanese competitors with a conspiracy to monopolize the American market through predatory pricing, if the factual context renders the claim implausible--if the claim is one that simply makes no economic sense--then the American companies must come forward with more persuasive evidence to support their claim than would otherwise be necessary in order to defeat the Japanese companies' motion for summary judgment; the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of *Rule 56(e) of the Federal Rules of Civil Procedure*, since, if the Japanese companies had no rational economic motive to conspire, and their conduct is consistent with other, equally plausible explanations such as competitive behavior or an attempt to raise prices, the conduct does not give rise to an inference of conspiracy. (White, Brennan, Blackmun, and Stevens, JJ., dissented from this

holding.)

[***LEdHN12]

SUMMARY JUDGMENT AND JUDGMENT ON
PLEADINGS §5

inferences in favor of nonmoving party --

Headnote:[12]

On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

[***LEdHN13]

EVIDENCE §394

RESTRAINTS OF TRADE, MONOPOLIES, AND
UNFAIR TRADE PRACTICES §10

inferences as to conspiracy -- antitrust case --

Headnote:[13]

Antitrust law limits the range of permissible inferences from ambiguous evidence in a case under 1 of the Sherman Act (*15 USCS 1*); thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

[***LEdHN14]

RESTRAINTS OF TRADE, MONOPOLIES, AND
UNFAIR TRADE PRACTICES §10

SUMMARY JUDGMENT AND JUDGMENT ON
PLEADINGS §4

TRIAL §197

antitrust conspiracy -- possibility of independent action --

Headnote:[14]

In order to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of 1 of the Sherman Act (*15 USCS 1*) must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

[***LEdHN15]

RESTRAINTS OF TRADE, MONOPOLIES, AND
UNFAIR TRADE PRACTICES §10

SUMMARY JUDGMENT AND JUDGMENT ON
PLEADINGS §4

antitrust conspiracy claim -- competing inferences --

Headnote:[15]

In an action by American manufacturers charging their Japanese competitors with a conspiracy to monopolize the American market through predatory pricing, the American companies, in order to defeat a motion for summary judgment, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed them.

SYLLABUS

Petitioners are 21 Japanese corporations or Japanese-controlled American corporations that manufacture and/or sell "consumer electronic products" (CEPs) (primarily television sets). Respondents are American corporations that manufacture and sell television sets. In 1974, respondents brought an action in Federal District Court, alleging that petitioners, over a 20-year period, had illegally conspired to drive American firms from the American CEP market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. Respondents claim that various portions of this scheme violated, *inter alia*, §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, and § 73 of the Wilson Tariff Act. After several years of discovery, petitioners moved for summary judgment on all claims. The District Court then directed the parties to file statements listing all the documentary evidence that would be offered if the case went to trial. After the statements were filed, the court found the bulk of the evidence on which respondents relied was inadmissible, that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy, and that any inference of conspiracy was unreasonable. Summary judgment therefore was granted in petitioners' favor. The Court of Appeals reversed. After determining that much

of the evidence excluded by the District Court was admissible, the Court of Appeals held that the District Court erred in granting a summary judgment and that there was both direct and circumstantial evidence of a conspiracy. Based on inferences drawn from the evidence, the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market.

Held: The Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. Pp. 582-598.

(a) The "direct evidence" on which the Court of Appeals relied -- petitioners' alleged supracompetitive pricing in Japan, the "five company rule" by which each Japanese producer was permitted to sell only to five American distributors, and the "check prices" (minimum prices fixed by agreement with the Japanese Government for CEPs exported to the United States) insofar as they established minimum prices in the United States -- cannot by itself give respondents a cognizable claim against petitioners for antitrust damages. Pp. 582-583.

(b) To survive petitioners' motion for a summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. If the factual context renders respondents' claims implausible, *i. e.*, claims that make no economic sense, respondents must offer more persuasive evidence to support their claims than would otherwise be necessary. To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Thus, respondents here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. Pp. 585-588.

(c) Predatory pricing conspiracies are by nature speculative. They require the conspirators to sustain substantial losses in order to recover uncertain gains. The alleged conspiracy is therefore implausible. Moreover, the record discloses that the alleged conspiracy has not succeeded in over two decades of operation. This is

strong evidence that the conspiracy does not in fact exist. The possibility that petitioners have obtained supracompetitive profits in the Japanese market does not alter this assessment. Pp. 588-593.

(d) Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect. There is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage conspiracies. Pp. 593-595.

(e) The Court of Appeals erred in two respects: the "direct evidence" on which it relied had little, if any, relevance to the alleged predatory pricing conspiracy, and the court failed to consider the absence of a plausible motive to engage in predatory pricing. In the absence of any rational motive to conspire, neither petitioners' pricing practices, their conduct in the Japanese market, nor their agreements respecting prices and distributions in the American market sufficed to create a "genuine issue for trial" under *Federal Rule of Civil Procedure 56(e)*. On remand, the Court of Appeals may consider whether there is other, unambiguous evidence of the alleged conspiracy. Pp. 595-598.

COUNSEL: Donald J. Zoeller argued the cause for petitioners. With him on the briefs were John L. Altieri, Jr., Harold G. Levison, Peter J. Gartland, James S. Morris, Kevin R. Keating, Charles F. Schirmeister, Ira M. Millstein, A. Paul Victor, Jeffrey L. Kessler, Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Donald F. Turner, and Henry T. Reath.

Charles F. Rule argued the cause pro hac vice for the United States as amicus curiae urging reversal. With him on the brief were Acting Solicitor General Wallace, Charles S. Stark, Robert B. Nicholson, Edward T. Hand, Richard P. Larm, Abraham D. Sofaer, and Elizabeth M. Teel.

Edwin P. Rome argued the cause for respondents. With him on the brief were William H. Roberts, Arnold I. Kalman, Philip J. Curtis, and John Borst, Jr. *

* Briefs of amici curiae urging reversal were filed for the Government of Japan by Stephen M. Shapiro; and for the American Association of Exporters and Importers et al. by Robert Herzstein and Hadrian R. Katz.

475 U.S. 574, *; 106 S. Ct. 1348, **;
89 L. Ed. 2d 538, ***; 1986 U.S. LEXIS 38

Briefs of amici curiae were filed for the Government of Australia et al. by Mark R. Joelson and Joseph P. Griffin; and for the Semiconductor Industry Association by Joseph R. Creighton.

JUDGES: POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, post, p. 598.

OPINION BY: POWELL

OPINION

[*576] [***546] [**1350] JUSTICE POWELL delivered the opinion of the Court.

[***LEdHR1A] [1A]This case requires that we again consider the standard district courts must apply [**1351] when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. *In re Japanese Electronic Products* [*577] *Antitrust Litigation*, 723 F.2d 238 (CA3 1983); 513 F.Supp. 1100 (ED Pa. 1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that constitute the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

A

Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs) -- for the most part, television sets. Petitioners include both Japanese manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974,¹ claiming that petitioners had illegally conspired to drive [*578] American firms from the American CEP market. According to respondents, the gist of this conspiracy [***547] was a "scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States." 723 F.2d, at 251 (quoting respondents' preliminary pretrial memorandum). These "low prices" were allegedly at levels that produced substantial losses for petitioners. 513 F.Supp., at 1125. The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. Respondents claimed that various portions of this scheme violated §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, § 73 of the Wilson Tariff Act, and the Antidumping Act of 1916.

1 NUE had filed its complaint four years earlier, in the District Court for the District of New Jersey. Zenith's complaint was filed separately in 1974, in the Eastern District of Pennsylvania. The two cases were consolidated in the Eastern District of Pennsylvania in 1974.

After several years of detailed discovery, petitioners filed motions for summary judgment on all claims against them. The District Court directed the parties to file, with preclusive effect, "Final Pretrial Statements" listing all the documentary evidence that would be offered if the case proceeded to trial. Respondents filed such a statement, and petitioners responded with a series of motions challenging the admissibility of respondents' evidence. In three detailed opinions, the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible.²

475 U.S. 574, *578; 106 S. Ct. 1348, **1351;
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2 The inadmissible evidence included various government records and reports, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1125 (ED Pa. 1980), business documents offered pursuant to various hearsay exceptions, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1190 (ED Pa. 1980), and a large portion of the expert testimony that respondents proposed to introduce. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp. 1313 (ED Pa. 1981).

[**1352] [***LEdHR2A] [2A]The District Court then turned to petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged [*579] conspiracy. At bottom, the court found, respondents' claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. 513 F.Supp., at 1125-1127. After reviewing the evidence both by category and *in toto*, the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under § 1 of the Sherman Act and the Wilson Tariff Act. Because the Sherman Act § 2 claims, which alleged that petitioners had combined to monopolize the American CEP market, were functionally indistinguishable from the § 1 claims, the court dismissed them also. Finally, the court found that the Robinson-Patman Act claims depended on the same supposed conspiracy as the Sherman Act claims. Since the court had found no genuine issue of fact as to the conspiracy, [***548] it entered judgment in petitioners' favor on those claims as well.³

3 The District Court ruled separately that petitioners were entitled to summary judgment on respondents' claims under the Antidumping Act of 1916. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1190 (ED Pa. 1980).

Respondents appealed this ruling, and the Court of Appeals reversed in a separate opinion issued the same day as the opinion concerning respondents' other claims. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 319 (CA3 1983).

[***LEdHR2B] [2B]Petitioners ask us to review the Court of Appeals' Antidumping Act decision along with its decision on the rest of this mammoth case. The Antidumping Act claims were not, however, mentioned in the questions presented in the petition for certiorari, and they have not been independently argued by the parties. See this Court's Rule 21.1(a). We therefore decline the invitation to review the Court of Appeals' decision on those claims.

[*580] B

The Court of Appeals for the Third Circuit reversed. 4 The court began by examining the District Court's evidentiary rulings, and determined that much of the evidence excluded by the District Court was in fact admissible. 723 F.2d, at 260-303. These evidentiary rulings are not before us. See 471 U.S. 1002 (1985) (limiting grant of certiorari).

4 As to 3 of the 24 defendants, the Court of Appeals affirmed the entry of summary judgment. Petitioners are the 21 defendants who remain in the case.

On the merits, and based on the newly enlarged record, the court found that the District Court's summary judgment decision was improper. The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," 723 F.2d, at 304, but it found that "the legal problem . . . is different" when "there is direct evidence of concert of action." *Ibid.* Here, the court concluded, "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." *Id.*, at 304-305. Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. *Id.*, at 305. Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

475 U.S. 574, *580; 106 S. Ct. 1348, **1352;
89 L. Ed. 2d 538, ***LEdHR2B; 1986 U.S. LEXIS 38

1. The Japanese market for CEPs was characterized by oligopolistic behavior, [**1353] with a small number of producers meeting regularly and exchanging information on price and other matters. *Id.*, at 307. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese Government imposed significant barriers to entry. *Ibid.*

2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to [*581] operate at something approaching full capacity in order to make a profit. *Ibid.*

3. Petitioners' plant capacity exceeded the needs of the Japanese market. *Ibid.*

4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. *Id.*, at 310. The parties refer to these prices as the "check [***549] prices," and to the agreements that require them as the "check price agreements."

5. Petitioners agreed to distribute their products in the United States according to a "five company rule": each Japanese producer was permitted to sell only to five American distributors. *Ibid.*

6. Petitioners undercut their own check prices by a variety of rebate schemes. *Id.*, at 311. Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check-price agreements.

Based on inferences from the foregoing conclusions, 5 the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial.

5 In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales "generally were at prices

which produced losses, often as high as twenty-five percent on sales." 723 F.2d, at 311. The court did not identify any direct evidence of below-cost pricing; nor did it place particularly heavy reliance on this aspect of the expert evidence. See n. 19, *infra*.

[*582] The court found it unnecessary to address petitioners' claim that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign. The claim, in essence, was that because MITI required petitioners to enter into the check-price agreements, liability could not be premised on those agreements. The court concluded that this case did not present any issue of sovereign compulsion, because the check-price agreements were being used as "evidence of a low export price conspiracy" and not as an independent basis for finding antitrust liability. The court also believed it was unclear that the check prices in fact were mandated by the Japanese Government, notwithstanding a statement to that effect by MITI itself. *Id.*, at 315.

[***LEdHR1B] [1B]We granted certiorari to determine (i) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment, and (ii) whether petitioners could be held liable under the antitrust laws for a conspiracy in part compelled by a foreign sovereign. 471 U.S. 1002 (1985). We reverse on the first issue, but do not reach the second.

II

[***LEdHR3A] [3A] [***LEdHR4] [4] [***LEdHR5] [5]We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. [**1354] *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (CA2 1945) (L. Hand, J.); 1 P. [***550] Areeda & D. Turner, *Antitrust Law* para. 236d (1978).⁶ Nor can respondents recover damages for [*583] any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), but it could not injure respondents: as

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89 L. Ed. 2d 538, ***550; 1986 U.S. LEXIS 38

petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489 (1977). Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supra-competitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents. See 723 F.2d, at 304-305.

[***LEdHR3B] [3B]

6 The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). The effect on which respondents rely is the artificially depressed level of prices for CEPs in the United States.

Petitioners' alleged cartelization of the Japanese market could not have caused that effect over a period of some two decades. Once petitioners decided, as respondents allege, to reduce output and raise prices in the Japanese market, they had the option of either producing fewer goods or selling more goods in other markets. The most plausible conclusion is that petitioners chose the latter option because it would be more profitable than the former. That choice does not flow from the cartelization of the Japanese market. On the contrary, were the Japanese market perfectly competitive petitioners would still have to choose whether to sell goods overseas, and would still presumably make that

choice based on their profit expectations. For this reason, respondents' theory of recovery depends on proof of the asserted price-cutting conspiracy in this country.

[*584] [***LEdHR6A] [6A] Respondents nevertheless argue that these supposed conspiracies, if not themselves grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that is cognizable: a conspiracy to monopolize the American market by means of pricing below the market level.⁷ The thrust of respondents' [***551] argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting [**1355] monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

[***LEdHR6B] [6B]

7 Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy -- whether there is one conspiracy or several -- respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 538-540 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489 (1977); see also Note, Antitrust Standing, Antitrust Injury, and the Per Se Standard, 93 *Yale L.J.* 1309 (1984). That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury.

[***LEdHR7A] [7A] The Court of Appeals found that respondents' allegation of a horizontal conspiracy to

engage in predatory pricing,⁸ [*585] if proved,⁹ would be a *per se* violation of § 1 of the Sherman Act. 723 F.2d, at 306. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

8 Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in. *E. g.*, *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 238 U. S. App. D. C. 309, 331-336, 740 F.2d 980, 1002-1007 (1984), cert. denied, 470 U.S. 1005 (1985). In such cases, "predatory pricing" means pricing below some appropriate measure of cost. *E. g.*, *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-235 (CA1 1983); see *Utah Pipe Co. v. Continental Baking Co.*, 386 U.S. 685, 698, 701, 702, n. 14 (1967).

***LEdHR7B] [7B] There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level.

9 We do not consider whether recovery should ever be available on a theory such as respondents' when the pricing in question is above some measure of incremental cost. See generally

Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 709-718 (1975) (discussing cost-based test for use in § 2 cases). As a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one. See Part IV-A, *infra*.

III

LEdHR8] [8] ***LEdHR9] [9] To survive petitioners' motion for summary judgment,¹⁰ respondents must establish that there [552] is a genuine issue of material [*586] fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. *Fed. Rule Civ. Proc. 56(e)*; ¹¹*First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968). This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. *Supra*, at 582-583. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," [***1356] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S., at 489, because they actually tended to benefit respondents. *Supra*, at 582-583. Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

10 Respondents argued before the District Court that petitioners had failed to carry their initial burden under *Federal Rule of Civil Procedure 56(c)* of demonstrating the absence of a genuine issue of material fact. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Cf. *Catrett v. Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 756 F.2d 181, cert. granted, 474 U.S. 944 (1985). That issue was resolved in petitioners' favor, and is not before us.

11 *Rule 56(e)* provides, in relevant part:

"When a motion for summary judgment is

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89 L. Ed. 2d 538, ***552; 1986 U.S. LEXIS 38

made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[**LEdHR10] [10]Second, the issue of fact must be "genuine." *Fed. Rules Civ. Proc. 56(c), (e)*. When the moving party has carried its burden under *Rule 56(c)*,¹² its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *DeLuca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943 (1950); 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2727 (1983); Clark, *Special Problems* [*587] in *Drafting and Interpreting Procedural Codes and Rules*, 3 Vand. L. Rev. 493, 504-505 (1950). Cf. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial*." *Fed. Rule Civ. Proc. 56(e)* (emphasis added). See also Advisory Committee Note to 1963 Amendment of *Fed. Rule Civ. Proc. 56(e)*, 28 U. S. C. App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Cities Service, supra*, at 289.

12 See n. 10, *supra*.

[**LEdHR11A] [11A]It follows from these settled principles that if the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Cities Service* is instructive. [**553] The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U.S., at 278-279. The Court acknowledged that, in isolation, the defendant's refusal to

deal might well have sufficed to create a triable issue. *Id.*, at 277. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.*, at 280.

[**LEdHR12] [12] [**LEdHR13] [13] [**LEdHR14] [14] [**LEdHR15] [15]Respondents correctly note that "[on] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 [*588] U.S. 654, 655 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764. See also *Cities Service, supra*, at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that [**1357] could not have harmed respondents. See *Cities Service, supra*, at 280.

Petitioners argue that these principles apply fully to this case. According to petitioners, the alleged conspiracy is one that is economically irrational and practically infeasible. Consequently, petitioners contend, they had no motive to engage in the alleged predatory pricing conspiracy; indeed, they had a strong motive *not* to conspire in the manner respondents allege. Petitioners argue that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed. This argument requires us to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.

IV

A

475 U.S. 574, *588; 106 S. Ct. 1348, **1357;
89 L. Ed. 2d 538, ***LEdHR15; 1986 U.S. LEXIS 38

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment [***554] to be rational, [*589] the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

"Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses." R. Bork, *The Antitrust Paradox* 145 (1978).

See also McGee, *Predatory Pricing Revisited*, 23 J. Law & Econ. 289, 295-297 (1980). As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[the] predator must make a substantial investment with no assurance that it will pay off." Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful. See, e. g., Bork, *supra*, at 149-155; Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 699 (1975); Easterbrook, *supra*; Koller, *The Myth of Predatory Pricing -- An Empirical Study*, [*590] 4 Antitrust Law & Econ. Rev. 105 (1971); McGee, *Predatory Price Cutting: The Standard Oil (N. J.) Case*, 1 J. Law & Econ. 137 (1958);

McGee, *Predatory Pricing Revisited*, 23 J. Law & Econ., at 292-294. See also *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 88 (CA2 1981) ("[Nowhere] in the recent outpouring of literature on the subject do commentators suggest that [predatory] pricing is either common or likely to increase"), cert. denied, 455 U.S. 943 (1982).

These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to [**1358] charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to [***555] destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits [*591] what they earlier gave up in below-cost prices. See *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, *supra*, at 89; Areeda & Turner, 88 Harv. L. Rev., at 698. Two decades after their conspiracy is alleged to have commenced,¹³ petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of petitioners. 6 App. to Brief for Appellant in No. 81-2331 (CA3), pp. 2575a-2576a. Moreover, those shares, which together approximate 40%

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of sales, did not decline appreciably during the 1970's. *Ibid.* Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. 723 F.2d, at 316. ¹⁴ Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing -- that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant. ¹⁵

13 NUE's complaint alleges that petitioners' conspiracy began as early as 1960; the starting date used in Zenith's complaint is 1953. NUE Complaint para. 52; Zenith Complaint para. 39.

14 During the same period, the number of American firms manufacturing television sets declined from 19 to 13. 5 App. to Brief for Appellant in No. 81-2331 (CA3), p. 1961a. This decline continued a trend that began at least by 1960, when petitioners' sales in the United States market were negligible. *Ibid.* See Zenith Complaint paras. 35, 37.

15 Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time. Judge Easterbrook, commenting on this case in a law review article, offers the following sensible assessment:

"The plaintiffs [in this case] maintain that for the last fifteen years or more at least ten Japanese manufacturers have sold TV sets at less than cost in order to drive United States firms out of business. Such conduct cannot possibly produce profits by harming competition, however. If the Japanese firms drive some United States firms out of business, they could not recoup. Fifteen years of losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the defendants should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from

other foreign firms (Korea and many other nations make TV sets), and from defendants themselves. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition." Easterbrook, *The Limits of Antitrust*, 63 *Texas L. Rev.* 1, 26-27 (1984) (footnotes omitted).

[*592] [**1359] The [***556] alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel. ¹⁶ Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial -- as would likely be necessary [*593] in order to drive out the competition ¹⁷ -- petitioners would most likely have to sustain their cartel for years simply to break even.

16 The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

17 The predators' losses must actually *increase* as the conspiracy nears its objective: the greater

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89 L. Ed. 2d 538, ***556; 1986 U.S. LEXIS 38

the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.

Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and -- as indicated above -- the facts actually are to the contrary: RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.¹⁸

18 The same is true of any supposed excess production capacity that petitioners may have possessed. The existence of plant capacity that exceeds domestic demand does tend to establish the ability to sell products abroad. It does not, however, provide a motive for selling at prices lower than necessary to obtain sales; nor does it explain why petitioners would be willing to *lose* money in the United States market without some reasonable prospect of recouping their investment.

B

[***557] In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. *Monsanto*, 465 U.S., at 762-764. [*594] Respondents, petitioners' competitors, seek to hold petitioners liable for [**1360] damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five company rule) whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to

prove a combination to suppress prices.¹⁹ But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto, supra*, at 763-764. "[We] must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (CA1 1983).

19 Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp., at 1356-1363. Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. See 723 F.2d, at 277-282. We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors, discussed in Part IV-A, *supra*, that suggest that such conduct is irrational.

In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained, *supra*, at 588-593, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the [*595] gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-detering: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators. See Easterbrook, *The Limits of Antitrust*, 63 *Texas L. Rev.* 1, 26 (1984). Finally, unlike predatory pricing by a

475 U.S. 574, *595; 106 S. Ct. 1348, **1360;
89 L. Ed. 2d 538, ***557; 1986 U.S. LEXIS 38

single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the [***558] evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.

V

[**LEdHR1C] [1C]As our discussion in Part IV-A shows, petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains. Cf. *Cities Service*, 391 U.S., at 279. The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." 723 F.2d, at 304. The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

[**1361] The "direct evidence" on which the court relied was evidence of *other* combinations, not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' [*596] claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the check-price agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market -- the so-called five company rule. That practice may have facilitated a horizontal territorial allocation, see *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), but its natural effect would be to raise market prices rather than reduce them.²⁰ Evidence that tends to support any of these collateral conspiracies thus says little, if anything,

about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

20 The Court of Appeals correctly reasoned that the five company rule might tend to insulate petitioners from competition with each other. 723 F.2d, at 306. But this effect is irrelevant to a conspiracy to price predatorily. Petitioners have no incentive to underprice each other if they already are pricing *below* the level at which they could sell their goods. The far more plausible inference from a customer allocation agreement such as the five company rule is that petitioners were conspiring to *raise* prices, by limiting their ability to take sales away from each other. Respondents -- petitioners' competitors -- suffer no harm from a conspiracy to raise prices. *Supra*, at 582-583. Moreover, it seems very unlikely that the five company rule had any significant effect of any kind, since the "rule" permitted petitioners to sell to their American subsidiaries, and did not limit the number of distributors to which the subsidiaries could resell. 513 F.Supp., at 1190.

[**LEdHR11B] [11B]That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of *Rule 56(e)*. Lack of motive bears on the range of permissible conclusions that might be drawn [***559] from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, [*597] the conduct does not give rise to an inference of conspiracy. See *Cities Service, supra*, at 278-280. Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that

475 U.S. 574, *597; 106 S. Ct. 1348, **1361;
89 L. Ed. 2d 538, ***559; 1986 U.S. LEXIS 38

remains far distant more than two decades after the conspiracy's birth. Even had they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial." *Fed. Rule Civ. Proc. 56(e)*.²¹

21 We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.*, at 763-764. See *supra*, at 588.

[**1362] On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "[tend] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically [*598] senseless conspiracy. *Monsanto*, 465 U.S., at 764. In the absence of such evidence, there is no "genuine issue for trial" under *Rule 56(e)*, and petitioners are entitled to have summary judgment reinstated.

VI

Our decision makes it unnecessary to reach the sovereign compulsion issue. The heart of petitioners' argument on that issue is that MITI, an agency of the Government of Japan, required petitioners to fix minimum prices for export to the United States, and that petitioners are therefore immune from antitrust liability for any scheme of which those minimum prices were an integral part. As we discussed in *Part II, supra*, respondents could not have suffered a cognizable injury from any action that raised prices in the American CEP market. If liable at all, petitioners are liable for conduct that is distinct from the check-price agreements. The sovereign compulsion [***560] question that both petitioners and the Solicitor General urge us to decide thus is not presented here.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

DISSENT BY: WHITE

DISSENT

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). After surveying the massive record, including very [*599] significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§ 1 and 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that [**1363] "[where] the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"

475 U.S. 574, *599; 106 S. Ct. 1348, **1363;
89 L. Ed. 2d 538, ***560; 1986 U.S. LEXIS 38

Ante, at 587 (quoting *Cities Service, supra*, at 289). I also agree that "[on] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Ante*, at 587 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following critique of the Third Circuit's opinion:

"[The] Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, [***561] which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude [*600] that petitioners' price-cutting behavior was independent and not conspiratorial." *Ante*, at 581.

In a similar vein, the Court summarizes *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible . . ." *Ante*, at 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury.¹ These holdings in no way undermine [*601] the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

¹ The Court adequately summarizes the quite fact-specific holding in *Cities Service*. *Ante*, at 587.

In *Monsanto*, the Court held that a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is not, *standing alone*, sufficient to create a jury question. 465 U.S., at 763-764. To understand this holding, it is important to realize that under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), it is

permissible for a manufacturer to announce retail prices in advance and terminate those who fail to comply, but that under *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), it is impermissible for the manufacturer and its distributors to agree on the price at which the distributors will sell the goods. Thus, a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is lawful under *Colgate*, unless the termination is pursuant to a shared understanding between the manufacturer and its distributors respecting enforcement of a resale price maintenance scheme. *Monsanto* holds that to establish liability under *Dr. Miles*, more is needed than evidence of behavior that is consistent with a distributor's exercise of its prerogatives under *Colgate*. Thus, "[there] must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U.S., at 764. *Monsanto* does not hold that if a terminated dealer produces some further evidence of conspiracy beyond the bare fact of postcomplaint termination, the judge hearing a motion for summary judgment should balance all the evidence pointing toward conspiracy against all the evidence pointing toward independent action.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

II

In defining what respondents must show in order to recover, the Court makes assumptions [**1364] that invade the factfinder's province. The Court states with very little discussion that respondents can recover under § 1 of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or [***562] (ii) pricing below some appropriate measure of cost." *Ante*, at 585, n. 8. This statement is premised on the assumption that "[an]

475 U.S. 574, *601; 106 S. Ct. 1348, **1364;
89 L. Ed. 2d 538, ***562; 1986 U.S. LEXIS 38

agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." *Ibid.* In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court.

The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below "the level necessary to sell their products or . . . some appropriate measure of cost." *Ibid.* First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasing [*602] exports to this country resulted in depressed prices here, which harmed respondents.² Second, the DePodwin Report indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.³

2 Dr. DePodwin summarizes his view of the harm caused by Japanese cartelization as follows:

"When we consider the injuries inflicted on United States producers, we must again look at the Japanese television manufacturers' export agreement as part of a generally collusive scheme embracing the Japanese domestic market as well. This scheme increased the supply of television receivers to the United States market while restricting supply in the Japanese market. If Japanese manufacturers had competed in both domestic and export markets, they would have sold more in the domestic market and less in the United States. A greater proportion of Japanese production capacity would have been devoted to domestic sales. Domestic prices would have been lower and export prices would have been higher. The size of the price differential between domestic and export markets would have

diminished practically to the vanishing point. Consequently, competition among Japanese producers in both markets would have resulted in reducing exports to the United States and United States prices would have risen. In addition, investment by the United States industry would have increased. As it was, however, the influx of sets at depressed prices cut the rates of return on television receiver production facilities in the United States to so low a level as to make such investment uneconomic.

"We can therefore conclude that the American manufacturers of television receivers would have made larger sales at higher prices in the absence of the Japanese cartel agreements. Thus, the collusive behavior of Japanese television manufacturers resulted in a very severe injury to those American television manufacturers, particularly to National Union Electric Corporation, which produced a preponderance of television sets with screen sizes of nineteen inches and lower, especially those in the lower range of prices." 5 App. to Brief for Appellants in No. 81-2331 (CA3), pp. 1629a-1630a.

3 The DePodwin Report has this, among other things, to say in summarizing the harm to respondents caused by the five company rule, exchange of production data, price coordination, and other allegedly anti-competitive practices of petitioners:

"The impact of Japanese anti-competitive practices on United States manufacturers is evident when one considers the nature of competition. When a market is fully competitive, firms pit their resources against one another in an attempt to secure the business of individual customers. However, when firms collude, they violate a basic tenet of competitive behavior, i. e., that they act independently. United States firms were confronted with Japanese competitors who collusively were seeking to destroy their established customer relationships. Each Japanese company had targeted customers which it could service with reasonable assurance that its fellow Japanese cartel members would not become involved. But just as importantly, each Japanese firm would be assured that what was

475 U.S. 574, *602; 106 S. Ct. 1348, **1364;
89 L. Ed. 2d 538, ***562; 1986 U.S. LEXIS 38

already a low price level for Japanese television receivers in the United States market would not be further depressed by the actions of its Japanese associates.

"The result was a phenomenal growth in exports, particularly to the United States. Concurrently, Japanese manufacturers, and the defendants in particular, made large investments in new plant and equipment and expanded production capacity. It is obvious, therefore, that the effect of the Japanese cartel's concerted actions was to generate a larger volume of investment in the Japanese television industry than would otherwise have been the case. This added capacity both enabled and encouraged the Japanese to penetrate the United States market more deeply than they would have had they competed lawfully." *Id.*, at 1628a-1629a.

For a more complete statement of DePodwin's explanation of how the alleged cartel operated, and the harms it caused respondents, see *id.*, at 1609a-1642a. This material is summarized in a chart found *id.*, at 1633a.

[*603] [**1365] The [***563] DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents.⁴

4 In holding that Parts IV and V of the Report had been improperly excluded, the Court of Appeals said:

"The trial court found that DePodwin did not use economic expertise in reaching the opinion that the defendants participated in a Japanese television cartel. 505 *F.Supp.* at 1342-46. We have examined the excluded portions of Parts IV and V in light of the admitted portions, and we conclude that this finding is clearly erroneous. As a result, the court also held the opinions to be unhelpful to the factfinder. What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing

the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs' conspiracy theory. Considering the complexity of the economic issues involved, it simply cannot be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue." *In re Japanese Electronics Products Antitrust Litigation*, 723 *F.2d* 238, 280 (1983).

The Court of Appeals had similar views about Parts VI and VII.

[*604] The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth. See, *e. g.*, *ante*, at 595. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, see Part III-B, *infra*, I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

III

In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [The] 'direct evidence' on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory [***564] pricing." *Ante*, at 595. The Court's position is without substance.

A

The first claim of error is that the Third Circuit treated evidence regarding price fixing in Japan and the so-called five company rule and check prices as "'direct evidence' of a conspiracy that injured respondents." *Ante*, at 583 (citing *In re Japanese Electronics Products Antitrust Litigation*, 723 *F.2d* 238, 304-305 (1983)). The passage from the Third [*605] Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. *Ibid.* The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that

475 U.S. 574, *605; 106 S. Ct. 1348, **1365;
89 L. Ed. 2d 538, ***564; 1986 U.S. LEXIS 38

evidence regarding the five company rule could support a finding of antitrust injury to respondents.⁵ The Third [**1366] Circuit twice specifically noted that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. *Id.*, at 306, 310-311. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five company rule was not a simple price-raising device:

"[A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *Id.*, at 311.

I see nothing erroneous in this reasoning.

5 I use the Third Circuit's analysis of the five company rule by way of example; the court did an equally careful analysis of the parts the cartel activity in Japan and the check prices could have played in an actionable conspiracy. See generally *id.*, at 303-311.

In discussing the five-company rule, I do not mean to imply any conclusion on the validity of petitioners' sovereign compulsion defense. Since the Court does not reach this issue, I see no need of my addressing it.

B

The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But [*606] the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by

petitioners. *Ibid.* The Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct [***565] is irrational." *Ante*, at 594, n. 19. But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales. I agree with the Third Circuit that the answer to this question is "yes."

It is misleading for the Court to state that the Court of Appeals "did not disturb the District Court's analysis of the factors that substantially undermine the probative value of [evidence in the DePodwin Report respecting below-cost sales]." *Ibid.* The Third Circuit held that the exclusion of the portion of the DePodwin Report regarding below-cost pricing was erroneous because "the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely." 723 F.2d, at 282. In short, the Third Circuit found DePodwin's affidavit sufficient to create a genuine factual issue regarding the correctness of his conclusion that petitioners sold below cost over a long period of time. Having made this determination, the court saw no need -- nor do I -- to address the District Court's analysis point by point. The District Court's criticisms of DePodwin's [*607] methods are arguments that a factfinder should consider.

IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm [**1367] the judgment below and remand this case for trial.

REFERENCES

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24 Federal Procedure, L Ed, *Monopolies and Restraints of Trade* 54:254, 54:255

24 *Am Jur Trials* 1, *Defending Antitrust Lawsuits*

475 U.S. 574, *607; 106 S. Ct. 1348, **1367;
89 L. Ed. 2d 538, ***565; 1986 U.S. LEXIS 38

15 USCS 1, 2, 13(a); USCS, Federal Rules of Civil Procedure, Rule 56

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Index to Annotations, Restraints of Trade and

Monopolies; Summary Judgment

Annotation References:

Reviewability of federal court's denial of motion for summary judgment. *17 L Ed 2d 886* .

Extraterritorial application of federal antitrust laws to acts occurring in foreign commerce. *40 ALR Fed 343*.

APPENDIX 35



MEMORIAL HOSPITAL ET AL. v. MARICOPA COUNTY ET AL.

No. 72-847

SUPREME COURT OF THE UNITED STATES

415 U.S. 250; 94 S. Ct. 1076; 39 L. Ed. 2d 306; 1974 U.S. LEXIS 101

November 6, 1973, Argued
February 26, 1974, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF ARIZONA.

DISPOSITION: 108 Ariz. 373, 498 P. 2d 461, reversed and remanded.

SUMMARY:

An indigent who had resided in Maricopa County, Arizona for approximately 1 month was admitted to a nonprofit, private community hospital for treatment of a respiratory illness. Thereafter, pursuant to an Arizona statute governing medical care for indigents, the private hospital requested that the indigent be transferred to the county's public hospital facility and that the county reimburse the private hospital for care and services provided to the indigent. Relying on an Arizona statute requiring an indigent to be a resident of a county for the preceding 12 months in order to be eligible for free nonemergency medical care, the county refused both requests because the indigent did not meet the residency requirement. An action was then instituted to determine whether the county was obligated to provide medical care for the indigent or was liable to the private hospital for the costs it sustained in treating the indigent. Although the trial court held that the residency requirement was violative of the *equal protection clause of the Fourteenth Amendment*, the Arizona Supreme Court reversed and upheld the constitutionality of the challenged requirement (108 Ariz 373, 498 P2d 461).

On appeal, the United States Supreme Court reversed and remanded. In an opinion by Marshall, J., expressing the view of five members of the court, it was held that the statute was repugnant to the *equal protection clause of the Fourteenth Amendment* since the durational residency requirement created an invidious classification that impinged on the right of interstate travel by denying newcomers basic necessities of life, the state failing to show a compelling governmental interest in such a classification nor demonstrating that in pursuing legitimate objectives, it had chosen means which did not unnecessarily impinge on constitutionally protected rights.

Burger, Ch. J., and Blackmun, J., concurred in the result.

Douglas, J., filing a separate opinion, expressed the view that the critical issue in the case concerned invidious discrimination against the poor rather than the right to interstate travel.

Rehnquist, J., dissenting, expressed the view that (1) the legal question involved was simply whether Arizona acted arbitrarily in enacting the durational residency requirement, (2) any impediment placed on the right to travel by the requirement was negligible, and (3) the requirement did not involve an urgent need for the necessities of life or a benefit funded from current revenues to which the indigent might well have contributed.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement --

Headnote:[1A][1B]

A state statute requiring a year's residence in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care at the county's expense is repugnant to the *equal protection clause*, since such a durational residency requirement creates an invidious classification that impinges on the right of interstate travel by denying basic necessities of life to newcomers where the state fails to show a compelling state interest in such a classification nor demonstrates that in pursuing legitimate objectives, it has chosen means which do not unnecessarily impinge on constitutionally protected interests.

[***LEdHN2]

APPEAL AND ERROR §383

probable jurisdiction -- conflict between federal and state decisions --

Headnote:[2]

The United States Supreme Court will note probable jurisdiction to resolve a conflict in decisions between a federal court and the highest court of a state regarding the constitutionality under the *Fourteenth Amendment's equal protection clause* of a state statutory residency requirement which is a condition of an indigent's receiving free medical care.

[***LEdHN3]

CONSTITUTIONAL LAW §348.5

classification -- residency requirement -- medical care for indigent --

Headnote:[3]

In determining whether a durational residency provision which is a condition to an indigent's receiving

free medical care from a county under a state statute violates the *equal protection clause of the Fourteenth Amendment*, the United States Supreme Court will first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.

[***LEdHN4]

CONSTITUTIONAL LAW §348.5

residency requirement -- medical care for indigent -- compelling state interest --

Headnote:[4]

In order to be constitutional, a state statute's durational residency requirement, which is a condition to an indigent's receiving free medical care from a county, must be justified by a compelling state interest.

[***LEdHN5]

STATES §7

unconstitutional activities by counties -- directed by state --

Headnote:[5]

A county, at the direction of a state, cannot accomplish what would be unconstitutional if done directly by the state.

[***LEdHN6]

APPEAL AND ERROR §709

construction of state statute --

Headnote:[6]

It is not the function of the United States Supreme Court to construe a state statute contrary to the construction given it by the highest court of a state.

[***LEdHN7]

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement --

Headnote:[7]

415 U.S. 250, *, 94 S. Ct. 1076, **;
39 L. Ed. 2d 306, ***LEdHN7; 1974 U.S. LEXIS 101

In determining whether a state statute's durational residency requirement, which is a condition to an indigent's receiving free medical care from a county, is violative of the equal protection clause of the *Fourteenth Amendment*, the fact that such residency requirement is inapplicable to the provision of emergency medical care, does not save the challenged requirement from constitutional doubt.

[***LEdHN8]

CONSTITUTIONAL LAW §326

right to interstate travel -- rights of new residents of state --

Headnote:[8]

The right of interstate travel insures new residents the same right to vital government benefits and privileges in the states to which they migrate as are enjoyed by other residents.

[***LEdHN9]

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement -- compelling state interest --

Headnote:[9]

Since a state statute's durational residency requirement, which is a condition to an indigent's receiving free medical care from a county, penalizes indigents for exercising their right to migrate and to settle in that state, the classification created by the residency requirement, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional under the *equal protection clause of the Fourteenth Amendment*.

[***LEdHN10]

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement -- effect of saving tax money --

Headnote:[10]

In order to justify a state statute's durational residency requirement, which is a condition to an

indigent's receiving free medical care from a county, the state must do more than show that denying free medical care to new residents saves money, since a state may not protect the public fisc by drawing an invidious distinction between classes of its citizens; the conservation of the taxpayers' purse is not a sufficient state interest to sustain a durational residency requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another state.

[***LEdHN11]

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement -- purpose --

Headnote:[11]

To the extent that the purpose of a state statute's durational residency requirement, which is a condition to an indigent's receiving free medical care from a county, is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible under the *equal protection clause of the Fourteenth Amendment*; nor is such a requirement valid to the extent that its purpose is to deter those indigents who take up residence in order to utilize the county's medical facilities, since a state may no more try to fence out those indigents who seek better public medical facilities than it may try to fence out indigents generally.

[***LEdHN12]

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement -- protection of long-time residents --

Headnote:[12]

A state statute's requirement of durational residency in a county as a condition to an indigent's receiving medical care at the county's expense, cannot be justified on the ground that a county should be able to protect long-time taxpaying residents from dilution of the quality of county medical services due to an influx of newcomers, since the *equal protection clause of the Fourteenth Amendment* prohibits an apportionment of state services according to the past tax contributions of its citizens.

[***LEdHN13]

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement --
public support for hospital --

Headnote:[13]

A state statute's requirement of durational residency in a county as a condition to an indigent's receiving medical care at the county's expense, cannot be justified on the ground that the requirement is necessary to obtain public support for a county hospital on the theory that otherwise the voters would feel that low income families would be attracted by the hospital facility, since a state may not employ an invidious discrimination to sustain the political viability of its programs.

[***LEdHN14]

CIVIL RIGHTS §6

construction of segregated schools -- invalidity of
congressional authorization of funds --

Headnote:[14]

Although Congress might induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools, that purpose would not sustain such a scheme.

[***LEdHN15]

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement --
administrative objectives --

Headnote:[15]

A state statute's requirement of durational residency in a county as a condition to an indigent's receiving medical care at the county's expense, such requirement being challenged as violating the *equal protection clause of the Fourteenth Amendment*, cannot be justified on the ground that it serves administrative objectives by providing a convenient rule of thumb to determine bona fide residence, since such a test is overbroad to accomplish its avowed purpose, and a mere residency requirement would accomplish the objective of limiting the use of public medical facilities to bona fide residents

of the county without sweeping within its prohibitions those bona fide residents who had moved into the state within the qualifying period.

[***LEdHN16]

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement --
prevention of fraud --

Headnote:[16]

Although a state has a valid interest in preventing fraud by any applicant for medical care, a state statute's requirement of durational residency as a condition to an indigent's receiving medical care at the county's expense, such requirement being challenged as violating the *equal protection clause of the Fourteenth Amendment*, cannot be justified on the ground that it is a useful tool for preventing fraud since the residency provision is not suited to that purpose in that an indigent who is intent on committing fraud, could as easily swear to having been a resident of the county for the preceding year as to being one currently, and since there is no need for the state to rely on the durational residency requirement as a safeguard against fraud when other mechanisms which would serve that purpose are available which would have a less drastic impact on constitutionally protected interests.

[***LEdHN17]

CONSTITUTIONAL LAW §348.5

medical care for indigent -- residency requirement --
budget predictability --

Headnote:[17]

A state statute's requirement of durational residency in a county as a condition to an indigent's receiving medical care at the county's expense, such requirement being challenged as violating the *equal protection clause of the Fourteenth Amendment*, cannot be justified on the ground that the waiting period is necessary for budget predictability, since it is a difficult and speculative task to estimate how many indigent newcomers to the county will require medical care during their first year in the jurisdiction, and since the irrelevance of the residency requirement for budgetary planning is indicated by the fact that emergency medical care for all newcomers and

415 U.S. 250, *; 94 S. Ct. 1076, **;
39 L. Ed. 2d 306, ***; 1974 U.S. LEXIS 101

more complete medical care for the aged is provided at public expense regardless of whether the patient has been a resident of the county for the preceding year.

SYLLABUS

This is an appeal from a decision of the Arizona Supreme Court upholding the constitutionality of an Arizona statute requiring a year's residence in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care at the county's expense. *Held*: The durational residence requirement, in violation of the *Equal Protection Clause*, creates an "invidious classification" that impinges on the right of interstate travel by denying newcomers "basic necessities of life." *Shapiro v. Thompson*, 394 U.S. 618. Pp. 253-270.

(a) Such a requirement, since it operates to penalize indigents for exercising their constitutional right of interstate migration, must be justified by a compelling state interest. *Shapiro v. Thompson*, *supra*; *Dunn v. Blumstein*, 405 U.S. 330. Pp. 253-262.

(b) The State has not shown that the durational residence requirement is "legitimately defensible" in that it furthers a compelling state interest, and none of the purposes asserted as justification for the requirement -- fiscal savings, inhibiting migration of indigents generally, deterring indigents from taking up residence in the county solely to utilize the medical facilities, protection of longtime residents who have contributed to the community particularly by paying taxes, maintaining public support of the county hospital, administrative convenience in determining bona fide residence, prevention of fraud, and budget predictability -- satisfies the State's burden of justification and insures that the State, in pursuing its asserted objectives, has chosen means that do not unnecessarily impinge on constitutionally protected interests. Pp. 262-269.

COUNSEL: Mary M. Schroeder argued the cause for appellants. With her on the brief was John P. Frank.

William J. Carter III argued the cause and filed a brief for appellees. *

* Sandor O. Shuch and John J. Relihan filed a brief for the Legal Aid Society of Maricopa County as amicus curiae urging reversal.

JUDGES: Marshall, J., delivered the opinion of the

Court, in which Brennan, Stewart, White, and Powell, JJ., joined. Burger, C. J., and Blackmun, J., concurred in the result. Douglas, J., filed a separate opinion, post, p. 270. Rehnquist, J., filed a dissenting opinion, post, p. 277.

OPINION BY: MARSHALL

OPINION

[*251] [***311] [**1078] MR. JUSTICE MARSHALL delivered the opinion of the Court.

[***LEdHR1A] [1A]

This case presents an appeal from a decision of the Arizona Supreme Court upholding an Arizona statute requiring a year's residence in a county as a condition to receiving nonemergency hospitalization or medical care at the county's expense. The constitutional question presented is whether this durational residence requirement is repugnant to the *Equal Protection Clause* as applied by this Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[**1079] I

Appellant Henry Evaro is an indigent suffering from a chronic asthmatic and bronchial illness. In early June 1971, Mr. Evaro moved from New Mexico to Phoenix in Maricopa County, Arizona. On July 8, 1971, Evaro had a severe respiratory attack and was sent by his attending physician to appellant Memorial Hospital, a nonprofit private community hospital. Pursuant to the Arizona statute governing medical care for indigents, Memorial notified the Maricopa County Board of Supervisors that it had in its charge an indigent who might qualify for county care and requested that Evaro be transferred to the County's public hospital facility. In accordance with the approved procedures, Memorial also [*252] claimed reimbursement from the County in the amount of \$ 1,202.60, for the care and services it had provided Evaro.

Under Arizona law, the individual county governments are charged with the mandatory duty of providing necessary hospital and medical care for their indigent sick.¹ But the statute requires an indigent to have been a resident of the County for the preceding 12 months in order to be eligible for free nonemergency medical care.² Maricopa County refused to admit Evaro to its public hospital or to reimburse Memorial solely because Evaro had not been a resident of the County for

the preceding year. Appellees do not dispute that Evaro is an indigent or that he is a bona fide resident of Maricopa County.³

1 *Ariz. Rev. Stat. Ann. § 11-291* (Supp. 1973-1974).

2 *Section 11-297A* (Supp. 1973-1974) provides in relevant part that:

"Except in emergency cases when immediate hospitalization or medical care is necessary for the preservation of life or limb no person shall be provided hospitalization, medical care or outpatient relief under the provisions of this article without first filing with a member of the board of supervisors of the county in which he resides a statement in writing, subscribed and sworn to under oath, that he is an indigent as shall be defined by rules and regulations of the state department of economic security, an unemployable totally dependent upon the state or county government for financial support, or an employable of sworn low income without sufficient funds to provide himself necessary hospitalization and medical care, *and that he has been a resident of the county for the preceding twelve months.*" (Emphasis added.)

3 Thus, the question of the rights of transients to medical care is not presented by this case.

This action was instituted to determine whether appellee Maricopa County was obligated to provide medical care for Evaro or was liable to Memorial for the costs it incurred because of the County's refusal to do so. This controversy necessarily requires an adjudication [***312] of the constitutionality of the Arizona durational [*253] residence requirement for providing free medical care to indigents.

[***LEdHR2] [2]The trial court held the residence requirement unconstitutional as a violation of the *Equal Protection Clause*. In a prior three-judge federal court suit against Pinal County, Arizona, the District Court had also declared the residence requirement unconstitutional and had enjoined its future application in Pinal County. *Valenciano v. Bateman*, 323 *F.Supp.* 600 (*Ariz.* 1971).⁴ Nonetheless, the Arizona Supreme Court upheld the challenged requirement. To resolve this conflict between a federal court and the highest court of the State, [**1080] we noted probable jurisdiction, 410 *U.S.* 981

(1973), and we reverse the judgment of the Arizona Supreme Court.

4 Arizona's intermediate appellate court had also declared the durational residence requirement unconstitutional in *Board of Supervisors, Pima County v. Robinson*, 10 *Ariz. App.* 238, 457 *P. 2d* 951 (1969), but its decision was vacated as moot by the Arizona Supreme Court. 105 *Ariz.* 280, 463 *P. 2d* 536 (1970).

An Arizona one-year durational residence requirement for care at state mental health facilities was declared unconstitutional in *Vaughan v. Bower*, 313 *F.Supp.* 37 (*Ariz.*), *aff'd*, 400 *U.S.* 884 (1970). See n. 11, *infra*.

A Florida one-year durational residence requirement for medical care at public expense was found unconstitutional in *Arnold v. Halifax Hospital Dist.*, 314 *F.Supp.* 277 (*MD Fla.* 1970), and *Crapps v. Duval County Hospital Auth.*, 314 *F.Supp.* 181 (*MD Fla.* 1970).

II

[***LEdHR3] [3]In determining whether the challenged durational residence provision violates the *Equal Protection Clause*, we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.⁵ The Court considered similar durational [*254] residence requirements for welfare assistance in *Shapiro v. Thompson*, 394 *U.S.* 618 (1969). The Court observed that those requirements created two classes of needy residents "indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class [was] granted and second class [was] denied welfare aid upon which may depend the ability . . . to obtain the very means to subsist -- food, shelter, and other necessities of life." *Id.*, at 627. The Court found that because this classification impinged on the constitutionally guaranteed right of interstate travel, it was to be judged by the standard of whether it promoted a compelling state interest.⁶ Finding such an interest wanting, the Court held the challenged residence requirements unconstitutional.

415 U.S. 250, *254; 94 S. Ct. 1076, **1080;
39 L. Ed. 2d 306, ***LEdHR3; 1974 U.S. LEXIS 101

5 E. g., *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 173 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972).

6 394 U.S., at 634. See also *id.*, at 642-644 (STEWART, J., concurring).

[***LEdHR4] [4]Appellees argue that the residence requirement before us is distinguishable from those in *Shapiro*, while appellants urge that *Shapiro* is controlling. We agree with appellants that Arizona's durational residence requirement for free medical care must be justified by a compelling state interest and that, such interests [***313] being lacking, the requirement is unconstitutional.

III

The right of interstate travel has repeatedly been recognized as a basic constitutional freedom.⁷ Whatever [*255] its ultimate scope, however, the right to travel was involved in only a limited sense in *Shapiro*. The Court was there concerned only with the right to migrate, "with intent to settle and abide"⁸ or, as the Court put it, "to migrate, resettle, find a new job, and start a new life." *Id.*, at 629. Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement. But, in *Shapiro*, the Court explained that "the residence requirement and the one-year waiting-period requirement [**1081] are distinct and independent prerequisites" for assistance and only the latter was held to be unconstitutional. *Id.*, at 636. Later, in invalidating a durational residence requirement for voter registration on the basis of *Shapiro*, we cautioned that our decision was not intended to "cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements." *Dunn v. Blumstein*, 405 U.S. 330, 342 n. 13 (1972).

⁷ *Dunn v. Blumstein*, *supra*; *Shapiro v. Thompson*, 394 U.S. 618 (1969); see *Wyman v. Lopez*, 404 U.S. 1055 (1972); *Oregon v. Mitchell*, 400 U.S. 112, 237 (1970) (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.), 285-286 (STEWART, J., concurring and dissenting, with whom BURGER, C. J., and BLACKMUN, J., joined); *Wyman v. Bowens*, 397 U.S. 49 (1970); *United States v. Guest*, 383 U.S. 745, 757-759 (1966); cf. *Griffin v. Breckenridge*, 403 U.S. 88, 105-106 (1971); *Demiragh v. DeVos*, 476 F.2d 403 (CA2 1973). See generally Z. Chafee, Three Human Rights in the Constitution

of 1787, pp. 171-181, 187 *et seq.* (1956).

8 See *King v. New Rochelle Municipal Housing Auth.*, 442 F.2d 646, 648 n. 5 (CA2 1971); *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807, 811 (CA1 1970); *Wellford v. Battaglia*, 343 F.Supp. 143, 147 (Del. 1972); cf. *Truax v. Raich*, 239 U.S. 33, 39 (1915); Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N. Y. U. L. Rev. 989, 1012 (1969).

IV

[***LEdHR5] [5] [***LEdHR6] [6]The appellees argue that the instant county residence requirement is distinguishable from the state residence requirements in *Shapiro*, in that the former penalizes, not interstate, but rather intrastate, travel. Even were we to draw a constitutional distinction between interstate and [*256] intrastate travel, a question we do not now consider, such a distinction would not support the judgment of the Arizona court in the case before us. Appellant Evaro has been effectively penalized for his interstate migration, although this was accomplished under the guise of a county residence requirement. What would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction. The Arizona Supreme Court could have construed the waiting-period requirements to apply to intrastate but not interstate migrants;⁹ but it did [***314] not do so, and "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974).

9 Appellees argue that the County should be able to apply a durational residence requirement to preserve the quality of services provided its longtime residents because of their ties to the community and the previous contributions they have made, particularly through past payment of taxes. It would seem inconsistent to argue that the residence requirement should be construed to bar longtime Arizona residents, even if unconstitutional as applied to persons migrating into Maricopa County from outside the State. Surely, longtime residents of neighboring counties have more ties with Maricopa County and equity in its public programs, as through past payment of state taxes, than do migrants from distant States. This "contributory" rationale is

415 U.S. 250, *256; 94 S. Ct. 1076, **1081;
39 L. Ed. 2d 306, ***314; 1974 U.S. LEXIS 101

discussed, *infra*, at 266.

V

Although any durational residence requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such a requirement to be *per se* unconstitutional. The Court's holding was conditioned, 394 U.S., at 638 n. 21, by the caveat that some "waiting-period or residence requirements . . . may not be penalties upon the exercise of the constitutional right of interstate travel." The amount of impact required to give [*257] rise to the compelling-state-interest test was not made clear.¹⁰ The Court spoke of the requisite impact in two ways. First, we considered whether the waiting period would deter migration:

"An indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute." *Id.*, at 629.

Second, the Court considered the extent to which the residence requirement served to *penalize* the exercise of the right to travel.

¹⁰ For a discussion of the problems posed by this ambiguity, see Judge Coffin's perceptive opinion in *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807 (CA1 1970).

The appellees here argue that the denial of nonemergency medical care, unlike the denial of welfare, is not apt to deter migration; but it is far from clear that the challenged statute is unlikely to have any deterrent effect. A person afflicted with a serious respiratory ailment, particularly an indigent [**1082] whose efforts to provide a living for his family have been inhibited by his incapacitating illness, might well think of migrating to the clean dry air of Arizona, where relief from his disease could also bring relief from unemployment and poverty. But he may hesitate if he knows that he must make the move without the possibility of falling back on the State for medical care should his condition still plague him or grow more severe during his first year of residence.

It is true, as appellees argue, that there is no evidence in the record before us that anyone was actually deterred

from traveling by the challenged restriction. But neither did the majority in *Shapiro* find any reason "to dispute the 'evidence that few welfare recipients have in fact been [*258] deterred [from moving] by residence requirements.' Indeed, none of the litigants had themselves been deterred." *Dunn*, 405 U.S., at 340 (citations omitted). An attempt to distinguish *Shapiro* by urging that a durational residence requirement for voter registration did not deter travel, was found to be a "fundamental misunderstanding of the law" in [***315] *Dunn*, *supra*, at 339-340:¹¹

"*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to *penalize* the exercise of that right [to travel]" (Emphasis in original; footnote omitted.)

¹¹ In *Vaughan v. Bower*, 313 F.Supp. 37 (Ariz.), *aff'd*, 400 U.S. 884 (1970), a federal court struck down an Arizona law permitting the director of a state mental hospital to return to the State of his prior residence, any indigent patient who had not been a resident of Arizona for the year preceding his civil commitment. It is doubtful that the challenged law could have had any deterrent effect on migration, since few people consider being committed to a mental hospital when they decide to take up residence in a new State. See also *Affeldt v. Whitcomb*, 319 F.Supp. 69 (ND Ind. 1970), *aff'd*, 405 U.S. 1034 (1972).

Thus, *Shapiro* and *Dunn* stand for the proposition that a classification which "operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration," must be justified by a compelling state interest. *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.) (emphasis added). Although any durational residence requirement imposes a potential cost on migration, the Court in *Shapiro* cautioned that some [*259] "waiting-period[s] . . . may not be penalties." 394 U.S., at 638 n. 21. In *Dunn v. Blumstein*, *supra*, the Court found that the denial of the franchise, "a fundamental political right," *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), was a penalty requiring application of the compelling-state-interest test. In *Shapiro*, the Court

415 U.S. 250, *259; 94 S. Ct. 1076, **1082;
39 L. Ed. 2d 306, ***315; 1974 U.S. LEXIS 101

found denial of the basic "necessities of life" to be a penalty. Nonetheless, the Court has declined to strike down state statutes requiring one year of residence as a condition to lower tuition at state institutions of higher education.¹²

12 See *Vlandis v. Kline*, 412 U.S. 441, 452-453, n. 9 (1973).

Whatever the ultimate parameters of the *Shapiro* penalty analysis,¹³ it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance.¹⁴ And, governmental [**1083] privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. See, e. g., *Shapiro, supra*; *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340-342 (1969). It would be odd, indeed, to find that the State of Arizona was required to afford Evaro welfare assistance to [***316] keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the [*260] medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.¹⁵

13 For example, the *Shapiro* Court cautioned that it meant to "imply no view of the validity of waiting-period or residence requirements determining eligibility [*inter alia*] to obtain a license to practice a profession, to hunt or fish, and so forth." 394 U.S., at 638 n. 21.

14 Dept. of Health, Education, and Welfare (HEW) Report on Medical Resources Available to Meet the Needs of Public Assistance Recipients, House Committee on Ways and Means, 86th Cong., 2d Sess., 74 (Comm. Print 1961). Similarly, President Nixon has observed: "It is health which is real wealth," said Gandhi, "and not pieces of gold and silver." Health, Message from the President, 92d Cong., 1st Sess., H. R. Doc. No. 92-49, p. 18 (1971). See also materials cited at n. 4, *supra*.

15 Reference to the tuition cases is instructive. The lower courts have contrasted in-state tuition with "necessities of life" in a way that would clearly include medical care in the latter category. The District Court in *Starns v. Malkerson*, 326 F.Supp. 234, 238 (Minn. 1970), *aff'd*, 401 U.S. 985 (1971), quoted with approval from *Kirk v.*

Board of Regents, 273 Cal. App. 2d 430, 440, 78 Cal. Rptr. 260, 266-267 (1969), appeal dismissed, 396 U.S. 554 (1970) (emphasis added):

"While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro* involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children. Thus, the residence requirement in *Shapiro* could cause great suffering and even loss of life. The durational residence requirement for attendance at publicly financed institutions of higher learning [does] not involve similar risks. Nor was petitioner . . . precluded from the benefit of obtaining higher education. Charging higher tuition fees to non-resident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents."

See also Note, The Constitutionality of Nonresident Tuition, 55 Minn. L. Rev. 1139, 1149-1158 (1971). Moreover, in *Vlandis, supra*, the Court observed that "special problems [are] involved in determining the bona fide residence of college students who come from out of State to attend [a] public university . . .," since those students are characteristically transient, 412 U.S., at 452. There is no such ambiguity about whether appellant Evaro is a bona fide resident of Maricopa County.

[**LEdHR7] [7]Nor does the fact that the durational residence requirement is inapplicable to the provision of emergency medical care save the challenged provision from constitutional doubt. As the Arizona Supreme Court observed, appellant "Evaro was an indigent person who required continued medical care for the preservation of his health and well being . . .," even if he did not require immediate emergency care.¹⁶ The State could not deny Evaro care [*261] just because, although gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart

disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.¹⁷

¹⁶ 108 Ariz. 373, 374, 498 P. 2d 461, 462 (emphasis added).

¹⁷ See *Valenciano v. Bateman*, 323 F.Supp. 600, 603 (Ariz. 1971). See generally HEW Report on Medical Resources, *supra*, n. 14, at 73-74; Dept. of HEW, Human Investment Programs: Delivery of Health Services for the Poor (1967).

Finally, appellees seek to distinguish *Shapiro* as involving a partially federally funded program. Maricopa County has received federal funding for its public hospital¹⁸ but, more importantly, this [**1084] Court has held that whether or not a welfare program is federally funded is irrelevant to the applicability of the [***317] *Shapiro* analysis. *Pease v. Hansen*, 404 U.S. 70 (1971); *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁸ See HEW, Hill-Burton Project Register, July 1, 1947-June 30, 1967. HEW Publication No. (HSM) 72-4011, p. 37. Maricopa County has received over \$ 2 million in Hill-Burton (42 U. S. C. § 291 *et seq.*) funds since 1947.

[***LEdHR8] [8] [***LEdHR9] [9]Not unlike the admonition of the Bible that, "Ye shall have one manner of law, as well for the stranger, as for one of your own country," Leviticus 24:22 (King James Version), the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents. The State of Arizona's durational residence requirement for free medical care penalizes indigents for exercising their right to migrate [*262] to and settle in that State.¹⁹ Accordingly, the classification created by the residence requirement, "unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro*, 394 U.S., at 634. (Emphasis in original.)

¹⁹ Medicaid, the primary federal program for providing medical care to indigents at public expense, does not permit participating States to

apply a durational residence requirement as a condition to eligibility, 42 U. S. C. § 1396a (b)(3), and "this conclusion of a coequal branch of Government is not without significance." *Frontiero v. Richardson*, 411 U.S. 677, 687-688 (1973). The State of Arizona does not participate in the Medicaid program.

VI

We turn now to the question of whether the State has shown that its durational residence requirement is "legitimately defensible,"²⁰ in that it furthers a compelling state interest.²¹ A number of purposes are asserted to be served by the requirement and we must [*263] determine whether these satisfy the appellees' heavy burden of justification, and insure that the State, in pursuing its asserted objectives, has chosen means that do not unnecessarily burden constitutionally protected interests. *NAACP v. Button*, 371 U.S. 415, 438 (1963).

²⁰ Cf. Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1223-1224 (1970); Note, Developments in the Law -- Equal Protection, 82 Harv. L. Rev. 1065, 1076-1077 (1969).

²¹ The Arizona Supreme Court observed that because this case involves a governmental benefit akin to welfare, the "reasonable basis" test of *Dandridge v. Williams*, 397 U.S. 471 (1970), should apply. In upholding a state regulation placing an absolute limit on the amount of welfare assistance to be paid a dependent family regardless of size or actual need, the Court in *Dandridge* found it "enough that the State's action be rationally based and free from invidious discrimination." *Id.*, at 487. The Court later distinguished *Dandridge* in *Graham v. Richardson*, 403 U.S. 365, 376 (1971), where MR. JUSTICE BLACKMUN, writing for the Court, observed that "appellants' attempted reliance on *Dandridge* . . . is also misplaced, since the classification involved in that case [did not impinge] upon a fundamental constitutional right . . ." Strict scrutiny is required here because the challenged classification impinges on the right of interstate travel. Compare *Dandridge*, *supra*, at 484 n. 16, with *Shapiro v. Thompson*, *supra*.

A

415 U.S. 250, *263; 94 S. Ct. 1076, **1084;
39 L. Ed. 2d 306, ***LEdHR9; 1974 U.S. LEXIS 101

The Arizona Supreme Court observed:

"Absent a residence requirement, any indigent sick person . . . could seek admission to [Maricopa County's] hospital, the facilities being the newest and most modern [***318] in the state, and the resultant volume would cause long waiting periods or severe hardship on [the] county if it tried to tax its property owners to support [these] indigent sick" *108 Ariz. 373, 376, 498 P. 2d 461, 464.*

The County thus attempts to sustain the requirement as a necessary means to insure the fiscal integrity of its free [**1085] medical care program by discouraging an influx of indigents, particularly those entering the County for the sole purpose of obtaining the benefits of its hospital facilities.

[**LEdHR10] [10]First, a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens, *Shapiro, supra, at 633*, so appellees must do more than show that denying free medical care to new residents saves money. The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State. See *Rivera v. Dunn, 329 F.Supp. 554 (Conn. 1971)*, *aff'd, 404 U.S. 1054 (1972)*.

[**LEdHR11] [11]Second, to the extent the purpose of the requirement is to inhibit the immigration of indigents generally, [*264] that goal is constitutionally impermissible.²² And, to the extent the purpose is to deter only those indigents who take up residence in the County solely to utilize its new and modern public medical facilities, the requirement at issue is clearly overinclusive. The challenged durational residence requirement treats every indigent, in his first year of residence, as if he came to the jurisdiction solely to obtain free medical care. Such a classification is no more defensible than the waiting period in *Shapiro, supra*, of which the Court said:

"The class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other

purposes with those who come for the sole purpose of collecting higher benefits." *394 U.S., at 631.*

Moreover, "a State may no more try to fence out those indigents who seek [better public medical facilities] than it may try to fence out indigents generally." *Ibid.* An indigent who considers the quality of public hospital facilities in entering the State is no less deserving than one who moves into the State in order to take advantage of its better educational facilities. *Id., at 631-632.*

22 *Shapiro v. Thompson, 394 U.S., at 629.*

It is also useful to look at the other side of the coin -- at who will bear the cost of indigents' illnesses if the County does not provide needed treatment. For those newly arrived residents who do receive at least hospital care, the cost is often borne by private nonprofit hospitals, like appellant Memorial -- many of which are already in precarious financial straits.²³ When absorbed [*265] by private hospitals, the costs of caring for indigents must be passed on to paying patients and "at a rather inconvenient time" -- adding to the already [***319] astronomical costs of hospitalization which bear so heavily on the resources of most Americans.²⁴ The financial pressures under which private nonprofit hospitals operate have already led many of them to turn away patients who cannot pay or to severely limit the number of indigents [**1086] they will admit.²⁵ And, for those indigents who receive no care, the cost is, of course, measured by their own suffering.

23 See Cantor, *The Law and Poor People's Access to Health Care*, 35 *Law & Contemp. Prob.* 901, 909-914 (1970); cf. *Catholic Medical Center v. Rockefeller, 305 F.Supp. 1256 and 1268 (EDNY 1969)*, vacated and remanded, *397 U.S. 820, aff'd on remand, 430 F.2d 1297*, appeal dismissed, *400 U.S. 931 (1970)*.

24 HEW Report on Medical Resources, *supra*, n. 14, at 74. See generally Health, Message from the President, *supra*, n. 14; E. Kennedy, In *Critical Condition: The Crises in America's Health Care* (1973); Hearings on The Health Care Crisis in America before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (1971).

25 Cantor, *supra*, n. 23; See E. Kennedy, *supra*, n. 24, at 78-94; Note, *Working Rules for Assuring Nondiscrimination in Hospital Administration*, 74

415 U.S. 250, *265; 94 S. Ct. 1076, **1086;
39 L. Ed. 2d 306, ***319; 1974 U.S. LEXIS 101

Yale L. J. 151, 156 n. 32 (1964); cf., e. g., *Stanturf v. Sipes*, 447 S. W. 2d 558 (Mo. 1969) (hospital refused treatment to frostbite victim who was unable to pay \$ 25 deposit). See generally HEW Report on Medical Resources, *supra*, n. 14, at 74; Hearings on The Health Care Crisis in America, *supra*, n. 24.

In addition, the County's claimed fiscal savings may well be illusory. The lack of timely medical care could cause a patient's condition to deteriorate to a point where more expensive emergency hospitalization (for which no durational residence requirement applies) is needed. And, the disability that may result from letting an untreated condition deteriorate may well result in the patient and his family becoming a burden on the State's welfare rolls for the duration of his emergency care, or permanently, if his capacity to work is impaired.²⁶

26 "Lack of timely hospitalization and medical care for those unable to pay has been considered an economic liability to the patient, the hospital, and to the community in which these citizens might otherwise be self-supporting" HEW Report on Medical Resources, *supra*, n. 14, at 73; Comment, Indigents, Hospital Admissions and Equal Protection, 5 U. Mich. J. L. Reform 502, 515-516 (1972); cf. Battistella & Southby, Crisis in American Medicine, *The Lancet* 581, 582 (Mar. 16, 1968).

[*266] [***LEdHR12] [12]The appellees also argue that eliminating the durational residence requirement would dilute the quality of services provided to longtime residents by fostering an influx of newcomers and thus requiring the County's limited public health resources to serve an expanded pool of recipients. Appellees assert that the County should be able to protect its longtime residents because of their contributions to the community, particularly through the past payment of taxes. We rejected this "contributory" rationale both in *Shapiro* and in *Vlandis v. Kline*, 412 U.S. 441, 450 n. 6 (1973), by observing:

"Such reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it

would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The *Equal Protection Clause* prohibits such an apportionment of state services." *Shapiro*, 394 U.S., at 632-633 (footnote omitted).

[***LEdHR13] [13] [***LEdHR14] [14]Appellees express a concern that the threat of an influx of indigents would discourage "the development of modern and effective [public medical] facilities." It is [***320] suggested that whether or not the durational residence requirement actually deters migration, the voters think that it protects them from low income families' being attracted by the county hospital; hence, the requirement is necessary for public support of that medical facility. A State may not employ an invidious discrimination to sustain the political viability of its programs. As we [*267] observed in *Shapiro*, *supra*, at 641, "perhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools," but that purpose would not sustain such a scheme. See also *Cole v. Housing Authority of the City of Newport*, 435 F.2d 807, 812-813 (CA1 1970).

B

[***LEdHR15] [15]The appellees also argue that the challenged statute serves some administrative objectives. They claim that the one-year waiting period is a convenient rule of thumb to determine bona fide residence. Besides not being factually defensible, this test is certainly overbroad to accomplish its avowed purpose. A mere residence requirement would accomplish the objective of limiting the [**1087] use of public medical facilities to bona fide residents of the County without sweeping within its prohibitions those bona fide residents who had moved into the State within the qualifying period. Less drastic means, which do not impinge on the right of interstate travel, are available and employed²⁷ to ascertain an individual's true intentions, without exacting a protracted waiting period which may have dire economic and health consequences for certain citizens. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The Arizona State welfare agency applies criteria other than the duration of residency to determine whether an applicant is a bona fide resident.²⁸ The Arizona Medical Assistance to the Aged law provides public medical care for certain senior citizens, conditioned only on residence.²⁹ Pinal County, Arizona, has operated its

415 U.S. 250, *267; 94 S. Ct. 1076, **1087;
39 L. Ed. 2d 306, ***LEdHR15; 1974 U.S. LEXIS 101

public hospital without benefit of the [*268] durational residence requirement since the application of the challenged statute in that County was enjoined by a federal court in *Valenciano v. Bateman*, 323 F.Supp. 600 (Ariz. 1971).³⁰

27 See *Green v. Dept. of Public Welfare of Delaware*, 270 F.Supp. 173, 177-178 (Del. 1967).

28 *Ariz. Rev. Stat. Ann. § 46-292 (1)* (Supp. 1973-1974).

29 § 46-261.02 (3) (Supp. 1973-1974).

30 In addition, Pima County, Arizona, did not apply the durational residence requirement between August 1969, when the requirement was found unconstitutional by the Arizona Court of Appeals, *Board of Supervisors, Pima County v. Robinson*, 10 *Ariz. App.* 238, 457 P. 2d 951, and September 1970, when that judgment was vacated as moot by the Arizona Supreme Court, 105 *Ariz.* 280, 463 P. 2d 536.

[***LEdHR16] [16]The appellees allege that the waiting period is a useful tool for preventing fraud. Certainly, a State has a valid interest in preventing fraud by any applicant for medical care, whether a newcomer or oldtime resident, *Shapiro*, 394 U.S., at 637, but the challenged provision is illsuited to that purpose. An indigent applicant, intent on committing fraud, could as easily swear to having been a resident of the county for the preceding year as to being one currently. And, there is no need for the State to rely on the durational requirement as a safeguard against fraud when other mechanisms to serve that purpose are available which would have a [***321] less drastic impact on constitutionally protected interests. *NAACP v. Button*, 371 U.S., at 438. For example, state law makes it a crime to file an "untrue statement . . . for the purpose of obtaining hospitalization, medical care or outpatient relief" at county expense. *Ariz. Rev. Stat. Ann. § 11-297C* (Supp. 1973-1974). See *Dunn*, 405 U.S., at 353-354; *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

[***LEdHR17] [17]Finally, appellees assert that the waiting period is necessary for budget predictability, but what was said in *Shapiro* is equally applicable to the case before us:

"The records . . . are utterly devoid of evidence that [*269] [the County] uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year. [The appellees do not take] a census of new residents Nor are new residents required to give advance notice of their need for . . . assistance. Thus, the . . . authorities cannot know how many new residents come into the jurisdiction in any year, much less how many of them will require public assistance." 394 U.S., at 634-635 (footnote omitted).

Whatever the difficulties in projecting how many newcomers to a jurisdiction will require welfare assistance, it could only be an even more difficult and speculative [**1088] task to estimate how many of those indigent newcomers will require medical care during their first year in the jurisdiction. The irrelevance of the one-year residence requirement to budgetary planning is further underscored by the fact that *emergency* medical care for all newcomers and more complete medical care for the aged are currently being provided at public expense regardless of whether the patient has been a resident of the County for the preceding year. See *Shapiro*, *supra*, at 635.

VII

[***LEdHR1B] [1B]

The Arizona durational residence requirement for eligibility for nonemergency free medical care creates an "invidious classification" that impinges on the right of interstate travel by denying newcomers "basic necessities of life." Such a classification can only be sustained on a showing of a compelling state interest. Appellees have not met their heavy burden of justification, or demonstrated that the State, in pursuing legitimate objectives, has chosen means which do not unnecessarily impinge on constitutionally protected interests. Accordingly, the judgment of the Supreme Court of Arizona is reversed and [*270] the case remanded for further action not inconsistent with this opinion.

So ordered.

THE CHIEF JUSTICE and MR. JUSTICE
BLACKMUN concur in the result.

[***322] MR. JUSTICE DOUGLAS.

415 U.S. 250, *270; 94 S. Ct. 1076, **1088;
39 L. Ed. 2d 306, ***322; 1974 U.S. LEXIS 101

The legal and economic aspects of medical care¹ are enormous; and I doubt if decisions under the *Equal Protection Clause of the Fourteenth Amendment* are equal to the task of dealing with these matters. So far as interstate travel *per se* is considered, I share the doubts of my Brother REHNQUIST. The present case, however, turns for me on a different axis. The problem has many aspects. The therapy of Arizona's atmosphere brings many there who suffer from asthma, bronchitis, arthritis, and tuberculosis. Many coming are indigent or become indigent after arrival. Arizona does not deny medical help to "emergency" cases "when immediate hospitalization or medical care is necessary for the preservation of life or limb," *Ariz. Rev. Stat. Ann. § 11-297A* (Supp. 1973-1974). For others, it requires a 12-month durational residence.

1 See appendix to this opinion, *post*, p. 274.

The Act is not aimed at interstate travelers; it applies even to a long-term resident who moves from one county to another. As stated by the Supreme Court of Arizona in the present case: "The requirement applies to all citizens within the state including long term residents of one county who move to another county. Thus, the classification does not single out non-residents nor attempt to penalize interstate travel. The requirement is uniformly applied." *108 Ariz. 373, 375, 498 P. 2d 461, 463*.

[*271] What Arizona has done, therefore, is to fence the poor out of the metropolitan counties, such as Maricopa County (Phoenix) and Pima County (Tucson) by use of a durational residence requirement. We are told that eight Arizona counties have no county hospitals and that most indigent care in those areas exists only on a contract basis. In *San Antonio Independent School Dist. v. Rodriguez*, *411 U.S. 1*, we had a case where Texas created a scheme by which school districts with a low property tax base, from which they could raise only meager funds, offered a lower quality of education to their students than the wealthier districts. That system was upheld against the charge that the state system violated the *Equal Protection Clause*. It was a closely divided Court and I was in dissent. I suppose that if a State can fence in the poor in educational programs, it can do so in medical programs. But to allow Arizona freedom to [*1089] carry forward its medical program we must go one step beyond the *San Antonio* case. In the latter there was no legal barrier to movement into a better

district. Here a one-year barrier to medical care, save for "emergency" care, is erected around the areas that have medical facilities for the poor.

Congress has struggled with the problem. In the Kerr-Mills Act of 1960, 74 Stat. 987, *42 U. S. C. § 302 (b)(2)*, it added provisions to the Social Security Act requiring the Secretary of Health, Education, and Welfare to disapprove any state plan for medical assistance to the aged (Medicaid) that excludes "any individual who resides in the state," thus eliminating durational residence requirements.

[***323] Maricopa County has received over \$ 2 million in federal funds for hospital construction under the Hill-Burton Act, *42 U. S. C. § 291 et seq.* Section 291c (e) authorizes the issuance of regulations governing the operation [*272] of Hill-Burton facilities. The regulations contain conditions that the facility to be constructed or modernized with the funds "will be made available to all persons residing in the territorial area of the applicant" and that the applicant will render "a reasonable volume of services to persons unable to pay therefor."² The conditions of free services for indigents, however, may be waived if "not feasible from a financial viewpoint."

2 Title *42 CFR § 53.111 (b)(8)* defines that term to mean "a level of uncompensated services which meets a need for such services in the area served by an applicant and which is within the financial ability of such applicant to provide."

Prior to the application the state agency must obtain from the applicant an assurance "that there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor. The requirement of an assurance from an applicant shall be waived if the applicant demonstrates to the satisfaction of the State agency, subject to subsequent approval by the Secretary, that such a requirement is not feasible from a financial viewpoint." *42 CFR § 53.111 (c)(1)*.³

3 The waiver of such a requirement requires notice and opportunity for public hearing. *42 CFR § 53.111 (c)(2)*.

So far as I can ascertain, the durational residence requirement imposed by Maricopa County has not been federally approved as a condition to the receipt of

415 U.S. 250, *272; 94 S. Ct. 1076, **1089;
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Hill-Burton funds.

Maricopa County does argue that it is not financially feasible to provide free nonemergency medical care to new residents. Even so, the federal regulatory framework does not leave the County uncontrolled in determining which indigents will receive the benefit of the resources which are available. It is clear, for example, that the County could not limit such service to whites out of [*273] a professed inability to service indigents of all races because 42 CFR § 53.112 (c) prohibits such discrimination in the operation of Hill-Burton facilities. It does not allow racial discrimination even against transients.

Moreover, Hill-Burton Act donees are guided by 42 CFR § 53.111 (g), which sets out in some detail the criteria which must be used in identifying persons unable to pay for such services. The criteria include the patient's health and medical insurance coverage, personal and family income, financial obligations and resources, and "similar factors." Maricopa County, pursuant to the state law here challenged, employs length of county residence as an additional criterion in identifying indigent recipients of uncompensated nonemergency medical care. The federal regulations, however, do not seem to recognize that as an acceptable criterion.

And, as we held in *Thorpe v. Housing Authority*, 393 U.S. 268; *Mourning v. Family Publications Service*, 411 U.S. 356, [**1090] these federal conditions attached to [***324] federal grants are valid when "reasonably related to the purposes of the enabling legislation." 393 U.S., at 280-281.

It is difficult to impute to Congress approval of the durational residence requirement, for the implications of such a decision would involve weighty equal protection considerations by which the Federal Government, *Bolling v. Sharpe*, 347 U.S. 497, as well as the States, are bound.

The political processes⁴ rather than equal protection litigation are the ultimate solution of the present problem. But in the setting of this case the invidious discrimination against the poor, *Harper v. Virginia Board of Elections*, 383 U.S. 663, not the right to travel interstate, is in my view the critical issue.

4 For the impact of "free" indigent care on private hospitals and their paying patients see Dept. of Health, Education, and Welfare (HEW)

Report on Medical Resources Available to Meet the Needs of Public Assistance Recipients, House Committee on Ways and Means, 86th Cong., 2d Sess. (Comm. Print 1961).

APPENDIX TO OPINION OF DOUGLAS, J.

GOURMAND AND FOOD -- A FABLE⁵

5 Foreword to an article on Medical Care and its Delivery: An Economic Appraisal by Judith R. Lave and Lester B. Lave in 35 Law & Contemp. Prob. 252 (1970).

The people of Gourmand loved good food. They ate in good restaurants, donated money for cooking research, and instructed their government to safeguard all matters having to do with food. Long ago, the food industry had been in total chaos. There were many restaurants, some very small. Anyone could call himself a chef or open a restaurant. In choosing a restaurant, one could never be sure that the meal would be good. A commission of distinguished chefs studied the situation and recommended that no one be allowed to touch food except for qualified chefs. "Food is too important to be left to amateurs," they said. Qualified chefs were licensed by the state with severe penalties for anyone else who engaged in cooking. Certain exceptions were made for food preparation in the home, but a person could serve only his own family. Furthermore, to become a qualified chef, a man had to complete at least twenty-one years of training (including four years of college, four years of cooking school, and one year of apprenticeship). All cooking schools had to be first class.

*These reforms did succeed in raising the quality of cooking. But a restaurant meal became substantially more expensive. A second commission observed that not everyone could afford to eat out. "No one," they said, "should be denied a good meal because of his [*275] income." Furthermore, they argued that chefs should work toward the goal of giving everyone "complete physical and psychological satisfaction." For those people who could not afford to eat out, the government declared that they should be allowed to do so as often as they liked and the government would pay. For others, it was recommended that they organize themselves in groups and pay part of their income into a pool that would undertake to pay the costs incurred by members in dining out. To insure the greatest satisfaction, the groups were set up so that a member could eat out anywhere and*

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39 L. Ed. 2d 306, ***324; 1974 U.S. LEXIS 101

as often as he liked, could have as elaborate a meal as he desired, and would have to pay nothing or only [***325] a small percentage of the cost. The cost of joining such prepaid dining clubs rose sharply.

Long ago, most restaurants would have one chef to prepare the food. A few restaurants were more elaborate, with chefs specializing in roasting, fish, salads, sauces, and many other things. People rarely went to these elaborate restaurants since they were so expensive. With the establishment of prepaid dining clubs, everyone wanted to eat at these fancy restaurants. At the same time, young chefs in school disdained going to cook in a small restaurant where they would have to cook everything. [**1091] The pay was higher and it was much more prestigious to specialize and cook at a really fancy restaurant. Soon there were not enough chefs to keep the small restaurants open.

With prepaid clubs and free meals for the poor, many people started eating their three-course meals at the elaborate restaurants. Then they began to increase the number of courses, directing the chef to "serve the best with no thought for the bill." (Recently a 317-course meal was served.)

The costs of eating out rose faster and faster. A new [*276] government commission reported as follows: (1) Noting that licensed chefs were being used to peel potatoes and wash lettuce, the commission recommended that these tasks be handed over to licensed dishwashers (whose three years of dishwashing training included cooking courses) or to some new category of personnel. (2) Concluding that many licensed chefs were overworked, the commission recommended that cooking schools be expanded, that the length of training be shortened, and that applicants with lesser qualifications be admitted. (3) The commission also observed that chefs were unhappy because people seemed to be more concerned about the decor and service than about the food. (In a recent taste test, not only could one patron not tell the difference between a 1930 and a 1970 vintage but he also could not distinguish between white and red wines. He explained that he always ordered the 1930 vintage because he knew that only a really good restaurant would stock such an expensive wine.)

The commission agreed that weighty problems faced the nation. They recommended that a national prepayment group be established which everyone must join. They recommended that chefs continue to be paid

on the basis of the number of dishes they prepared. They recommended that every Gourmandese be given the right to eat anywhere he chose and as elaborately as he chose and pay nothing.

These recommendations were adopted. Large numbers of people spent all of their time ordering incredibly elaborate meals. Kitchens became marvels of new, expensive equipment. All those who were not consuming restaurant food were in the kitchen preparing it. Since no one in Gourmand did anything except prepare or eat meals, the country collapsed.

DISSENT BY: REHNQUIST

DISSENT

[*277] MR. JUSTICE REHNQUIST, dissenting.

I

The State of Arizona provides free medical care for indigents. Confronted, in common with its 49 sister States, with the assault of spiraling health and welfare costs upon limited state resources, it has felt bound to require that recipients [***326] meet three standards of eligibility. ¹ First, they must be indigent, unemployable, or unable to provide their own care. Second, they must be residents of the county in which they seek aid. Third, they must have maintained their residence for a period of one year. These standards, however, apply only to persons seeking nonemergency aid. An exception is specifically provided for "emergency cases when immediate hospitalization or medical care is necessary for the preservation of life or limb"

¹ *Ariz. Rev. Stat. Ann. § 11-297A* (Supp. 1973-1974) reads as follows:

"Except in emergency cases when immediate hospitalization or medical care is necessary for the preservation of life or limb no person shall be provided hospitalization, medical care or outpatient relief under the provisions of this article without first filing with a member of the board of supervisors of the county in which he resides a statement in writing, subscribed and sworn to under oath, that he is an indigent as shall be defined by rules and regulations of the state department of economic security, an unemployable totally dependent upon the state or

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county government for financial support, or an employable of sworn low income without sufficient funds to provide himself necessary hospitalization and medical care, and that he has been a resident of the county for the preceding twelve months."

Appellant Evaro moved from New Mexico to Arizona in June 1971, suffering [**1092] from a "chronic asthmatic and bronchial illness." In July 1971 he experienced a respiratory attack, and obtained treatment at the facilities of appellant Memorial Hospital, a privately operated [*278] institution. The hospital sought to recover its expenses from appellee Maricopa County under the provisions of *Ariz. Rev. Stat. Ann. § 11-297A* (Supp. 1973-1974), asserting that Evaro was entitled to receive county care. Since he did not satisfy the eligibility requirements discussed above,² appellee declined to assume responsibility for his care, and this suit was then instituted in the State Superior Court.

2 The parties stipulated that Mr. Evaro was "an indigent who recently changed his residence from New Mexico to Arizona and who has resided in the state of Arizona for less than twelve months." App. 10. Therefore Mr. Evaro failed to meet only the third requirement discussed in the text.

Appellants did not, and could not, claim that there is a constitutional right to nonemergency medical care at state or county expense or a constitutional right to reimbursement for care extended by a private hospital.³ They asserted, however, that the state legislature, having decided to give free care to certain classes of persons, must give that care to Evaro as well. The Court upholds that claim, holding that the Arizona eligibility requirements burdened Evaro's "right to travel."

3 This Court has noted that citizens have no constitutional right to welfare benefits. See, e. g., *Dandridge v. Williams*, 397 U.S. 471 (1970); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

Unlike many traditional government services, such as police or fire protection, the provision of health care has commonly been undertaken by private facilities and personnel. But as strains on private services become greater, and the costs of obtaining care increase, federal, state, and local governments have been pressed to assume a larger role. Reasonably enough, it seems to me, those

governments which now find themselves in the hospital business seek to operate that business primarily for those [*279] persons dependent on the financing locality both by association and by need.

Appellants in this case nevertheless [***327] argue that the State's efforts, admirable though they may be, are simply not impressive enough. But others excluded by eligibility requirements certainly could make similar protests. Maricopa County residents of many years, paying taxes to both construct and support public hospital facilities, may be ineligible for care because their incomes are slightly above the marginal level for inclusion. These people have been excluded by the State, not because their claim on limited public resources is without merit, but because it has been deemed less meritorious than the claims of those in even greater need. Given a finite amount of resources, Arizona after today's decision may well conclude that its indigency threshold should be elevated since its counties must provide for out-of-state migrants as well as for residents of longer standing. These more stringent need requirements would then deny care to additional persons who until now would have qualified for aid.

Those presently excluded because marginally above the State's indigency standards, those who may be excluded in the future because of more stringent indigency requirements necessitated by today's decision, and appellant Evaro, all have a plausible claim to government-supported medical care. The choice between them necessitated by a finite amount of resources is a classic example of the determination of priorities to be accorded conflicting claims, and would in the recent past have been thought to be a matter particularly within the competence of the state legislature to decide. As this Court stated in *Dandridge v. Williams*, 397 U.S. 471, 487 (1970), "the Constitution does not empower this Court to second-guess state officials charged with the difficult [*280] responsibility of allocating limited public welfare [**1093] funds among the myriad of potential recipients."

The Court holds, however, that the State was barred from making the choice it made because of the burden its choice placed upon Evaro's "right to travel." Although the Court's definition of this "right" is hardly precise, the Court does state: "The right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which

they migrate as are enjoyed by other residents." This rationale merits further attention.

II

The right to travel throughout the Nation has been recognized for over a century in the decisions of this Court. ⁴ See *Crandall v. Nevada*, 6 Wall. 35 (1868). But the concept of that right has not been static. To see how distant a cousin the right to travel enunciated in this case is to the right declared by the Court in *Crandall*, reference need only be made to the language of Mr. Justice Miller, speaking for the Court:

"But if the government has these rights on her own account, the citizen also has correlative rights. 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. [***328] 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 [*281] 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." *Id.*, at 44.

⁴ Although the right to travel has been recognized by this Court for over a century, the origin of the right still remains somewhat obscure. The majority opinion in this case makes no effort to identify the source, simply relying on recent cases which state such a right exists.

The Court in *Crandall* established no right to free benefits from every State through which the traveler might pass, but more modestly held that the State could not use its taxing power to impede travel across its borders. ⁵

⁵ The tax levied by the State of Nevada was upon every person leaving the State. As this Court has since noted, the tax was a direct tax on travel and was not intended to be a charge for the use of state facilities. See *Evansville Airport v. Delta Airlines*, 405 U.S. 707 (1972).

Later cases also defined this right to travel quite conservatively. For example, in *Williams v. Fears*, 179 U.S. 270 (1900), the Court upheld a Georgia statute

taxing "emigrant agents" -- persons hiring labor for work *outside* the State -- although agents hiring for local work went untaxed. The Court recognized that a right to travel existed, stating:

"Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the *Fourteenth Amendment* and by other provisions of the Constitution." *Id.*, at 274.

The Court went on, however, to decide that the statute, despite the added cost it assessed against exported labor, affected freedom of egress "only incidentally and remotely." *Ibid.* ⁶

⁶ The Court also rejected an equal protection argument, concluding: "We are unable to say that such a discrimination, if it existed, did not rest on reasonable grounds, and was not within the discretion of the state legislature." 179 U.S., at 276.

[*282] The leading earlier case, *Edwards v. California*, 314 U.S. 160 (1941), provides equally little [**1094] support for the Court's expansive holding here. In *Edwards* the Court invalidated a California statute which subjected to criminal penalties any person "that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person." *Id.*, at 171. Five members of the Court found the statute unconstitutional under the *Commerce Clause*, finding in the Clause a "prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." *Id.*, at 173. Four concurring Justices found a better justification for the result in the *Fourteenth Amendment's* protection of the "privileges of national citizenship." ⁷

⁷ See the concurring opinions of MR. JUSTICE DOUGLAS (with whom Mr. Justice Black and Mr. Justice Murphy joined), 314 U.S., at 177, and Mr. Justice Jackson, *id.*, at 181.

Regardless of the right's precise [***329] source and definition, it is clear that the statute invalidated in *Edwards* was specifically designed to, and would, deter

415 U.S. 250, *282; 94 S. Ct. 1076, **1094;
39 L. Ed. 2d 306, ***329; 1974 U.S. LEXIS 101

indigent persons from entering the State of California. The imposition of criminal penalties on all persons assisting the entry of an indigent served to block ingress as surely as if the State had posted guards at the border to turn indigents away. It made no difference to the operation of the statute that the indigent, once inside the State, would be supported by federal payments.⁸ Furthermore, [*283] the statute did not require that the indigent intend to take up continuous residence within the State. The statute was not therefore an incidental or remote barrier to migration, but was in fact an effective and purposeful attempt to insulate the State from indigents.

⁸ The Court in *Edwards* observed: "After arriving in California [the indigent] was aided by the Farm Security Administration, which . . . is wholly financed by the Federal government." 314 U.S., at 175. The Court did not express a view at that time as to whether a different result would have been reached if the State bore the financial burden. But cf. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

The statute in the present case raises no comparable barrier. Admittedly, some indigent persons desiring to reside in Arizona may choose to weigh the possible detriment of providing their own nonemergency health care during the first year of their residence against the total benefits to be gained from continuing location within the State, but their mere entry into the State does not invoke criminal penalties. To the contrary, indigents are free to live within the State, to receive welfare benefits necessary for food and shelter,⁹ and to receive free emergency medical care if needed. Furthermore, once the indigent has settled within a county for a year, he becomes eligible for full medical care at county expense. To say, therefore, that Arizona's treatment of indigents compares with California's treatment during the 1930's would border on the frivolous.

⁹ See *Ariz. Rev. Stat. Ann. § 46-233* (Supp. 1973-1974), which provides that an eligible recipient of general assistance must have "established residence at the time of application."

Since those older cases discussing the right to travel are unhelpful to Evaro's cause here, reliance must be placed elsewhere. A careful reading of the Court's opinion discloses that the decision rests almost entirely on two cases of recent vintage: *Shapiro v. Thompson*, 394

U.S. 618 (1969), and *Dunn v. Blumstein*, 405 U.S. 330 (1972). In *Shapiro* the Court struck down statutes requiring one year's residence prior to receiving welfare benefits. In *Dunn* the Court struck down a statute requiring a year's residence before receiving the right to vote. In placing reliance on these two cases, the Court [*284] must necessarily distinguish or discredit recent cases of this Court upholding statutes requiring a year's residence [*1095] for lower in-state tuition.¹⁰ The important question for this purpose, according to the Court's analysis, is whether a classification "operates to penalize those persons . . . who have exercised their constitutional right of interstate migration." (Emphasis in Court's opinion.)

¹⁰ See *Starns v. Malkerson*, 326 F.Supp. 234 (Minn. 1970), aff'd, 401 U.S. 985 (1971); *Vlandis v. Kline*, 412 U.S. 441 (1973).

Since [***330] the Court concedes that "some 'waiting-period[s] . . . may not be penalties," *ante*, at 258-259, one would expect to learn from the opinion how to distinguish a waiting period which is a penalty from one which is not. Any expense imposed on citizens crossing state lines but not imposed on those staying put could theoretically be deemed a penalty on travel; the toll exacted from persons crossing from Delaware to New Jersey by the Delaware Memorial Bridge is a "penalty" on interstate travel in the most literal sense of all. But such charges,¹¹ as well as other fees for use of transportation facilities such as taxes on airport users,¹² have been upheld by this Court against attacks based upon the right to travel. It seems to me that the line to be derived from our prior cases is that some financial impositions on interstate travelers have such indirect or inconsequential impact on travel that they simply do not constitute the type of direct purposeful barriers struck down in *Edwards* and *Shapiro*. Where the impact is that remote, a State can reasonably require that the citizen bear some proportion of the State's cost in its facilities. I would think that this standard is not only supported by this Court's decisions, but would be [*285] eminently sensible and workable. But the Court not only rejects this approach, it leaves us entirely without guidance as to the proper standard to be applied.

¹¹ See, e. g., *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245 (1928); *Hendrick v. Maryland*, 235 U.S. 610 (1915).

¹² See *Evansville Airport v. Delta Airlines*, 405

415 U.S. 250, *285; 94 S. Ct. 1076, **1095;
39 L. Ed. 2d 306, ***330; 1974 U.S. LEXIS 101

U.S. 707 (1972).

The Court instead resorts to *ipse dixit*, declaring rather than demonstrating that the right to nonemergency medical care is within the class of rights protected by *Shapiro and Dunn*:

"Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements. See, e. g., *Shapiro, supra*; *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340-342 (1969)." *Ante*, at 259. (Emphasis added; footnotes omitted.)

However clear this conclusion may be to the majority, it is certainly not clear to me. The solicitude which the Court has shown in cases involving the right to vote,¹³ and the virtual denial of entry inherent in denial of welfare benefits -- "the very means by which to live," *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) -- ought not be so casually extended to the alleged deprivation here. Rather, the Court should examine, as it has done in the past, whether the challenged requirement erects a real and purposeful barrier to movement, or the threat of such a barrier, or whether the effects on travel, viewed realistically, are merely incidental and remote. As the above discussion has shown, the barrier [***331] here is hardly [*286] a counterpart to the barriers condemned in earlier cases. That being so, [**1096] the Court should observe its traditional respect for the State's allocation of its limited financial resources rather than unjustifiably imposing its own preferences.

¹³ See, e. g., *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

III

The Court, in its examination of the proffered state interests, categorically rejects the contention that those who have resided in the county for a fixed period of time may have a greater stake in community facilities than the newly arrived. But this rejection is accomplished more by fiat than by reason. One of the principal factual distinctions between *Starns v. Malkerson*, 326 F.Supp.

234 (Minn. 1970), *aff'd*, 401 U.S. 985 (1971), and *Vlandis v. Kline*, 412 U.S. 441 (1973), both of which upheld durational residence requirements for in-state university tuition,¹⁴ and *Shapiro*, which struck them down for welfare recipients, is the nature of the aid which the State or county provides. Welfare benefits, whether in cash or in kind, are commonly funded from current tax revenues, which may well be supported by the very newest arrival as well as by the longtime resident. But universities and hospitals, although demanding operating support from current revenues, require extensive capital facilities which cannot possibly be funded out of current tax revenues. Thus, entirely apart from the majority's conception of whether nonemergency health care is more or less important than continued education, [*287] the interest of longer established residents in capital facilities and their greater financial contribution to the construction of such facilities seems indisputable.¹⁵

¹⁴ In *Vlandis*, while striking down a Connecticut statute that in effect prevented a new state resident from obtaining lower tuition rates for the full period of enrollment, we stated that the decision should not "be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status." 412 U.S., at 452. *Starns* was cited as support for this position.

¹⁵ This distinction may be particularly important in a State such as Arizona where the Constitution provides for limitations on state and county debt. See *Ariz. Const., Art. 9, § 5* (State); *Art. 9, § 8* (County). See generally Comment, *Dulling the Edge of Husbandry: The Special Fund Doctrine in Arizona*, 1971 L. & Soc. O. (Ariz. St. L. J.) 555.

Other interests advanced by the State to support its statutory eligibility criteria are also rejected virtually out of hand by the Court. The protection of the county economies is dismissed with the statement that "the conservation of the taxpayers' purse is simply not a sufficient state interest" ¹⁶ The Court points out that the cost of care, if not borne by the Government, may be borne by private hospitals such as appellant Memorial Hospital. While this observation is doubtless true in large part, and is bound to present a problem to any private hospital, it does not seem to me that it thus becomes a constitutional determinant. The Court also observes that the State may in fact *save* money by

415 U.S. 250, *287; 94 S. Ct. 1076, **1096;
39 L. Ed. 2d 306, ***331; 1974 U.S. LEXIS 101

providing nonemergency medical care rather than waiting for deterioration of an illness. However valuable a qualified [***332] cost analysis might be to legislators drafting eligibility requirements, and however little this speculation may bear on Evaro's condition (which the record does not indicate to have been a deteriorating illness), this sort of judgment has traditionally been confided to legislatures, rather than to courts charged with determining constitutional questions.

16 The appellees in this case filed an affidavit indicating that acceptance of appellants' position would impose an added burden on property taxpayers in Maricopa County of over \$ 2.5 million in the first year alone. App. 12-17.

The Court likewise rejects all arguments based on [*288] administrative objectives. Refusing to accept the assertion that a one-year waiting period is a "convenient [**1097] rule of thumb to determine bona fide residence," the majority simply suggests its own alternatives. Similar analysis is applied in rejecting the appellees' argument based on the potential for fraud. The Court's declaration that an indigent applicant "intent on committing fraud, could as easily swear to having been a resident of the county for the preceding year as to being one currently" ignores the obvious fact that fabricating presence in the State for a year is surely more difficult than fabricating only a present intention to remain.

The legal question in this case is simply whether the State of Arizona has acted arbitrarily in determining that access to local hospital facilities for nonemergency medical care should be denied to persons until they have established residence for one year. The impediment which this quite rational determination has placed on appellant Evaro's "right to travel" is so remote as to be negligible: so far as the record indicates Evaro moved from New Mexico to Arizona three years ago and has remained ever since. The eligibility requirement has not the slightest resemblance to the actual barriers to the right

of free ingress and egress protected by the Constitution, and struck down in cases such as *Crandall* and *Edwards*. And, unlike *Shapiro*, it does not involve an urgent need for the necessities of life or a benefit funded from current revenues to which the claimant may well have contributed. It is a substantial broadening of, and departure from, all of these holdings, all the more remarkable for the lack of explanation which accompanies the result. Since I can subscribe neither to the method nor the result, I dissent.

REFERENCES

16 *Am Jur 2d, Constitutional Law* 516

25 *Am Jur Pl & Pr Forms, Welfare Laws, Forms* 12, 17-20

US L Ed Digest, *Constitutional Law* 348.5

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L Ed Index to Annos, Domicil or Residence; Equal Protection of the Laws; Medical Treatment or Care; Poor Persons; Travel

ALR Quick Index, Domicil or Residence; Equal Protection of Law; Medical Treatment and Care; Poor and Poor Laws

Federal Quick Index, Domicil or Residence; Equal Protection of the Laws; Medical Care or Treatment; Poor Persons; Travel

Annotation References:

Federal constitutional right of interstate travel. 27 *L Ed 2d* 862.

Constitutionality of poor relief law, as affected by requirement as to period of residence as condition of relief. 132 ALR 518.

APPENDIX 36



MOORE v. CITY OF EAST CLEVELAND, OHIO

No. 75-6289

SUPREME COURT OF THE UNITED STATES

431 U.S. 494; 97 S. Ct. 1932; 52 L. Ed. 2d 531; 1977 U.S. LEXIS 17

Argued November 2, 1976

May 31, 1977

PRIOR HISTORY: APPEAL FROM THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant sought review of a judgment of the Court of Appeals of Ohio, Cuyahoga County, which affirmed appellant's conviction of violating a city ordinance by housing in her dwelling a grandson.

OVERVIEW: Appellant argued that appellee municipality's housing ordinance, which categorized a second grandchild living in appellant's home as an illegal occupant, violated the Due Process Clause of *U.S. Const. amend. XIV*. The court agreed, saying that the ordinance bore no rational relationship to permissible state objectives. This ordinance did not distinguish between related and unrelated individuals, the court explained, but sliced into the family and regulated what categories of relatives might live together. Such intrusion into family life was not constitutionally protected. Rejecting arguments that the ordinance served to prevent overcrowding, minimize traffic, and avoid burdening the

public school system, the court held that the provision had but a tenuous relation to the alleviation of these objectives. Nor was the constitutional right to live together as a family limited to the nuclear family, the court ruled, as the extended family traditionally played a role in providing sustenance and security. Cutting off protection of family rights at the first convenient boundary, the nuclear family, was arbitrary and could not be justified.

OUTCOME: The judgment affirming appellant's conviction of violating appellee's city ordinance by housing a member of her extended family was reversed, because the ordinance violated constitutional due process protections by intruding upon family sanctity and because the ordinance had only a tenuous relationship to the alleviation of legitimate city goals.

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview

431 U.S. 494, *; 97 S. Ct. 1932, **;
52 L. Ed. 2d 531, ***; 1977 U.S. LEXIS 17

Constitutional Law > Substantive Due Process > Scope of Protection

[HN1] The U.S. Supreme Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of *U.S. Const. amend. XIV*.

Governments > Legislation > Overbreadth

[HN2] The family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, the U.S. Supreme Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

Constitutional Law > Substantive Due Process > Scope of Protection

***Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Warranty of Habitability
Real Property Law > Zoning & Land Use > Building & Housing Codes***

[HN3] East Cleveland, Ohio, Housing Code § 1341.08 violates the *Due Process Clause of the Fourteenth Amendment* because it has but a tenuous relation to alleviation of the conditions mentioned by the city.

***Constitutional Law > Bill of Rights > General Overview
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview***

Governments > Local Governments > Boundaries

[HN4] There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the *Bill of Rights*. History counsels caution and restraint. But it does not counsel abandonment, nor does it require cutting off any protection of family rights at the first convenient, if arbitrary boundary - the boundary of the nuclear family.

Constitutional Law > Substantive Due Process > Scope of Protection

[HN5] Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history and solid recognition of the basic values that underlie our society. U.S. Supreme Court decisions establish that the Constitution protects the sanctity of the family precisely

because the institution of the family is deeply rooted in U.S. history and tradition.

SUMMARY:

A housing ordinance of East Cleveland, Ohio, in limiting occupancy of a dwelling unit to members of a single family, defines as a "family" only a few categories of related individuals, essentially parents and their children (the "nuclear" family). Upon trial in an Ohio state court, a woman who lived in her home with her son and two grandsons was convicted of violating the ordinance, because the grandsons were first cousins rather than brothers. The Court of Appeals of Ohio, Cuyahoga County, affirmed, rejecting the defendant's claim that the ordinance was unconstitutional. The Supreme Court of Ohio denied review.

On appeal, the United States Supreme Court reversed. Although unable to agree on an opinion, five members of the court agreed that the ordinance violated the *due process clause of the Fourteenth Amendment*.

Powell, J., announced the judgment of the court, and in an opinion joined by Brennan, Marshall, and Blackmun, JJ., expressed the view that (1) when a city undertook intrusive regulation of family life—one of the liberties protected by the *due process clause of the Fourteenth Amendment*—the court must examine carefully the importance of the governmental interests advanced and the extent to which they were served by the challenged regulation, (2) the ordinance in the case at bar could not be justified as a means of serving the city's legitimate goals in preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on the city's school system, the ordinance serving such goals only marginally, at best, and (3) the substantive due process right to live together as a family did not extend only to the nuclear family, since the Constitution's protection of the sanctity of the family was deeply rooted in the nation's history and tradition, and since such tradition was not limited to respect for the bonds uniting the members of the nuclear family, but extended as well to the sharing of their household with uncles, aunts, cousins, and especially grandparents.

Brennan, J., joined by Marshall, J., concurred, stating that (1) the ordinance displayed an insensitivity toward the economic and emotional needs of a large part of society, since the nuclear family was the pattern often found in much of white suburbia, whereas the "extended"

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family was the prominent pattern for large numbers of the poor and deprived minorities of society, particularly blacks, and (2) the choice of the extended family pattern was within the freedom of personal choice in matters of family life that was one of the liberties protected by the *due process clause of the Fourteenth Amendment*.

Stevens, J., concurring in the judgment, expressed the view that (1) the proper standard for determining the validity of the ordinance in the case at bar was that before a zoning ordinance could be declared unconstitutional it must be shown to be clearly arbitrary and unreasonable as having no substantial relation to the public health, safety, morale, or general welfare, (2) no justification appeared for the ordinance's restriction on an owner's use of his property, and (3) thus the ordinance constituted a taking of property without due process and without just compensation.

Burger, Ch. J., dissented, expressing the view that it was not necessary to reach the constitutional issue, since in view of considerations of federalism, comity, and the need to alleviate the overburdening of federal courts, the defendant's deliberate refusal to use the plainly adequate administrative remedy provided by the city--that of seeking a variance from the terms of the ordinance--should be deemed to foreclose her from pressing any constitutional objections to the zoning ordinance, and (2) the court should take the opportunity to make it clear that even though issues of constitutional law were involved, and even though the case might be related to criminal prosecutions, nevertheless when state or local governments provided an administrative remedy, no federal forum would be open unless the claimant exhausted such remedy or showed either that the remedy was inadequate or that resort to the remedy was futile.

Stewart, J., joined by Rehnquist, J., dissenting, expressed the view that (1) the ordinance did not violate constitutionally protected rights of association or privacy, (2) the interest in an "extended" family was not one implicit in the concept of ordered liberty, and thus was not entitled to substantive due process protection, and (3) the ordinance was a rational attempt to promote the city's interest in preserving the character of its neighborhoods, and thus did not violate the *equal protection clause*.

White, J., dissenting, expressed the view that (1) the court should be extremely reluctant to apply substantive due process principles so as to strike down legislation adopted by a state or city to promote its welfare, (2) the

due process liberty interest involved in the case at bar was not entitled to such substantive due process protection as to require invalidation of the ordinance, since the ordinance served the normal goals of zoning regulation by limiting, in identifiable circumstances, the number of people who could occupy a single household, and (3) similarly, the ordinance did not violate the *equal protection clause*, since there was a rational justification for the ordinance's restrictions.

LAWYERS' EDITION HEADNOTES:

LAW §528.5

due process -- zoning ordinance -- limitation of "family" --

Headnote:

The United States Supreme Court will hold that the *due process clause of the Fourteenth Amendment* is violated by a municipal ordinance which--in limiting occupancy of a dwelling unit to members of a single family--defines as a "family" only a few categories of related individuals, thus operating to impose criminal liability on a woman living in her home with her son and two grandsons because the grandsons were first cousins rather than brothers, where (1) four Justices of the Supreme Court are of the opinion that the ordinance deprived the woman of her liberty in violation of the due process clause, and (2) a fifth Justice is of the opinion that the ordinance constituted a taking of property without due process and without just compensation. [Per Powell, J., Brennan, J., Marshall, J., Blackmun, J., and Stevens, J. Dissenting: Stewart, J., Rehnquist, J., and White, J.]

SYLLABUS

Appellant lives in her East Cleveland, Ohio, home with her son and two grandsons (who are first cousins). An East Cleveland housing ordinance limits occupancy of a dwelling unit to members of a single family, but defines "family" in such a way that appellant's household does not qualify. Appellant was convicted of a criminal violation of the ordinance. Her conviction was upheld on appeal over her claim that the ordinance is unconstitutional. Appellee city contends that the ordinance should be sustained under *Village of Belle Terre v. Boraas*, 416 U.S. 1, which upheld an ordinance

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52 L. Ed. 2d 531, ***; 1977 U.S. LEXIS 17

imposing limits on the types of groups that could occupy a single dwelling unit. *Held*: The judgment is reversed. Pp. 498-506; 513-521.

Reversed.

MR. JUSTICE POWELL, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded that the ordinance deprived appellant of her liberty in violation of the *Due Process Clause of the Fourteenth Amendment*.

(a) This case is distinguishable from *Belle Terre, supra*, where the ordinance affected only unrelated individuals. The ordinance here expressly selects certain categories of relatives who may live together and declares that others may not, in this instance making it a crime for a grandmother to live with her grandson. Pp. 498-499.

(b) When the government intrudes on choices concerning family living arrangements, the usual deference to the legislature is inappropriate; and the Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. P. 499.

(c) The ordinance at best has but a tenuous relationship to the objectives cited by the city: avoiding overcrowding, traffic congestion, and an undue financial burden on the school system. Pp. 499-500.

(d) The strong constitutional protection of the sanctity of the family established in numerous decisions of this Court extends to the family choice involved in this case and is not confined within an arbitrary boundary drawn at the limits of the nuclear family (essentially a couple and their dependent children). Appropriate limits on substantive due process come not from drawing arbitrary lines but from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." *Griswold v. Connecticut*, 381 U.S. 479, 501 (Harlan, J., concurring). The history and tradition of this Nation compel a larger conception of the family. Pp. 500-506.

MR. JUSTICE STEVENS concluded that under the limited standard of review preserved in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, and *Nectow v. Cambridge*, 277 U.S. 183, before a zoning ordinance can be declared unconstitutional it must be shown to be clearly arbitrary and unreasonable as having no substantial relation to the

public health, safety, morals, or general welfare; to appellee city has failed totally to explain the need for a rule that would allow a homeowner to have grandchildren live with her if they are brothers but not if they are cousins; and under that standard appellee city's unprecedented ordinance constitutes a taking of property without due process and without just compensation. Pp. 513-521.

POWELL, J., announced the judgment of the Court and delivered an opinion in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 506. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 513. BURGER, C.J., filed a dissenting opinion, *post*, p. 521. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 531. WHITE, J., filed a dissenting opinion, *post*, p. 541.

COUNSEL: *Edward R. Stege, Jr.*, argued the cause for appellant. With him on the brief were *Francis D. Murtaugh, Jr.*, and *Lloyd B. Snyder*.

Leonard Young argued the cause for appellee. With him on the brief was *Henry B. Fischer*. *

* *Melvin L. Wulf* and *Benjamin Sheerer* filed a brief for the American Civil Liberties Union et al. as *amici curiae*.

JUDGES: Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens

OPINION BY: POWELL

OPINION

[*495] [***535] [**1934] MR. JUSTICE POWELL announced the judgment of the Court, and delivered an opinion in which MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN joined.

East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members [*496] of a single family. § 1351.02. ¹ But the ordinance contains an unusual and complicated definitional section that recognizes as a "family" only a few categories of related individuals. § 1341.08. ² Because her family, living together in her home, fits none

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of those categories, appellant stands convicted of a criminal offense. The question in this case is whether the ordinance violates the *Due Process Clause of the Fourteenth Amendment*.³

1 All citations by section number refer to the Housing Code of the city of East Cleveland, Ohio.
2 Section 1341.08 (1966) provides:

"Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

"(e) A family may consist of one individual."

3 Appellant also claims that the ordinance contravenes the *Equal Protection Clause*, but it is not necessary for us to reach that contention.

I

Appellant, Mrs. Inez Moore, lives in her East Cleveland home together with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys are first cousins rather than brothers; we

are told that John [*497] came to live with his grandmother and with the [***536] elder and younger Dale Moores after his mother's death.⁴

4 Brief for Appellant 4, 25. John's father, John Moore, Sr., has apparently been living with the family at least since the time of trial. Whether he was living there when the citation was issued is in dispute. Under the ordinance his presence too probably would be a violation. But we take the case as the city has framed it. The citation that led to prosecution recited only that John Moore, Jr., was in the home in violation of the ordinance.

In early 1973, Mrs. Moore received a notice of violation from the city, stating that John was an "illegal occupant" and directing her to comply with the ordinance. When she failed to remove him from her home, the city filed a criminal charge. Mrs. Moore moved to dismiss, claiming that the ordinance was constitutionally invalid on its face. Her motion was overruled, and upon conviction she was sentenced to five days in jail and a \$ 25 fine. The Ohio Court of Appeals affirmed after giving full consideration to her constitutional claims,⁵ [*498] and the [**1935] Ohio Supreme Court denied review. We noted probable jurisdiction of her appeal, 425 U.S. 949 (1976).

5 The dissenting opinion of THE CHIEF JUSTICE suggests that Mrs. Moore should be denied a hearing in this Court because she failed to seek discretionary administrative relief in the form of a variance, relief that is no longer available. There are sound reasons for requiring exhaustion of administrative remedies in some situations, but such a requirement is wholly inappropriate where the party is a *criminal defendant* in circumstances like those present here. See generally *McKart v. United States*, 395 U.S. 185 (1969). Mrs. Moore defends against the State's prosecution on the ground that the ordinance is facially invalid, an issue that the zoning review board lacks competency to resolve. In any event, this Court has never held that a general principle of exhaustion could foreclose a criminal defendant from asserting constitutional invalidity of the statute under which she is being prosecuted. See, e.g., *Yakus v. United States*, 321 U.S. 414, 446-447 (1944).

Moreover, those cases that have denied

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certain nonconstitutional defenses to criminal defendants for failure to exhaust remedies did so pursuant to statutes that implicitly or explicitly mandated such a holding. See, e.g., *Falbo v. United States*, 320 U.S. 549 (1944); *Yakus v. United States*, *supra*; *McGee v. United States*, 402 U.S. 479 (1971). Because of the statutes the defendants were on notice that failure to pursue available administrative relief might result in forfeiture of a defense in an enforcement proceeding. But here no Ohio statute or ordinance required exhaustion or gave Mrs. Moore any such warning. Indeed, the Ohio courts entertained all her claims, perceiving no denigration of state administrative process in according full judicial review.

II

The city argues that our decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), requires us to sustain the ordinance attacked here. Belle Terre, like East Cleveland, imposed limits on the types of groups that could occupy a single dwelling unit. Applying the constitutional standard announced in this Court's leading land-use case, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926),⁶ we sustained the [***537] Belle Terre ordinance on the ground that it bore a rational relationship to permissible state objectives.

⁶ *Euclid* held that land-use regulations violate the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S., at 395. See *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). Later cases have emphasized that the general welfare is not to be narrowly understood; it embraces a broad range of governmental purposes. See *Berman v. Parker*, 348 U.S. 26 (1954). But our cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose.

But one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." 416 U.S., at 9. East Cleveland, in contrast, has chosen to regulate

the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain [*499] categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate. [HN1] "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the *Due Process Clause of the Fourteenth Amendment*." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974). A host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *id.*, at 495-496 (Goldberg, J., concurring); *id.*, at 502-503 (WHITE, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 542-544, 549-553 (1961) (Harlan, J., dissenting); cf. *Loving v. Virginia*, 388 U.S. 1, 12 [**1936] (1967); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Of course, [HN2] the family is not beyond regulation. See *Prince v. Massachusetts*, *supra*, at 166. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. See *Poe v. Ullman*, *supra*, at 554 (Harlan, J., dissenting).

When thus examined, this ordinance [***538] cannot survive. The city seeks to justify it as a means of preventing overcrowding, [*500] minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best.⁷ For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family

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contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household. We need not labor the point. Section 1341.08 [HN3] has but a tenuous relation to alleviation of the conditions mentioned by the city.

7 It is significant that East Cleveland has another ordinance specifically addressed to the problem of overcrowding. See *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 536-537 (1973). Section 1351.03 limits population density directly, tying the maximum permissible occupancy of a dwelling to the habitable floor area. Even if John, Jr., and his father both remain in Mrs. Moore's household, the family stays well within these limits.

III

The city would distinguish the cases based on *Meyer* and *Pierce*. It points out that none of them "gives grandmothers any fundamental rights with respect to grandsons," Brief for Appellee 18, and suggests that any constitutional right to live together as a family extends only to the nuclear family - essentially a couple and their dependent children.

To be sure, these cases did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, e.g., *LaFleur*, *Roe v. Wade*, *Griswold*, *supra*, or with the rights [*501] of parents to the custody and companionship of their own children, *Stanley v. Illinois*, *supra*, or with traditional parental authority in matters of child rearing and education. *Yoder*, *Ginsberg*, *Pierce*, *Meyer*, *supra*. But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the *Fourteenth Amendment's Due Process Clause*, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.

Understanding those reasons requires careful attention to this Court's function under the Due Process

Clause. Mr. Justice Harlan described it eloquently: S

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty [***539] and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to [**1937] what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. ⁸ No formula could serve as a substitute, in this area, for judgment and restraintI

[*502] ... S[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints,... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, *supra*, at 542-543 (dissenting opinion).I

8 This explains why *Meyer* and *Pierce* have survived and enjoyed frequent reaffirmance, while other substantive due process cases of the same era have been repudiated - including a number written, as were *Meyer* and *Pierce*, by Mr. Justice McReynolds.

Substantive due process has at times been a treacherous field for this Court. [HN4] There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the *Bill of Rights*. As the history of the *Lochner* era demonstrates, there is reason

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for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.⁹ That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary - the boundary of the nuclear family.

⁹ *Lochner v. New York*, 198 U.S. 45 (1905). See *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164-167 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 514-527 (1965) (Black, J., dissenting); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting); G. Gunther, *Cases and Materials on Constitutional Law* 550-596 (9th ed. 1975).

[*503] [HN5] Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society."¹⁰ *Griswold v. Connecticut*, 381 U.S., at 501 (Harlan, J., concurring).¹¹ See generally *Ingraham v. Wright*, 430 U.S. 651, 672-674, and nn. 41, 42 (1977); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring); *Lochner v. New York*, 198 U.S. 45, 76 [*1938] (1905) (Holmes, J., dissenting). Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.¹² It is through the family that we inculcate and [*504] pass down many of our most cherished values, moral and cultural.¹³

¹⁰ A similar restraint marks our approach to the questions whether an asserted substantive right is entitled to heightened solicitude under the *Equal Protection Clause* because it is "explicitly or implicitly guaranteed by the Constitution," *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973), and whether or to what extent a guarantee in the *Bill of Rights* should be "incorporated" in the Due Process Clause because it is "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149-150, n. 14 (1968); see *Johnson v. Louisiana*, 406 U.S. 356, 372 n. 9 (1972) (opinion of POWELL, J.).

¹¹ For a recent suggestion that the holding in *Griswold* is best understood in this fashion, see Pollak, Comment, 84 Yale L.J. 638, 650-653 (1975). "[I]n due course we will see *Griswold* as a reaffirmation of the Court's continuing obligation to test the justifications offered by the state for state-imposed constraints which significantly hamper those modes of individual fulfillment which are at the heart of a free society." *Id.*, at 653.

¹² In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court rested its holding in part on the constitutional right of parents to assume the primary role in decisions concerning the rearing of their children. That right is recognized because it reflects a "strong tradition" founded on "the history and culture of Western civilization," and because the parental role "is now established beyond debate as an enduring American tradition." *Id.*, at 232. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court spoke of the same right as "basic in the structure of our society." *Id.*, at 639. *Griswold v. Connecticut*, *supra*, struck down Connecticut's anticontraception statute. Three concurring Justices, relying on both the *Ninth* and *Fourteenth Amendments*, emphasized that "the traditional relation of the family" is "a relation as old and as fundamental as our entire civilization." 381 U.S., at 496 (Goldberg, J., joined by Warren, C.J., and BRENNAN, J., concurring). Speaking of the same statute as that involved in *Griswold*, Mr. Justice Harlan wrote, dissenting in *Poe v. Ullman*, 367 U.S. 497, 551-552 (1961): "[Here] we have not an intrusion into the home so much as on the life which characteristically has its place in the home....The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."

Although he agrees that the Due Process Clause has substantive content, MR. JUSTICE WHITE in dissent expresses the fear that our recourse to history and tradition will "broaden enormously the horizons of the Clause." *Post*, at 549-550. To the contrary, an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract

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formula taken from *Palko v. Connecticut*, 302 U.S. 319 (1937), and apparently suggested as an alternative. Cf. *Duncan v. Louisiana*, *supra*, at 149-150, n. 14 (rejecting the *Palko* formula as the basis for deciding what procedural protections are required of a State, in favor of a historical approach based on the Anglo-American legal tradition). Indeed, the passage cited in MR. JUSTICE WHITE's dissent as "most accurately [reflecting] the thrust of prior decisions" on substantive due process, *post*, at 545, expressly points to history and tradition as the source for "supplying... content to this Constitutional concept." *Poe v. Iman*, *supra*, at 542 (Harlan, J., dissenting).

13 See generally Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 623-624 (1977).

Ours [***541] is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. ¹⁴ Over the years millions [*505] of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household - indeed [**1939] who may take on major responsibility for the rearing of the children. ¹⁵ Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life. This is apparently what happened here. ¹⁶

14 See generally B. Yorburg, *The Changing Family* (1973); Bronfenbrenner, *The Calamitous*

Decline of the American Family, Washington Post, Jan. 2, 1977, p. C1. Recent census reports bear out the importance of family patterns other than the prototypical nuclear family. In 1970, 26.5% of all families contained one or more members over 18 years of age, other than the head of household and spouse. U.S. Department of Commerce, 1970 Census of Population, vol. 1, pt. 1, Table 208. In 1960 the comparable figure was 26.1%. U.S. Department of Commerce, 1960 Census of Population, vol. 1, pt. 1, Table 187. Earlier data are not available.

15 Cf. *Prince v. Massachusetts*, 321 U.S. 158 (1944), which spoke broadly of family authority as against the State, in a case where the child was being reared by her aunt, not her natural parents.

16 We are told that the mother of John Moore, Jr., died when he was less than one year old. He, like uncounted others who have suffered a similar tragedy, then came to live with the grandmother to provide the infant with a substitute for his mother's care and to establish a more normal home environment. Brief for Appellant 25.

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree [*506] of kinship to live together may not lightly be denied by the State. *Pierce* struck down on Oregon law requiring all children to attend the State's public schools, holding that the Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S., at 535. By the same token the Constitution prevents East Cleveland from standardizing its children - and its adults - by forcing all to live in certain narrowly defined family patterns.

Reversed.

CONCUR BY: BRENNAN; STEVENS

CONCUR

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

[***542] I join the plurality's opinion. I agree that the Constitution is not powerless to prevent East Cleveland from prosecuting as a criminal and jailing ¹ a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with

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her and been brought up by her since his mother's death when he was less than a year old. ² I do not question that a municipality may constitutionally zone to [*507] alleviate noise and traffic congestion and to prevent overcrowded and unsafe living conditions, in short to enact reasonable land-use restrictions in furtherance of the legitimate objectives East Cleveland claims for its ordinance. But the zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life. East Cleveland may not constitutionally define "family" as essentially confined to parents and the parents' own children. ³ The plurality's opinion conclusively demonstrates that classifying family patterns in this eccentric way is not a rational [**1940] means of achieving the ends East Cleveland claims for its ordinance, and further that the ordinance unconstitutionally abridges the "freedom of personal choice in matters of... family life [that] is one of the liberties protected by the *Due Process Clause of the Fourteenth Amendment.*" *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974). I write only to underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance in the light of the tradition of the American home that has been a feature of our society since our beginning as a Nation - the "tradition" in the plurality's words, "of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children..." *Ante*, at 504. The line drawn by this ordinance [*508] displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society.

1 This is a criminal prosecution which resulted in the grandmother's conviction and sentence to prison and a fine. Section 1345.99 permits imprisonment of up to six months, and a fine of up to \$ 1,000, for violation of any provision of the Housing Code. Each day such violation continues may, by the terms of this section, constitute a separate offense.

2 Brief for Appellant 4. In addition, we were informed by appellant's counsel at oral argument that

"application of this ordinance here would not only sever and disrupt the relationship between Mrs. Moore and her own son, but it would disrupt the relationship that is established between young John and young Dale, which is in essence a

sibling type relationship, and it would most importantly disrupt the relationship between young John and his grandmother, which is the only maternal influence that he has had during his entire life." Tr. of Oral Arg. 16.

The city did not dispute these representations, and it is clear that this case was argued from the outset as requiring decision in this context.

³ The East Cleveland ordinance defines "family" to include, in addition to the spouse of the "nominal head of the household," the couple's childless unmarried children, but only one dependent child (married or unmarried) having dependent children, and one parent of the nominal head of the household or of his or her spouse. Thus an "extended family" is authorized in only the most limited sense, and "family" is essentially confined to parents and their own children. Appellant grandmother was charged with violating the ordinance because John, Jr., lived with her at the same time her other grandson, Dale, Jr., was also living in the home; the latter is classified as an "unlicensed roomer" authorized by the ordinance to live in the house.

In [***543] today's America, the "nuclear family" is the pattern so often found in much of white suburbia. J. Vander Zanden, *Sociology: A Systematic Approach* 322 (3d ed. 1975). The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The "extended family" that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities, ⁴ remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern - virtually a means of survival - for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household. ⁵

4 See Report of the National Advisory Commission on Civil Disorders 278-281 (1968); Kosa & Nash, *Social Ascent of Catholics*, 8 *Social Order* 98-103 (1958); M. Novak, *The Rise of the Unmeltable Ethnics* 209-210 (1972); B. Yorborg, *The Changing Family* 106-109 (1973); Kosa, Rachiele, & Schommer, *Sharing the Home with Relatives*, 22 *Marriage and Family Living* 129 (1960).

5 See, e.g., H. Gans, *The Urban Villagers* 45-73, 245-249 (1962).

"Perhaps the most important - or at least the most visible - difference between the classes is one of family structure. *The working class subculture* is distinguished by the dominant role of the family circle....

"The specific characteristics of the family circle may differ widely - from the collateral peer group form of the West Enders, to the hierarchical type of the Irish, or to the classical three-generation extended family.... What matters most - and distinguishes this subculture from others - is that there be a family circle which is wider than the nuclear family, and that all of the opportunities, temptations, and pressures of the larger society be evaluated in terms of how they affect the ongoing way of life that has been built around this circle." *Id.*, at 244-245 (emphasis in original).

[*509] The "extended" form is especially familiar among black families. ⁶ We may suppose that this reflects the truism that black citizens, like generations of white immigrants before them, have been victims of economic and other disadvantages that would worsen if they were compelled to abandon extended, [**1941] for nuclear, living patterns. ⁷ Even in husband and wife [***544] households, 13% of black families compared with 3% of white families include relatives under 18 years old, in [*510] addition to the couple's own children. ⁸ In black households whose head is an elderly woman, as in this case, the contrast is even more striking: 48% of such black households, compared with 10% of counterpart white households, include related minor children not offspring of the head of the household. ⁹

⁶ Yorburg, *supra*, n. 4, at 108. "Within the black lower-class it has been quite common for several generations, or parts of the kin, to live together under one roof. Often a maternal grandmother is the acknowledged head of this type of household which has given rise to the term 'matrifocal' to describe lower-class black family patterns." See J. Scanzoni, *The Black Family in Modern Society* 134 (1971); see also Anderson, *The Pains and Pleasures of Old Black Folks*, *Ebony* 123, 128-130 (Mar. 1973). See generally E. Frazier, *The Negro Family in the United States* (1939);

Lewis, *The Changing Negro Family*, in E. Ginzberg, ed., *The Nation's Children* 108 (1960).

The extended family often plays an important role in the rearing of young black children whose parents must work. Many such children frequently "spend all of their growing-up years in the care of extended kin.... Often children are 'given' to their grandparents, who rear them to adulthood.... Many children normally grow up in a three-generation household and they absorb the influences of grandmother and grandfather as well as mother and father." J. Ladner, *Tomorrow's Tomorrow: The Black Woman* 60 (1972).

⁷ The extended family has many strengths not shared by the nuclear family.

"The case histories behind mounting rates of delinquency, addiction, crime, neurotic disabilities, mental illness, and senility in societies in which autonomous nuclear families prevail suggest that frequent failure to develop enduring family ties is a serious inadequacy for both individuals and societies." D. Blitsten, *The World of the Family* 256 (1963).

Extended families provide services and emotional support not always found in the nuclear family:

"The troubles of the nuclear family in industrial societies, generally, and in American society, particularly, stem largely from the inability of this type of family structure to provide certain of the services performed in the past by the extended family. Adequate health, education, and welfare provision, particularly for the two nonproductive generations in modern societies, the young and the old, is increasingly an insurmountable problem for the nuclear family. The unrelieved and sometimes unbearably intense parent-child relationship, where childrearing is not shared at least in part by others, and the loneliness of nuclear family units, increasingly turned in on themselves in contracted and relatively isolated settings, is another major problem." Yorburg, *supra*, n. 4, at 194.

⁸ R. Hill, *The Strengths of Black Families* 5 (1972).

⁹ *Id.*, at 5-6. It is estimated that at least 26% of black children live in other than husband-wife

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families, "including foster parents the presence of other male or female relatives (grandfather or grandmother, older brother or sister, uncle or aunt), male or female nonrelatives, [or with] only *one* adult (usually mother) present...." Scanzoni, *supra*, n. 6, at 44.

I do not wish to be understood as implying that East Cleveland's enforcement of its ordinance is motivated by a racially discriminatory purpose: The record of this case would not support that implication. But the prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens, surely demonstrates that the "extended family" pattern remains a vital tenet of our society.¹⁰ It suffices that in prohibiting this pattern of family living as a means of achieving its objectives, appellee city has chosen a device that deeply intrudes into family associational rights that historically have been central, and today remain central, to a large proportion of our population.

¹⁰ Novak, *supra*, n. 4; Hill, *supra*, at 5-6; N. Glazer & D. Moynihan, *Beyond the Melting Pot* 50-53 (2d ed. 1970); L. Rainwater & W. Yancey, *The Moynihan Report and the Politics of Controversy* 51-60 (1967).

Moreover, to sanction the drawing of the family line at the arbitrary boundary chosen by East Cleveland would surely conflict with prior decisions that protected "extended" family [*511] relationships. For the "private realm of family life which the state cannot enter," recognized as protected in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), was the relationship of aunt and niece. And in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), the protection held to have been unconstitutionally abridged was "the liberty of parents and *guardians* to direct the upbringing and education of children under their control" (emphasis added). See also *Wisconsin v. Yoder*, 406 U.S. 205, 232-233 (1972). Indeed, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the case primarily relied upon by the appellee, actually supports the Court's decision. The Belle Terre ordinance barred only unrelated individuals from constituting [***545] a family in a single-family zone. The village took special care in its brief to emphasize that its ordinance did not in any manner inhibit the choice of *related* individuals to constitute a family, whether in the "nuclear" or "extended" form. This was because the village perceived that choice as one it was

constitutionally powerless to inhibit. Its brief stated: [**1942] "Whether it be the extended family of a more leisurely age or the nuclear family of today the role of the family in raising and training successive generations of the species makes it more important, we dare say, than any other social or legal institution.... *If any freedom not specifically mentioned in the Bill of Rights enjoys a 'preferred position' in the law it is most certainly the family.*" (Emphasis supplied.) Brief for Appellants in No. 73-191, O.T. 1973, p. 26. The cited decisions recognized, as the plurality recognizes today, that the choice of the "extended family" pattern is within the "freedom of personal choice in matters of... family life [that] is one of the liberties protected by the *Due Process Clause of the Fourteenth Amendment.*" 414 U.S., at 639-640.

Any suggestion that the variance procedure of East Cleveland's Housing Code assumes special significance is without merit. This is not only because this grandmother [*512] was not obligated to exhaust her administrative remedy before defending this prosecution on the ground that the single-family occupancy ordinance violates the *Equal Protection Clause*. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the leading case in the zoning field, expressly held that one attacking the constitutionality of a building or zoning code need not first seek a variance. *Id.*, at 386. Rather, the matter of a variance is irrelevant also because the municipality is constitutionally powerless to abridge, as East Cleveland has done, the freedom of personal choice of related members of a family to live together. Thus, the existence of the variance procedure serves to lessen neither the irrationality of the definition of "family" nor the extent of its intrusion into family life-style decisions.

There is no basis for an inference - other than the city's self-serving statement that a hardship variance "possibly with some (stipulations) would probably have been granted" - that this grandmother would have obtained a variance had she requested one. Indeed, a contrary inference is more supportable. In deciding to prosecute her in the first place, the city tipped its hand how discretion would have been exercised. In any event, § 1311.02 (1965), limits the discretion of the Board of Building Code Appeals to grant variances to those which are "in harmony with the general intent of such ordinance...." If one of the legitimate objectives of the definition of "family" was to preserve the single (nuclear) family character of East Cleveland, then granting this

431 U.S. 494, *512; 97 S. Ct. 1932, **1942;
52 L. Ed. 2d 531, ***545; 1977 U.S. LEXIS 17

grandmother a variance would be in excess of the Board's powers under the ordinance.

Furthermore, the very existence of the "escape hatch" of the variance procedure only heightens the irrationality of the restrictive definition, since application of the ordinance then depends upon which family units the zoning authorities permit to reside together and whom the [***546] prosecuting authorities choose to prosecute. The Court's disposition of the analogous situation in *Roe v. Wade*, 410 U.S. 113 (1973), [*513] is instructive. There Texas argued that, despite a rigid and narrow statute prohibiting abortions except for the purpose of saving the mother's life, prosecuting authorities routinely tolerated elective abortion procedures in certain cases, such as nonconsensual pregnancies resulting from rape or incest. The Court was not persuaded that this saved the statute, THE CHIEF JUSTICE commenting that "no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion." *Id.*, at 208 (concurring opinion). Similarly, this grandmother cannot be denied the opportunity to defend against this criminal prosecution because of a variance procedure that holds her family hostage to the vagaries of discretionary administrative decisions. *Smith v. Cahoon*, 283 U.S. 553, 562 (1931). We have now passed well beyond the day when illusory escape hatches could justify the imposition of burdens on fundamental rights. *Stanley v. Illinois*, 405 U.S. 645, 647-649 [**1943] (1972); *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958).

MR. JUSTICE STEVENS, concurring in the judgment.

In my judgment the critical question presented by this case is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit.

Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property. This basic right has always been limited by the law of nuisance which proscribes uses that impair the enjoyment of other property in the vicinity. But the question whether an individual owner's use could be further limited by a municipality's comprehensive zoning plan was not finally decided until this century.

The holding in *Euclid v. Ambler Realty Co.*, 272 U.S.

365, that a city could use its police power, not just to abate a specific use of property which proved offensive, but also to create and implement a comprehensive plan for the use [*514] of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits.

In his opinion for the Court, Mr. Justice Sutherland fused the two express constitutional restrictions on any state interference with private property - that property shall not be taken without due process nor for a public purpose without just compensation - into a single standard: "[Before] [a zoning] ordinance can be declared unconstitutional, [it must be shown to be] clearly arbitrary and unreasonable, *having no substantial relation to the public health, safety, morals, or general welfare.*" *Id.*, at 395 (emphasis added). This principle was applied in *Nectow v. Cambridge*, [***547] 277 U.S. 183; on the basis of a specific finding made by the state trial court that "the health, safety, convenience and general welfare of the inhabitants of the part of the city affected" would not be promoted by prohibiting the landowner's contemplated use, this Court held that the zoning ordinance as applied was unconstitutional. *Id.*, at 188. ¹

¹ The Court cited *Zahn v. Board of Public Works*, 274 U.S. 325. The statement of the rule in *Zahn* remains viable today:

"The most that can be said [of this zoning ordinance] is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Id.*, at 328.

With one minor exception, ² between the *Nectow* decision in 1928 and the 1974 decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1, this Court did not review the substance of any zoning ordinances. The case-by-case development of the constitutional limits on the zoning power has not, therefore, taken place in this Court. On the other hand, during [*515] the past half century the broad formulations found in *Euclid* and *Nectow* have been applied in countless situations by the state courts.

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Those cases shed a revelatory light on the character of the single-family zoning ordinance challenged in this case.

2 *Goldblatt v. Town of Hempstead*, 369 U.S. 590.

Litigation involving single-family zoning ordinances is common. Although there appear to be almost endless differences in the language used in these ordinances,³ they contain three principal types of restrictions. [**1944] First, they define the kind of structure that may be erected on vacant land.⁴ Second, they require that a single-family home be occupied only by a "single housekeeping unit."⁵ Third, they often [*516] require that [***548] the housekeeping unit be made up of persons related by blood, adoption, or marriage, with certain limited exceptions.

3 See, for example, the various provisions quoted or paraphrased in *Brady v. Superior Court*, 200 Cal. App. 2d 69, 80-81, n. 3, 19 Cal. Rptr. 242, 249 n. 3 (1962).

4 As this Court recognized in *Euclid*, even residential apartments can have a negative impact on an area of single-family homes.

"[Often] the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by [a single-family dwelling area].... [The] coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the distributing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities, - until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances." 272 U.S., at 394-395.

5 Limiting use to single-housekeeping units, like limitations on the number of occupants, protects

the community's interest in minimizing overcrowding, avoiding the excessive use of municipal services, traffic control, and other aspects of an attractive physical environment. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9.

Although the legitimacy of the first two types of restrictions is well settled,⁶ attempts to limit occupancy to related persons have not been successful. The state courts have recognized a valid community interest in preserving the stable character of residential neighborhoods which justifies a prohibition against transient occupancy.⁷ Nevertheless, in well-reasoned opinions, the courts of Illinois,⁸ New York,⁹ New Jersey,¹⁰ [*517] [**1945] California,¹¹ [***549] Connecticut,¹² Wisconsin,¹³ and other jurisdictions,¹⁴ have permitted unrelated persons to occupy single-family residences notwithstanding an ordinance prohibiting, either expressly or implicitly, such occupancy.

6 See nn. 4 and 5, *supra*, and also Professor N. Williams' discussion of the subject in his excellent treatise on zoning law, 2 American Land Planning Law 349-361 (1974).

7 Types of group living which have not fared well under single-family ordinances include fraternities, *Schenectady v. Alumni Assn.*, 5 App. Div. 2d 14, 168 N.Y.S. 2d 754 (1957); sororities, *Cassidy v. Triebel*, 337 Ill. App. 117, 85 N.E. 2d 461 (1948); a retirement home designed for over 20 people, *Kellog v. Joint Council of Women's Auxiliaries Welfare Assn.*, 265 S.W. 2d 374 (Mo. 1954); and a commercial therapeutic home for emotionally disturbed children, *Browndale International v. Board of Adjustment*, 60 Wis. 2d 182, 208 N.W. 2d 121 (1973). These institutional uses are not only inconsistent with the single-housekeeping-unit concept but include many more people than would normally inhabit a single-family dwelling.

8 In *City of Des Plaines v. Trotter*, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966), the Illinois Supreme Court faced a challenge to a single-family zoning ordinance by a group of four unrelated young men who occupied a dwelling in violation of the ordinance which provided that a "'family' consists of one or more persons each related to the other by blood (or adoption or marriage)...." *Id.*, at 433, 216 N.E. 2d, at 117. In his opinion for the court, Justice Schaefer wrote:

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"When other courts have been called upon to define the term 'family' they have emphasized the single housekeeping unit aspect of the term, rather than the relationship of the occupants. [Citing cases.]

* * *

"In terms of permissible zoning objectives, a group of persons bound together only by their common desire to operate a single housekeeping unit, might be thought to have a transient quality that would affect adversely the stability of the neighborhood, and so depreciate the value of other property. An ordinance requiring relationship by blood, marriage or adoption could be regarded as tending to limit the intensity of land use. And it might be considered that a group of unrelated persons would be more likely to generate traffic and parking problems than would an equal number of related persons.

"But none of these observations reflects a universal truth. Family groups are mobile today, and not all family units are internally stable and well-disciplined. Family groups with two or more cars are not unfamiliar. And so far as intensity of use is concerned, the definition in the present ordinance, with its reference to the 'respective spouses' of persons related by blood, marriage or adoption, can hardly be regarded as an effective control upon the size of family units.

"The General Assembly has not specifically authorized the adoption of zoning ordinances that penetrate so deeply as this one does into the internal composition of a single housekeeping unit. Until it has done so, we are of the opinion that we should not read the general authority that it has delegated to extend so far." *Id.*, at 436-438, 216 N.E. 2d, at 119-120.

9 In *White Plains v. Ferraioli*, 34 N.Y. 2d 300, 313 N.E. 2d 756 (1974), the Court of Appeals of New York refused to apply an ordinance limiting occupancy of single-family dwellings to related individuals to a "group home" licensed by the State to care for abandoned and neglected children. The court wrote:

"Zoning is intended to control types of housing and living and not the genetic or intimate

internal family relations of human beings.

"Whether a family be organized along ties of blood or formal adoptions, or be a similarly structured group sponsored by the State, as is the group home, should not be consequential in meeting the test of the zoning ordinance. So long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance...." *Id.*, at 305-306, 313 N.E. 2d, at 758.

10 In *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 252, 281 A. 2d 513, 518 (1971), the Supreme Court of New Jersey reviewed a complex single-family zoning ordinance designed to meet what the court recognized to be a pressing community problem. The community, a seaside resort, had been inundated during recent summers by unruly groups of summer visitors renting seaside cottages. To solve the problems of excessive noise, overcrowding, intoxication, wild parties, and immorality that resulted from these group rentals, the community passed a zoning ordinance which prohibited seasonal rentals of cottages by most groups other than "families" reared by blood or marriage. The court found that even though the problems were severe, the ordinance "[precluded] so many harmless dwelling uses" that it became "sweepingly excessive, and therefore legally unreasonable." *Ibid.* The court quoted, *id.*, at 252, 281 A.2d, at 519, the following language from *Gabe Collins Realty, Inc. v. Margate City*, 112 N.J. Super. 341, 349, 271 A. 2d 430, 434 (1970), in a similar case as "equally applicable here":

"Thus, even in the light of the legitimate concern of the municipality with the undesirable concomitants of group rentals experienced in Margate City, and of the presumption of validity of municipal ordinances, we are satisfied that the remedy here adopted constitutes a sweepingly excessive restriction of property rights as against the problem sought to be dealt with, and in legal contemplation deprives plaintiffs of their property without due process."

The court in *Kirsch Holding Co.*, *supra*, at 251 n. 6, 281 A. 2d., at 518 n. 6, also quoted with

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approval the following statement from *Marino v. Mayor & Council of Norwood*, 77 N.J. Super. 587, 594, 187 A. 2d 217, 221 (1963):

"Until compelled to do so by a New Jersey precedent squarely in point, this court will not conclude that persons who have economic or other personal reasons for living together as a *bona fide* single housekeeping unit and who have no other orientation, commit a zoning violation, with possible penal consequences, just because they are not related."

11 A California appellate court in *Brady v. Superior Court*, 200 Cal. App. 2d, at 81, 19 Cal. Rptr., at 250, allowed use of a single-family dwelling by two unrelated students, noting:

"The erection or construction of a 'single family dwelling,' in itself, would imply that any building so constructed would contain a central kitchen, dining room, living room, bedrooms; that is, constitute a single housekeeping unit. Consequently, to qualify as a 'single family dwelling' an erected structure need only be used as a single housekeeping unit."

12 The Supreme Court of Connecticut allowed occupancy of a large summer home by four related families because the families did "not occupy separate quarters within the house, [but used] the lodging, cooking and eating facilities [as] common to all." *Neptune Park Assn. v. Steinberg*, 138 Conn. 357, 360, 84 A. 2d 687, 689 (1951).

13 The Supreme Court of Wisconsin, noting that "the letter killeth but the spirit giveth life," 2 Corinthians 3:6, held that six priests and two lay brothers constituted a "family" and that their use, for purely residential purposes of a single-family dwelling did not violate a single-family zoning ordinance. *Missionaries of Our Lady of LaSalette v. Whitefish Bay*, 267 Wis. 609, 66 N.W. 2d 627 (1954).

14 *Carroll v. Miami Beach*, 198 So. 2d 643 (Fla. App. 1967); *Robertson v. Western Baptist Hospital*, 267 S.W. 2d 395 (Ky. App. 1954); *Women's Kansas City St. Andrew Soc. v. Kansas City*, 58 F. 2d 593 (CA8 1932); *University Heights v. Cleveland Jewish Orphans' Home*, 20 F. 2d 743 (CA6 1927).

[*518] These cases delineate the extent to which the state courts have allowed zoning ordinances [**1946] to interfere with the right of a property owner to determine the internal composition of his [*519] household. The intrusion on that basic property right has not previously gone beyond the point where the ordinance defines a family to include only persons related by blood, marriage, or adoption. Indeed, [***550] as the cases in the margin demonstrate, state courts have not always allowed the intrusion to penetrate that far. The state decisions have upheld zoning ordinances which regulated the identity, as opposed to the number, of persons who may compose a household only to the extent that the ordinances require such households to remain nontransient, single-housekeeping units. ¹⁵

15 *Village of Belle Terre v. Boraas*, 416 U.S. 1, is consistent with this line of state authority. Chief Judge Breitel in *White Plains v. Ferraioli*, *supra*, at 304-305, 313 N.E. 2d, at 758, cogently characterized the *Belle Terre* decision upholding a single-family ordinance as one primarily concerned with the prevention of transiency in a small, quiet suburban community. He wrote:

"The group home [in *White Plains*] is not, for purposes of a zoning ordinance, a temporary living arrangement as would be a group of college students sharing a house and commuting to a nearby school (cf. *Village of Belle Terre v. Boraas*...). Every year or so, different college students would come to take the place of those before them. There would be none of the permanency of community that characterizes a residential neighborhood of private homes."

[*520] There appears to be no precedent for an ordinance which excludes any of an owner's relatives from the group of persons who may occupy his residence on a permanent basis. Nor does there appear to be any justification for such a restriction on an owner's use of his property. ¹⁶ The city has failed totally to explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins. Since this ordinance has not been shown to have any "substantial relation to the public health, safety, morals, or general welfare" of the city of East Cleveland, and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property - that of an owner to

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decide who may reside on his or her property - it must fall under the limited standard of review of zoning decisions which this Court preserved in [*521] *Euclid* and *Nectow*. Under that standard, East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation.

16 Of course, a community has other legitimate concerns in zoning an area for single-family use including prevention of overcrowding in residences and prevention of traffic congestion. A community which attacks these problems by restricting the composition of a household is using a means not reasonably related to the ends it seeks to achieve. See *Des Plaines v. Trottner*, 34 Ill. 2d, at 435-436, 216 N.E. 2d, at 118. To prevent overcrowding, a community can certainly place a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space. Indeed, the city of East Cleveland had on its books an ordinance requiring a minimum amount of floor space per occupant in every dwelling. See *Nolden v. East Cleveland City Comm'n*, 12 Ohio Misc. 205, 232 N.E. 2d 421 (Com. Pl. Ct. Cuyahoga Cty. 1966). Similarly, traffic congestion can be reduced by prohibiting on-street parking. To attack these problems through use of a restrictive definition of family is, as one court noted, like "[burning] the house to roast the pig." *Larson v. Mayor*, 99 N. J. Super. 365, 374, 240 A. 2d 31, 36 (1968). More narrowly, a limitation on *which* of the owner's grandchildren may reside with her obviously has no relevance to these problems.

For these reasons, I concur in the Court's judgment.

DISSENT BY: BURGER; STEWART; WHITE

DISSENT

MR. CHIEF JUSTICE BURGER, dissenting.

It is unnecessary for me to reach the difficult constitutional issue this case presents. Appellant's deliberate refusal to use a plainly adequate administrative remedy provided by [***551] the city should foreclose her from pressing in this Court any constitutional objections to the city's zoning ordinance. Considerations of federalism and comity, as well as the finite capacity of

federal courts, support this position. In courts, as in hospitals, two bodies cannot occupy the same space at the same time; [**1947] when any case comes here which could have been disposed of long ago at the local level, it takes the place that might well have been given to some other case, in which there was no alternative remedy.

(1)

The single-family zoning ordinances of the city of East Cleveland define the term "family" to include only the head of the household and his or her most intimate relatives, principally the spouse and unmarried and dependent children. Excluded from the definition of "family," and hence from cohabitation, are various persons related by blood or adoption to the head of the household. The obvious purpose of the city is the traditional one of preserving certain areas as family residential communities.

The city has established a Board of Building Code Appeals to consider variances from this facially stringent single-family limit when necessary to alleviate "practical difficulties and unnecessary hardships" and "to secure the general welfare and [do] substantial justice...." East Cleveland Codified Ordinances Code § 1311.02 (1965). The Board has power to grant variances to "[any] person adversely affected by a decision of [*522] any City official made in the enforcement of any [zoning] ordinance," so long as appeal is made to the Board within 10 days of notice of the decision appealed from. § 1311.03.

After appellant's receipt of the notice of violation, her lawyers made no effort to apply to the Board for a variance to exempt her from the restrictions of the ordinance, even though her situation appears on its face to present precisely the kind of "practical difficulties and unnecessary hardships" the variance procedure was intended to accommodate. Appellant's counsel does not claim appellant was unaware of the right to go to the Board and seek a variance, or that any attempt was made to secure relief by an application to the Board. ¹ Indeed, appellant's counsel makes no claim that the failure to seek a variance was due to anything other than a deliberate decision to forgo the administrative process in favor of a judicial forum.

1 Counsel for appellant candidly admitted at oral argument that "Mrs. Moore did not seek a variance in this case" but argued that her failure to

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do so is constitutionally irrelevant. Tr. of Oral Arg. 20. Thus, this was not an unpublicized administrative remedy of which appellant remained unaware until after it became unavailable. Such a case would, of course, present materially different considerations. Cf. *Lambert v. California*, 355 U.S. 225 (1957).

(2)

In view of appellant's deliberate bypass of the variance procedure, the question arises whether she should now be permitted to complain of the unconstitutionality of the singlefamily ordinance as it applies to her. This Court has not yet required one in appellant's position to utilize available state administrative remedies as a prerequisite to obtaining [***552] federal relief; but experience has demonstrated that such a requirement is imperative if the critical overburdening of federal courts at all levels is to be alleviated. That burden has now become "a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should." [*523] Department of Justice Committee on Revision of the Federal Judicial System, Report on the Needs of the Federal Courts 1 (1977). The same committee went on to describe the disastrous effects an exploding caseload has had on the administration of justice: S

"Overloaded courts... mean long delays in obtaining a final decision and additional expense as court procedures become more complex in the effort to handle the rush of business.... [The] quality of justice must necessarily suffer. Overloaded courts, seeking to deliver justice on time insofar as they can, necessarily begin to adjust their processes, sometimes in ways that threaten the integrity of the law and of the decisional process.

" [**1948] District courts have delegated more and more of their tasks to magistrates.... Time for oral argument is steadily cut back?. [The] practice of delivering written opinions is declining.

. . .

"... Courts are forced to add more clerks, more administrative personnel, to move cases faster and faster. They are losing... time for reflection, time for the deliberate maturation of principles." *Id.*, at 3-4.1

The devastating impact overcrowded dockets have

on the quality of justice received by all litigants makes it essential that courts be reserved for the resolution of disputes for which no other adequate forum is available.

A

The basis of the doctrine of exhaustion of administrative remedies was simply put in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), as S

"the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or [*524] threatened injury until the prescribed administrative remedy has been exhausted."I

Exhaustion is simply one aspect of allocation of overtaxed judicial resources. Appellant wishes to use a residential property in a manner at variance with a municipal housing code. That claim could have been swiftly and inexpensively adjudicated in a municipal administrative tribunal, without engaging cumbersome federal judicial machinery at the highest level. Of course, had appellant utilized the local administrative remedies and state judicial remedies to no avail, resort to this Court would have been available. ²

2 Exhaustion does not deny or limit litigants' rights to a federal forum "because state administrative agency determinations do not create res judicata or collateral estoppel effects. The exhaustion of state administrative remedies postpones rather than precludes the assertion of federal jurisdiction." Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537, 551 (1974).

The exhaustion principle asks simply that absent compelling circumstances - and [***553] none are claimed here - the avenues of relief nearest and simplest should be pursued first. This Court should now make unmistakably clear that when state or local governments provide administrative remedial procedures, no federal forum will be open unless the claimant can show either that the remedy is inadequate or that resort to those remedies is futile.

Utilization of available administrative processes is mandated for a complex of reasons. Statutes sometimes provide administrative procedures as the exclusive remedy. Even apart from a statutory command, it is

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common sense to permit the simple, speedy, and inexpensive processes of the administrative machinery to sift the facts and compile a complete record for the benefit of any reviewing courts. Exhaustion avoids interruption of the administrative process and allows application of an agency's specialized experience and the broad discretion granted to local entities, such as zoning boards. [*525] Indeed, judicial review may be seriously hampered if the appropriate agency has no chance to apply its experience, exercise its discretion or make a factual record reflecting all aspects of the problem.

Most important, if administrative remedies are pursued, the citizen may win complete relief without needlessly invoking judicial process. This permits the parties to resolve their disputes by relatively informal means far less costly and time consuming than litigation. By requiring exhaustion of administrative processes the courts are assured of reviewing only final agency decisions arrived at after considered judgment. It also permits agencies an opportunity to correct their own mistakes or give discretionary relief short of judicial review. Consistent failure by courts to mandate utilization of administrative remedies - under the [**1949] growing insistence of lawyers demanding broad judicial remedies - inevitably undermines administrative effectiveness and defeats fundamental public policy by encouraging "end runs" around the administrative process.

It is apparent without discussion that resort to the local appeals Board in this case would have furthered these policies, particularly since the exercise of informed discretion and experience by the proper agency is the essence of any housing code variance procedure. We ought not to encourage litigants to bypass simple, inexpensive, and expeditious remedies available at their doorstep in order to invoke expensive judicial machinery on matters capable of being resolved at local levels.

B

The suggestion is made that exhaustion of administrative remedies is not required on issues of constitutional law. In one sense this argument is correct, since administrative agencies have no power to decide questions of federal constitutional law. But no one has a right to a federal constitutional adjudication [*526] on an issue capable of being resolved on a less elevated plane. Indeed, few concepts have had more faithful adherence in this Court than the imperative of avoiding

constitutional resolution of issues capable of being disposed of otherwise. Mr. Justice Brandeis put it well in a related context, arguing for judicial restraint in *Ashwander v. TVA*, 297 U.S. 288, 347 [***554] (1936) (concurring opinion): S

"[This] Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of?. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."I

This Court has frequently remanded cases for exhaustion "before a challenge can be made in a reviewing court of the constitutionality of the basic statute, on which the agency may not pass...." K. Davis, *Administrative Law Text* 394 (3d ed. 1972). Indeed, exhaustion is often required precisely because there are constitutional issues present in a case, in order to avoid unnecessary adjudication of these delicate questions by giving the affected administrative agency an opportunity to resolve the matter on nonconstitutional grounds. See *Christian v. New York Dept. of Labor*, 414 U.S. 614 (1974); *Public Utilities Comm'n of California v. United States*, 355 U.S. 534, 539-540 (1958); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 553 (1954); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 766-767 (1947); *Natural Gas Co. v. Slattery*, 302 U.S. 300, 309-311 (1937); Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 Ind. L.J. 817, 883 (1976).

Of course, if administrative authority fails to afford relief, further exhaustion is pointless and judicial relief may be available. See *Weinberger v. Salfi*, 422 U.S. 749 (1975). [*527] But so long as favorable administrative action is still possible, the policies favoring exhaustion are not mitigated in the slightest by the presence of a constitutional issue. See *Christian, supra*. To the extent that a nonconstitutional decision is possible only at the administrative level, those policies are reinforced. Plainly we have here precisely such a case. Appearance before the local city Board would have provided an opportunity for complete relief without forcing a constitutional ruling. The posture of the constitutional issues in this case thus provides an additional reason supporting the exhaustion requirement.

C

431 U.S. 494, *527; 97 S. Ct. 1932, **1949;
52 L. Ed. 2d 531, ***554; 1977 U.S. LEXIS 17

It is also said that exhaustion is not required when to do so would inflict irreparable [**1950] injury on the litigant. In the present case, as in others in which a constitutional claim is asserted, injury is likely to include the "loss or destruction of substantive rights." In such a case, "the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay..., has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention." *Aircraft & Diesel Equipment Corp., supra*, at 773.

But there is every reason to require resort to administrative remedies "where the individual charged is to be deprived of nothing until the completion of [the administrative] [***555] proceeding." *Gibson v. Berryhill*, 411 U.S. 564, 574-575 (1973); see *Natural Gas Co., supra*, at 309-311; *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Aircraft & Diesel Equipment Corp., supra*, at 773-774. The focus must be on the adequacy of the administrative remedy. If the desired relief may be obtained without undue burdens, and if substantial rights are protected as the process moves forward, no harm is done by requiring the litigant to pursue and exhaust those remedies before calling on the Constitution of [*528] the United States. To do otherwise trivializes constitutional adjudication.³

³ This analysis explains those cases in which this Court has allowed persons subject to claimed unconstitutional restrictions on their freedom of expression to challenge that restriction without first applying for a permit which, if granted, would moot their claim. *E.g., Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958). In each instance the permit procedure was itself an unconstitutional infringement on *First Amendment* rights. Thus, in those cases irreparable injury - the loss or postponement of precious *First Amendment* rights - was a concomitant of the available administrative procedure.

Similarly explicable are those cases in which challenge is made to the constitutionality of the administrative proceedings themselves. See *Freedman v. Maryland*, 380 U.S. 51 (1965);

Public Utilities Comm'n of California v. United States, 355 U.S. 534, 540 (1958). But see *Christian v. New York Dept. of Labor*, 414 U.S. 614, 622 (1974), where appellants' constitutional due process challenge to administrative procedures was deferred pending agency action. Exhaustion in those situations would similarly risk infringement of a constitutional right by the administrative process itself.

In this case appellant need have surrendered no asserted constitutional rights in order to pursue the local administrative remedy. No reason appears why appellant could not have sought a variance as soon as notice of a claimed violation was received, without altering the living arrangements in question. The notice of violation gave appellant 10 days within which to seek a variance; no criminal or civil sanctions could possibly have attached pending the outcome of that proceeding.

Though timely invocation of the administrative remedy would have had no effect on appellant's asserted rights, and would have inflicted no irreparable injury, the present availability of such relief under the city ordinance is less clear. But it is unrealistic to expect a municipality to hold open its administrative process for years after legal enforcement action has begun. Appellant cannot rely on the current absence [*529] of administrative relief either as justification for the original failure to seek it, or as a reason why accountability for that failure is unreasonable. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 n. 22 (1975). Any other rule would make a mockery of the exhaustion doctrine by placing no penalty on its violation.

D

This is not a case where inadequate or unclear or costly remedies make exhaustion [**1951] inappropriate, or where the Board's position relating to appellant's claims is so fixed that further administrative review would be fruitless. There is not the slightest [***556] indication of any fixed Board policy against variances, or that a prompt application for a variance would not have been granted.⁴ Nor is it dispositive that the case involves criminal rather than civil penalties. The applicability of the exhaustion principle to bar challenges to the legality of prosecutions is established, even where, unlike the present case, substantial felony penalties are at stake. *McGee v. United States*, 402 U.S. 479 (1971); *Yakus v. United States*, 321 U.S. 414 (1944); *Falbo v.*

431 U.S. 494, *529; 97 S. Ct. 1932, **1951;
52 L. Ed. 2d 531, ***556; 1977 U.S. LEXIS 17

United States, 320 U.S. 549 (1944); see *McKart v. United States*, 395 U.S. 185 (1969). There is far less reason to take into account the criminal nature of the proceedings when only misdemeanor penalties are involved.

4 To be adequate for exhaustion purposes, an administrative remedy need not guarantee the litigant success on the merits in advance. What is required is a forum with the power to grant relief, capable of hearing the case with objectivity and dispatch. There is no reason to doubt that appellant would have received a fair hearing before the Board.

(3)

Thus, the traditional justifications offered in support of the exhaustion principle point toward application of the doctrine. But there is a powerful additional reason why exhaustion should be enforced in this case. We deal here with federal [*530] judicial review of an administrative determination by a subdivision of the State of Ohio. When the question before a federal court is whether to enforce exhaustion of state administrative remedies, interests of federalism and comity make the analysis strikingly similar to that appropriate when the question is whether federal courts should abstain from interference with ongoing state judicial proceedings.⁵ In both situations federal courts are being requested to act in ways lacking deference to, and perhaps harmful to, important state interests in order to vindicate rights which can be protected in the state system as well as in the federal. Cf. *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (BURGER, C.J., dissenting). The policies underlying this Court's refusals to jeopardize important state objectives needlessly in *Huffman v. Pursue, Ltd.*, *supra*; *Juidice v. Vail*, 430 U.S. 327 (1977); and *Trainor v. Hernandez*, *ante*, p. 434, argue strongly against action which encourages evasion and undermining of other important state interests embodied in regulatory procedures.

⁵ See *Parisi v. Davidson*, 405 U.S. 34, 37, 40 n. 6 (1972); *Public Utilities Comm'n v. United Fuel Co.*, 317 U.S. 456 (1943); *Natural Gas Co. v. Slattery*, 302 U.S. 300, 311 (1937); *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 229 (1908); *First Nat. Bank v. Board of County Comm'rs*, 264 U.S. 450 (1924); cf. *Schlesinger v. Councilman*, 420 U.S. 738, 756-757 (1975). See generally L. Jaffe, *Judicial Control of Administrative Action*

437-438 (1965); Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 Ind. L.J. 817, 861-862 (1976); Comment, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 Ind. L. Rev. 565 (1975).

When the State asserts its sovereignty through the administrative process, no less than when it proceeds judicially, "federal courts... should abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman, supra*, at 603; [***557] cf. *Younger v. Harris*, 401 U.S. 37, 41 (1971). A proper respect for state integrity is manifested by and, in part, dependent on, our reluctance to disrupt state [*531] proceedings even when important federal rights are asserted as a reason for doing so. Where, as here, state law affords an appropriate "doorstep" vehicle for vindication of the claims underlying those rights, federal courts should not be [**1952] called upon unless those remedies have been utilized. No litigant has a right to force a constitutional adjudication by eschewing the only forum in which adequate nonconstitutional relief is possible. Appellant seeks to invoke federal judicial relief. We should now make clear that the finite resources of this Court are not available unless the litigant has first pursued all adequate and available administrative remedies.

The doctrine of exhaustion of administrative remedies has a long history. Though its salutary effects are undisputed, they have often been casually neglected, due to the judicial penchant of honoring the doctrine more in the breach than in the observance. For my part, the time has come to insist on enforcement of the doctrine whenever the local or state remedy is adequate and where asserted rights can be protected and irreparable injury avoided within the administrative process. Only by so doing will this Court and other federal courts be available to deal with the myriad new problems clamoring for resolution.

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

In *Village of Belle Terre v. Boraas*, 416 U.S. 1, the Court considered a New York village ordinance that restricted land use within the village to single-family dwellings. That ordinance defined "family" to include all persons related by blood, adoption, or marriage who lived and cooked together as a single-housekeeping unit; it forbade occupancy by any group of three or more persons

who were not so related. We held that the ordinance was a valid effort by the village government to promote the general community welfare, and that it did not violate the *Fourteenth Amendment* or infringe [*532] any other rights or freedoms protected by the Constitution.

The present case brings before us a similar ordinance of East Cleveland, Ohio, one that also limits the occupancy of any dwelling unit to a single family, but that defines "family" to include only certain combinations of blood relatives. The question presented, as I view it, is whether the decision in *Belle Terre* is controlling, or whether the Constitution compels a different result because East Cleveland's definition of "family" is more restrictive than that before us in the *Belle Terre* case.

The city of East Cleveland is a residential suburb of Cleveland, Ohio. It has enacted a comprehensive Housing Code, one section of which prescribes that "[the] occupancy of any dwelling unit shall be limited to one, and only one, family...." ¹ The Code defines the term "family" as follows:

"Family' means a number of individuals related to the nominal head of the household or to the [***558] spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of [*533] the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

[**1953] "(e) A family may consist of one individual." ²

1 East Cleveland Housing Code § 1351.02 (1964).

2 East Cleveland Housing Code § 1341.08 (1966).

The appellant, Inez Moore, owns a 2 1/2-story frame house in East Cleveland. The building contains two "dwelling units." ³ At the time this litigation began Mrs. Moore occupied one of these dwelling units with her two sons, John Moore, Sr., and Dale Moore, Sr., and their two sons, John, Jr., and Dale, Jr. ⁴ These five persons constituted more than one family under the ordinance.

3 The Housing Code defines a "dwelling unit" as "a group of rooms arranged, maintained or designed to be occupied by a single family and consisting of a complete bathroom with toilet, lavatory and tub or shower facilities; one, and one only, complete kitchen or kitchenette with approved cooking, refrigeration and sink facilities; approved living and sleeping facilities. All of such facilities shall be in contiguous rooms and used exclusively by such family and by any authorized persons occupying such dwelling unit with the family." § 1341.07.

4 There is some suggestion in the record that the other dwelling unit in the appellant's house was also occupied by relative of Mrs. Moore. A notice of violation dated January 16, 1973, refers to "Ms. Carol Moore and her son, Derik," as illegal occupants in the other unit, and at some point the illegal occupancy in one of the units allegedly was corrected by transferring one occupant over to the other unit.

In January 1973, a city housing inspector cited Mrs. Moore for occupation of the premises by more than one family. ⁵ She received a notice of violation directing her to [*534] correct the situation, which she did not do. Sixteen months passed, during which the city repeatedly complained about the violation. Mrs. Moore did not request relief from the Board of Building Code Appeals, although the Code gives the Board the explicit [***559] power to grant a variance "where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance...." ⁶ Finally, in May 1974, a municipal court found Mrs. Moore guilty of violating the

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single-family occupancy ordinance. The court overruled her motion to dismiss the charge, rejecting her claim that the ordinance's definition of "family" is invalid on its face under the United States Constitution. The Ohio Court of Appeals affirmed on the authority of *Village of Belle Terre v. Boraas*, and the Ohio Supreme Court dismissed Mrs. Moore's appeal.

5 Mrs. Moore, as the owner of the house, was responsible for compliance with the Housing Code. East Cleveland Housing Code § 1343.04 (1966). The illegal occupant, however, was identified by the city as John Moore, Jr., Mrs. Moore's grandson. The record suggests no reason why he was named, rather than Dale Moore, Jr. The occupancy might have been legal but for one of the two grandsons. One of Mrs. Moore's sons, together with his son, could have lived with Mrs. Moore under § 1341.08(d) of the Code if they were dependent on her. The other son, provided he was "unmarried," could have been included under § 1341.08(b).

6 East Cleveland Building Code § 1311.02 (1965).

In my view, the appellant's claim that the ordinance in question invades constitutionally protected rights of association and privacy is in large part answered by the *Belle Terre* decision. The argument was made there that a municipality could not zone its land exclusively for single-family occupancy because to do so would interfere with protected rights of privacy or association. We rejected this contention, and held that the ordinance at issue "[involved] no 'fundamental' right guaranteed by the Constitution, such as... the right of association, *NAACP v. Alabama*, 357 U.S. 449;... or any rights of privacy, cf. *Griswold v. Connecticut*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438, 453-454." 416 U.S., at 7-8.

The *Belle Terre* decision thus disposes of the appellant's contentions to the extent they focus not on her blood relationships with her sons and grandsons but on more general [*535] notions about the "privacy of the home." Her suggestion that every person has a constitutional right permanently to [**1954] share his residence with whomever he pleases, and that such choices are "beyond the province of legitimate governmental intrusion," amounts to the same argument that was made and found unpersuasive in *Belle Terre*.

To be sure, the ordinance involved in *Belle Terre*

did not prevent blood relatives from occupying the same dwelling, and the Court's decision in that case does not, therefore, foreclose the appellant's arguments based specifically on the ties of kinship present in this case. Nonetheless, I would hold, for the reasons that follow, that the existence of those ties does not elevate either the appellant's claim of associational freedom or her claim of privacy to a level invoking constitutional protection.

To suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associational freedoms that the Constitution has been understood to protect. Freedom of association has been constitutionally recognized because it is often indispensable to effectuation of explicit *First Amendment* guarantees. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-461; *Bates v. Little Rock*, 361 U.S. 516, 523; *Shelton v. Tucker*, 364 U.S. 479; *NAACP v. Button*, 371 U.S. 415, 430-431; *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1; [***560] *Kusper v. Pontikes*, 414 U.S. 51, 56-61; cf. *Edwards v. South Carolina*, 372 U.S. 229. But the scope of the associational right, until now, at least, has been limited to the constitutional need that created it; obviously not every "association" is for *First Amendment* purposes or serves to promote the ideological freedom that the *First Amendment* was designed to protect.

The "association" in this case is not for any purpose relating to the promotion of speech, assembly, the press, or religion. And wherever the outer boundaries of constitutional protection [*536] of freedom of association may eventually turn out to be, they surely do not extend to those who assert no interest other than the gratification, convenience, and economy of sharing the same residence.

The appellant is considerably closer to the constitutional mark in asserting that the East Cleveland ordinance intrudes upon "the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166. Several decisions of the Court have identified specific aspects of what might broadly be termed "private family life" that are constitutionally protected against state interference. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-154 (woman's right to decide whether to terminate pregnancy); *Loving v. Virginia*, 388 U.S. 1, 12 (freedom to marry person of another race);

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Griswold v. Connecticut, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438 (right to use contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (parents' right to send children to private schools); *Meyer v. Nebraska*, 262 U.S. 390 (parents' right to have children instructed in foreign language).

Although the appellant's desire to share a single-dwelling unit also involves "private family life" in a sense, that desire can hardly be equated with any of the interests protected in the case just cited. The ordinance about which the appellant complains did not impede her choice to have or not to have children, and it did not dictate to her how her own children were to be nurtured and reared. The ordinance clearly does not prevent parents from living together or living with their unemancipated offspring.

But even though the Court's previous cases are not directly in point, the appellant contends that the importance of the "extended [**1955] family" in American society requires us to hold that her decision to share her residence with her grandsons may not be interfered with by the State. This decision, like the decisions involved in bearing and raising children, is said [*537] to be an aspect of "family life" also entitled to substantive protection under the Constitution. Without pausing to inquire how far under this argument an "extended family" might extend, I cannot agree. ⁷ When [***561] the Court has found that the *Fourteenth Amendment* placed a substantive limitation on a State's power to regulate, it has been in those rare cases in which the personal interests at issue have been deemed "implicit in the concept of ordered liberty." See *Roe v. Wade*, *supra*, at 152, quoting *Palko v. Connecticut*, 302 U.S. 319, 325. The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

⁷ The opinion of MR. JUSTICE POWELL and MR. JUSTICE BRENNAN'S concurring opinion both emphasize the traditional importance of the extended family in American life. But I fail to understand why it follows that the residents of East Cleveland are constitutionally prevented from following what MR. JUSTICE BRENNAN

calls the "pattern" of "white suburbia," even though that choice may reflect "cultural myopia." In point of fact, East Cleveland is a predominantly Negro community, with a Negro City Manager and City Commission.

The appellant also challenges the single-family occupancy ordinance on equal protection grounds. Her claim is that the city has drawn an arbitrary and irrational distinction between groups of people who may live together as a "family" and those who may not. While acknowledging the city's right to preclude more than one family from occupying a single-dwelling unit, the appellant argues that the purposes of the single-family occupancy law would be equally served by an ordinance that did not prevent her from sharing her residence with her two sons and their sons.

This argument misconceives the nature of the constitutional inquiry. In a case such as this one, where the challenged [*538] ordinance intrudes upon no substantively protected constitutional right, it is not the Court's business to decide whether its application in a particular case seems inequitable, or even absurd. The question is not whether some other ordinance, drafted more broadly, might have served the city's ends as well or almost as well. The task, rather, is to determine if East Cleveland's ordinance violates the *Equal Protection Clause of the United States Constitution*. And in performing that task, it must be borne in mind that "[we] deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the *Equal Protection Clause* if the law be "reasonable, not arbitrary" (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415) and bears 'a rational relationship to a [permissible] state objective.' *Reed v. Reed*, 404 U.S. 71, 76." *Village of Belle Terre v. Boraas*, 416 U.S., at 8. "[Every] line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." *Ibid.* (footnote omitted). ⁸

⁸ The observation of Mr. Justice Holmes quoted in the *Belle Terre* opinion, 416 U.S., at 8 n. 5, bears repeating here.

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or

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gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (dissenting opinion).

[***562] [**1956] Viewed in the light of these principles, I do not think East Cleveland's definition of "family" offends the Constitution. The city has undisputed power to ordain single-family residential [*539] occupancy. *Village of Belle Terre v. Boraas*, *supra*; *Euclid v. Ambler Realty Co.*, 272 U.S. 365. And that power plainly carries with it the power to say what a "family" is. Here the city has defined "family" to include not only father, mother, and dependent children, but several other close relatives as well. The definition is rationally designed to carry out the legitimate governmental purposes identified in the *Belle Terre* opinion: "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U.S., at 9.⁹

9 The appellant makes much of East Cleveland Housing Code § 1351.03 (1966), which prescribes a minimum habitable floor area per person; she argues that because the municipality has chosen to establish a specific density control the single-family ordinance can have no role to play. It is obvious, however, that § 1351.03 is directed not at preserving the character of a residential area but at establishing minimum health and safety standards.

Obviously, East Cleveland might have as easily and perhaps as effectively hit upon a different definition of "family." But a line could hardly be drawn that would not sooner or later become the target of a challenge like the appellant's. If "family" included all of the householder's grandchildren there would doubtless be the hard case of an orphaned niece or nephew. If, as the appellant suggests, a "family" must include all blood relatives,

what of longtime friends? The point is that any definition would produce hardships in some cases without materially advancing the legislative purpose. That this ordinance also does so is no reason to hold it unconstitutional, unless we are to use our power to interpret the United States Constitution as a sort of generalized authority to correct seeming inequity wherever it surfaces. It is not for us to rewrite the ordinance, or substitute our judgment for [*540] the discretion of the prosecutor who elected to initiate this litigation.¹⁰

10 MR. JUSTICE STEVENS, in his opinion concurring in the judgment, frames the issue in terms of the "appellant's right to use her own property as she sees fit." *Ante*, at 513. Focusing on the householder's property rights does not substantially change the constitutional analysis. If the ordinance is invalid under the *Equal Protection Clause* as to those classes of people whose occupancy it forbids, I should suppose it is also invalid as an arbitrary intrusion upon the property owner's rights to have them live with her. On the other hand, if the ordinance is a rational attempt to promote "the city's interest in preserving the character of its neighborhoods," *Young v. American Mini Theatres*, 427 U.S. 50, 71 (opinion of STEVENS, J.), it is consistent with the *Equal Protection Clause* and a permissible restriction on the use of private property under *Euclid v. Ambler Realty Co.*, 272 U.S. 365, and *Nectow v. Cambridge*, 277 U.S. 183.

The state cases that MR. JUSTICE STEVENS discusses do not answer this federal constitutional issue. For the most part, they deal with state-law issues concerning the proper statutory construction of the term "family," and they indicate only that state courts have been reluctant to extend ambiguous single-family zoning ordinances to nontransient, single-house-keeping units. By no means do they establish that narrow definitions of the term "family" are unconstitutional.

Finally, MR. JUSTICE STEVENS calls the city to task for failing "to explain the need" for enacting this particular ordinance. *Ante*, at 520. This places the burden on the wrong party.

In [***563] this connection the variance provisions

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of East Cleveland's Building Code assume special significance, for they show that the city recognized the difficult problems its ordinances were bound to create in particular cases, and provided a means to solve at least some of them. Section 1311.01 of the Code establishes a Board of Building Code Appeals. Section 1311.02 then provides, in pertinent part: S

"The Board of Building Code Appeals shall determine all matters properly [**1957] presented to it and where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance for which it is designated as [*541] the Board of Appeals, such Board shall have the power to grant variances in harmony with the general intent of such ordinance and to secure the general welfare and substantial justice in the promotion of the public health, comfort, convenience, morals, safety and general welfare of the City."I

The appellant did not request a variance under this section, although she could have done so. While it is impossible to know whether such a request would have been granted, her situation appears to present precisely the kind of "practical difficulties" and "unnecessary hardships" that the variance provisions were designed to accommodate.

This is not to say that the appellant was obligated to exhaust her administrative remedy before defending this prosecution on the ground that the single-family occupancy ordinance violates the *Equal Protection Clause*. In assessing her claim that the ordinance is "arbitrary" and "irrational," however, I think the existence of the variance provisions is particularly persuasive evidence to the contrary. The variance procedure, a traditional part of American land-use law, bends the straight lines of East Cleveland's ordinances, shaping their contours to respond more flexibly to the hard cases that are the inevitable byproduct of legislative linedrawing.

For these reasons, I think the Ohio courts did not err in rejecting the appellant's constitutional claims. Accordingly, I respectfully dissent.

MR. JUSTICE WHITE, dissenting.

The *Fourteenth Amendment* forbids any State to "deprive any person of life, liberty, or property, without due process of law," or to "deny to any person within its

jurisdiction the equal protection of the laws." Both provisions are invoked in this case in an attempt to invalidate a city zoning ordinance.

[*542] I

The emphasis of the Due Process Clause is on "process." As Mr. Justice Harlan once observed, it has been "ably and insistently argued in response to what were felt to be abuses by this Court of its reviewing power," that the Due Process Clause should be limited "to a guarantee of procedural fairness." *Poe v. Ullman*, [***564] 367 U.S. 497, 540 (1961) (dissenting opinion). These arguments had seemed "persuasive" to Justices Brandeis and Holmes, *Whitney v. California*, 274 U.S. 357, 373 (1927), but they recognized that the Due Process Clause, by virtue of case-to-case "judicial inclusion and exclusion," *Davidson v. New Orleans*, 96 U.S. 97, 104 (1878), had been construed to proscribe matters of substance, as well as inadequate procedures, and to protect from invasion by the States "all fundamental rights comprised within the term liberty." *Whitney v. California*, *supra*, at 373.

Mr. Justice Black also recognized that the *Fourteenth Amendment* had substantive as well as procedural content. But believing that its reach should not extend beyond the specific provisions of the *Bill of Rights*, see *Adamson v. California*, 332 U.S. 46, 68 (1947) (dissenting opinion), he never embraced the idea that the Due Process Clause empowered the courts to strike down merely unreasonable or arbitrary legislation, nor did he accept Mr. Justice Harlan's consistent view. See [***540] *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting), and *id.*, at 499 (Harlan, J., concurring in judgment). Writing at length in dissent in *Poe v. Ullman*, *supra*, at 543, Mr. Justice Harlan stated the essence of his position as follows: S

"This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, [**1958] press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and [*543] seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, see *Allgeyer v. Louisiana*, 165 U.S. 578; *Holden v. Hardy*, 169 U.S. 366; *Booth v. Illinois*, 184 U.S. 425; *Nebbia v. New York*, 291 U.S. 502; *Skinner v. Oklahoma*, 316 U.S. 535, 544 (concurring opinion); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, and

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which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. *Skinner v. Oklahoma, supra*; *Bolling v. Sharpe*, [347 U.S. 497 (1954)]."1

This construction was far too open ended for Mr. Justice Black. For him, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as substantive due process cases, were as suspect as *Lochner v. New York*, 198 U.S. 45 (1905), *Coppage v. Kansas*, 236 U.S. 1 (1915), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). In his view, *Ferguson v. Skrupa*, 372 U.S. 726 (1963), should have finally disposed of them all. But neither *Meyer* nor *Pierce* has been overruled, and recently [***565] there have been decisions of the same genre - *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut, supra*; and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Not all of these decisions purport to rest on substantive due process grounds, compare *Roe v. Wade, supra*, at 152-153, with *Eisenstadt v. Baird, supra*, at 453-454, but all represented substantial reinterpretations of the Constitution.

Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of [*544] the *Fifth* and *Fourteenth Amendments*. This is not to suggest, at this point, that any of these cases should be overruled, or that the process by which they were decided was illegitimate or even unacceptable, but only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable. And no one was more sensitive than Mr. Justice Harlan to any suggestion that his approach to the Due Process Clause would lead to judges "roaming at large in the constitutional field." *Griswold v. Connecticut, supra*, at 502. No one proceeded with more caution than he did when the validity of state or federal legislation was challenged in the name of the Due Process Clause.

This is surely the preferred approach. That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The

Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict [**1959] between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

II

Accepting the cases as they are and the Due Process Clause as construed by them, however, I think it evident that the [*545] threshold question in any due process attack on legislation, whether the challenge is procedural or substantive, is whether there is a deprivation of life, liberty, or property. With respect to "liberty," the statement of Mr. Justice Harlan in *Poe v. Ullman*, quoted *supra*, at 504, most accurately reflects the thrust of [***566] prior decisions - that the Due Process Clause is triggered by a variety of interests, some much more important than others. These interests have included a wide range of freedoms in the purely commercial area such as the freedom to contract and the right to set one's own prices and wages. *Meyer v. Nebraska, supra*, at 399, took a characteristically broad view of "liberty": S

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."I

As I have said, *Meyer* has not been overruled nor its definition of liberty rejected. The results reached in some

431 U.S. 494, *545; 97 S. Ct. 1932, **1959;
52 L. Ed. 2d 531, ***566; 1977 U.S. LEXIS 17

of the cases cited by Meyer have been discarded or undermined by later cases, but those cases did not cut back the definition of liberty espoused by earlier decisions. They disagreed only, but sharply, as to the protection that was "due" the particular liberty interests involved. See, for example, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

Just a few years ago, we recognized that while "the range of interests protected by procedural due process is not infinite," [*546] and while we must look to the nature of the interest rather than its weight in determining whether a protected interest is at issue, the term "liberty" has been given broad meaning in our cases. *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972). "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Stanley v. Illinois*, 405 U.S. 645." *Id.*, at 572.

It would not be consistent with prior cases to restrict the liberties protected by the Due Process Clause to those fundamental interests "implicit in the concept of ordered liberty." *Ante*, at 537. *Palko v. Connecticut*, 302 U.S. 319 (1937), from which this much-quoted phrase is taken, *id.*, at 325, is not to the contrary. *Palko* was a criminal case, and the issue was thus not whether a protected liberty interest was at stake but what protective process was "due" that interest. The Court used the quoted standard to determine which of the protections of the *Bill of Rights* was due a criminal defendant in a state court within the meaning of the *Fourteenth Amendment*. Nor do I think the broader view of " [**1960] liberty" is inconsistent with or foreclosed by the dicta in *Roe v. Wade*, 410 U.S., at 152, and *Paul v. Davis*, 424 U.S. 693, 713 [***567] (1976). These cases at most assert that only fundamental liberties will be given substantive protection; and they may be understood as merely identifying certain fundamental interests that the Court has deemed deserving of a heightened degree of protection under the Due Process Clause.

It seems to me that Mr. Justice Douglas was closest to the mark in *Poe v. Ullman*, 367 U.S., at 517, when he said that the trouble with the holdings of the "old Court" was not in its definition of liberty but in its definition of the protections guaranteed to that liberty - "not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that it

did." [*547]

The term "liberty" is not, therefore, to be given a crabbed construction. I have no more difficulty than MR. JUSTICE POWELL apparently does in concluding that appellant in this case properly asserts a liberty interest within the meaning of the Due Process Clause. The question is not one of liberty *vel non*. Rather, there being no procedural issue at stake, the issue is whether the precise interest involved - the interest in having more than one set of grandchildren live in her home - is entitled to such substantive protection under the Due Process Clause that this ordinance must be held invalid.

III

Looking at the doctrine of "substantive" due process as having to do with the possible invalidity of an official rule of conduct rather than of the procedures for enforcing that rule, I see the doctrine as taking several forms under the cases, each differing in the severity of review and the degree of protection offered to the individual. First, a court may merely assure itself that there is in fact a duly enacted law which proscribes the conduct sought to be prevented or sanctioned. In criminal cases, this approach is exemplified by the refusal of courts to enforce vague statutes that no reasonable person could understand as forbidding the challenged conduct. There is no such problem here.

Second is the general principle that "liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Meyer v. Nebraska*, 262 U.S., at 399-400. This means-end test appears to require that any statute restrictive of liberty have an ascertainable purpose and represent a rational means to achieve that purpose, whatever the nature of the liberty interest involved. This approach was part of the substantive due process doctrine [*548] prevalent earlier in the century, and it made serious inroads on the presumption of constitutionality supposedly accorded to state and federal legislation. But with *Nebbia v. New York*, 4N 291 U.S. 502 (1934), and other cases of the 1930's and 1940's such as *West Coast Hotel Co. v. Parrish*, *supra*, the courts came to demand far less from and to accord far more deference to legislative judgments. This was particularly true with respect to legislation seeking to control or regulate the economic life of the State or Nation. Even so, "while the legislative

431 U.S. 494, *548; 97 S. Ct. 1932, **1960;
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judgment on economic [***568] and business matters is well-nigh conclusive'..., it is not beyond judicial inquiry." *Poe v. Ullman, supra, at 518* (Douglas, J., dissenting). No case that I know of, including *Ferguson v. Skrupa, 372 U.S. 726 (1963)*, has announced that there is some legislation with respect to which there no longer exists a meansends test as a matter of substantive due process law. This is not surprising, for otherwise a protected liberty could be infringed by a law having no purpose or utility whatsoever. Of course, the current approach is to deal more gingerly with a [**1961] state statute and to insist that the challenger bear the burden of demonstrating its unconstitutionality; and there is a broad category of cases in which substantive review is indeed mild and very similar to the original thought of *Munn v. Illinois, 94 U.S. 113, 132 (1877)*, that "if a state of facts could exist that would justify such legislation," it passes its initial test.

There are various "liberties," however, which require that infringing legislation be given closer judicial scrutiny, not only with respect to existence of a purpose and the means employed, but also with respect to the importance of the purpose itself relative to the invaded interest. Some interests would appear almost impregnable to invasion, such as the freedoms of speech, press, and religion, and the freedom from cruel and unusual punishments. Other interests, for example, the right of association, the right to vote, and various [*549] claims sometimes referred to under the general rubric of the right to privacy, also weigh very heavily against state claims of authority to regulate. It is this category of interests which, as I understand it, MR. JUSTICE STEWART refers to as "implicit in the concept of ordered liberty." *Ante, at 537*. Because he would confine the reach of substantive due process protection to interests such as these and because he would not classify in this category the asserted right to share a house with the relatives involved here, he rejects the due process claim.

Given his premise, he is surely correct. Under our cases, the Due Process Clause extends substantial protection to various phases of family life, but none requires that the claim made here be sustained. I cannot believe that the interest in residing with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause. To say that one has a personal right to live with all, rather than some, of one's grandchildren and that this right is

implicit in ordered liberty is, as my Brother STEWART says, "to extend the limited substantive contours of the Due Process Clause beyond recognition." *Ibid*. The present claim is hardly one of which it could be said that "neither liberty nor justice would exist if [it] were sacrificed." *Palko v. Connecticut, 302 U.S., at 326*.

MR. JUSTICE POWELL would apparently construe the Due Process Clause to protect from all but quite important state regulatory interests any right or privilege that in his estimate is deeply rooted in the country's traditions. For me, this suggests a far too expansive charter for this Court and a far less meaningful and less confining guiding principle than MR. JUSTICE STEWART would use for serious substantive due process review. What the deeply [***569] rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable. The suggested view would broaden enormously the horizons of [*550] the Clause; and, if the interest involved here is any measure of what the States would be forbidden to regulate, the courts would be substantively weighing and very likely invalidating a wide range of measures that Congress and state legislatures think appropriate to respond to a changing economic and social order.

Mrs. Moore's interest in having the offspring of more than one dependent son live with her qualifies as a liberty protected by the Due Process Clause; but, because of the nature of that particular interest, the demands of the Clause are satisfied once the Court is assured that the challenged proscription is the product of a duly enacted or promulgated statute, ordinance, or regulation and that it is not wholly lacking in purpose or utility. That under this ordinance any number of unmarried children may reside with their mother and that this number might be as destructive of neighborhood values as one or more additional grandchildren is just another argument that children and grandchildren may not [**1962] constitutionally be distinguished by a local zoning ordinance.

That argument remains unpersuasive to me. Here the head of the household may house himself or herself and spouse, their parents, and any number of their unmarried children. A fourth generation may be represented by only one set of grandchildren and then only if born to a dependent child. The ordinance challenged by appellant prevents her from living with both sets of grandchildren

431 U.S. 494, *550; 97 S. Ct. 1932, **1962;
52 L. Ed. 2d 531, ***569; 1977 U.S. LEXIS 17

only in East Cleveland, an area with a radius of three miles and a population of 40,000. Brief for Appellee 16 n. 1. The ordinance thus denies appellant the opportunity to live with all her grandchildren in this particular suburb; she is free to do so in other parts of the Cleveland metropolitan area. If there is power to maintain the character of a single-family neighborhood, as there surely is, some limit must be placed on the reach of the "family." Had it been our task to legislate, we [*551] might have approached the problem in a different manner than did the drafters of this ordinance; but I have no trouble in concluding that the normal goals of zoning regulation are present here and that the ordinance serves these goals by limiting, in identifiable circumstances, the number of people who can occupy a single household. The ordinance does not violate the Due Process Clause.

IV

For very similar reasons, the equal protection claim must fail, since it is not to be judged by the strict scrutiny standard employed when a fundamental interest or suspect classification is involved, see, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972), and *Korematsu v. United States*, 323 U.S. 214 (1944), or by the somewhat less strict standard of *Craig v. Boren*, 429 U.S. 190 (1976), *Califano v. Webster*, 430 U.S. 313 (1977), *Reed v. Reed*, 404 U.S. 71 (1971), and *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Rather, it is the generally [***570] applicable standard of *McGowan v. Maryland*, 366 U.S. 420, 425 (1961): S

"The constitutional safeguard [of the *Equal Protection Clause*] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." I

See also *Dandridge v. Williams*, 397 U.S. 471 (1970); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Under this standard, it is not fatal if the purpose of the law is not articulated on its face, and there need be only a rational relation to the ascertained purpose.

[*552] On this basis, as already indicated, I have no trouble in discerning a rational justification for an ordinance that permits the head of a household to house one, but not two, dependent sons and their children.

Respectfully, therefore, I dissent and would affirm the judgment.

REFERENCES

Supreme Court's views as to constitutionality of residential zoning restrictions

16 *Am Jur 2d, Constitutional Law* 358- 360, 366, 367, 550; 82 *Am Jur 2d, Zoning and Planning* 13- 15, 109, 110

25 *Am Jur Pl & Pr Forms* (Rev Ed), *Zoning and Planning*, Forms 41 et seq.

20 *Am Jur Legal Forms 2d, Zoning and Planning* 268:1 et seq.

8 *Am Jur Proof of Facts 2d* 53, *Unreasonableness of Zoning Restriction*

16 *Am Jur Trials* 99, *Relief from Zoning Ordinance*

USCS, *Constitution, 14th Amendment*

US L Ed Digest, *Constitutional Law* 528.5, 549, 577

ALR Digests, *Constitutional Law* 458, 473

L Ed Index to Annos, *Due Process of Law; Zoning*

ALR Quick Index, *Due Process of Law; Family or Household; Zoning*

Federal Quick Index, *Due Process of Law; Zoning*

Annotation References:

Supreme Court's views as to constitutionality of residential zoning restrictions. 52 *L Ed 2d* 863.

Supreme Court's views as to concept of "liberty" under *due process clauses of Fifth and Fourteenth Amendments*. 47 *L Ed 2d* 975.

What constitutes a "family" within meaning of zoning regulation or restrictive covenant. 71 *ALR3d* 693.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 *ALR3d* 504.

Attack upon validity of zoning statute or ordinance as affected by provisions for variations, permits, etc. 136

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ALR 1378.

APPENDIX 37



1 of 100 DOCUMENTS

PALCO v. CONNECTICUT

No. 135

SUPREME COURT OF THE UNITED STATES*302 U.S. 319; 58 S. Ct. 149; 82 L. Ed. 288; 1937 U.S. LEXIS 549***November 12, 1937, Argued****December 6, 1937, Decided**

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

APPEAL from a judgment sustaining a sentence of death upon a verdict of guilty of murder in the first degree. The defendant had previously been convicted upon the same indictment of murder in the second degree, whereupon the State appealed and a new trial was ordered.

DISPOSITION: *122 Conn. 529; 191 Atl. 320*, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed a decision by the Supreme Court of Errors of Connecticut, which sustained a death sentence imposed. Defendant claimed that Conn. Gen. Stat. § 6494, which allowed the State to appeal in a criminal case, violated *U.S. Const. amend. XIV* because it allowed defendant to be tried twice and thus subjected him to double jeopardy in violation of *U.S. Const. amend. V*.

OVERVIEW: Defendant appealed a judgment that affirmed the death sentence imposed on the ground that Conn. Gen. Stat. § 6494, which allowed the State to appeal in a criminal case, violated *U.S. Const. amend. XIV* because it allowed defendant to be tried twice and thus subjected him to double jeopardy in violation of *U.S.*

Const. amend. V. The United States Supreme Court affirmed, holding that not all *U.S. Const. amend. V* rights were applicable to the states through *U.S. Const. amend. XIV*, and the state could choose not to adopt a right if it was not of the very essence of a scheme of ordered liberty, and its abolishment would not violate a principle of justice so rooted in the traditions and conscience of the American people as to be ranked as fundamental. The Court ruled that the state statute did not deny petitioner due process of law because allowing a retrial did not violate fundamental principles of liberty and justice where it was only done to ensure a trial free from substantial legal error.

OUTCOME: The Court affirmed the death sentence for first degree murder.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

[HN1] See Conn. Gen. Stat. § 6494.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy > Criminal Law & Procedure > Double Jeopardy > General Overview

302 U.S. 319, *; 58 S. Ct. 149, **;
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Governments > Federal Government > Claims By & Against

[HN2] *U.S. Const. amend. V*, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be subject for the same offense to be twice put in jeopardy of life or limb.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN3] See *U.S. Const. amend. XIV*.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Grand Jury Requirement

Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview
Estate, Gift & Trust Law > Wills > Beneficiaries > Elections

[HN4] *U.S. Const. amend. V* provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. In prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *U.S. Const. amend. V* provides also that no person shall be compelled in any criminal case to be a witness against himself. In prosecutions by a state, the exemption will fail if the state elects to end it. *U.S. Const. amend. VI* calls for a jury trial in criminal cases and *U.S. Const. amend. VII* for a jury trial in civil cases at common law where the value in controversy shall exceed \$ 20. Consistent with those amendments, trial by jury may be modified by a state or abolished altogether.

Constitutional Law > Substantive Due Process > Scope of Protection

Governments > Federal Government > Claims By & Against

[HN5] 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.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > General Overview

[HN6] 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. 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. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Substantive Due Process > Scope of Protection

Constitutional Law > Privileges & Immunities

[HN7] If the *Fourteenth Amendment* has absorbed privileges and immunities from the earlier articles of the federal *bill of rights*, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > General Overview

[HN8] Freedom of thought and of speech is the matrix, the indispensable condition, of nearly every other form of freedom.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN9] Fundamental in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW, §850

due process -- permitting state to appeal criminal prosecution. --

302 U.S. 319, *; 58 S. Ct. 149, **;
82 L. Ed. 288, ***LEdHN1; 1937 U.S. LEXIS 549

Headnote:[1]

A state statute permitting appeals in criminal cases to be taken by the state is not an infringement of the due process provisions of the *Fourteenth Amendment*.

[***LEdHN2]

CONSTITUTIONAL LAW, §513

scope of Fourteenth Amendment. --

Headnote:[2]

There is no general rule that whatever would be a violation of the original *Bill of Rights (Amendments 1-8 to the Federal Constitution)* is, by force of the *Fourteenth Amendment*, equally unlawful if done by a state; but such Amendment imports into its restrictions on state action only such immunities that are valid as against the Federal government by force of the specific pledges of particular amendments, as are implicit in the concept of ordered liberty.

[***LEdHN3]

CONSTITUTIONAL LAW, §510

abridging privileges and immunities of citizens of United States -- conviction on retrial obtained by state. --

Headnote:[3]

A conviction in a state court of murder in the first degree on a second trial of a criminal prosecution after a conviction of murder in the second degree had been set aside on an appeal taken by the state is not in derogation of any privileges or immunities that belong to the accused as a citizen of the United States, in violation of the *Fourteenth Amendment*.

SYLLABUS

1. Under a state statute allowing appeal by the State in criminal cases, when permitted by the trial judge, for correction of errors of law, a sentence of life imprisonment, on a conviction of murder in the second degree, was reversed. Upon retrial, the accused was convicted of murder in the first degree and sentenced to death. *Held* consistent with due process of law under the *Fourteenth Amendment*. P. 322.

2. Assuming that the prohibition of double jeopardy in the *Fifth Amendment* applies to jeopardy in the same case if the new trial be at the instance of the Government and not upon defendant's motion, it does not follow that a like prohibition is applicable against state action by force of the *Fourteenth Amendment*. Pp. 322 *et seq.*

3. The *Fourteenth Amendment* does not guarantee against state action all that would be a violation of the original *bill of rights (Amendments I to VIII)* if done by the Federal Government. P. 323.

4. The process of absorption whereby some of the privileges and immunities guaranteed by the federal *bill of rights* have been brought within the *Fourteenth Amendment*, has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. P. 326.

5. It is not necessary to the decision in this case to consider what the answer would have to be if the State were permitted after a trial free from error to try the accused over again or to bring another case against him. P. 328.

6. The conviction of the defendant upon the retrial ordered upon the appeal by the State in this case was not in derogation of any privileges or immunities that belonged to him as a citizen of the United States. *Maxwell v. Dow*, 176 U.S. 581. P. 329.

COUNSEL: Messrs. David Goldstein and George A. Saden for appellant.

Mr. Wm. H. Comley, with whom Mr. Lorin W. Willis, State's Attorney, was on the brief, for Connecticut.

JUDGES: Hughes, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts, Cardozo, Black

OPINION BY: CARDOZO

OPINION

[*320] [**149] [***289] MR. JUSTICE CARDOZO delivered the opinion of the Court.

[***LEdHR1] [1]A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the *Fourteenth Amendment of the Constitution of the United*

States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury [*321] found him [**150] guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the State of Connecticut, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886 which is printed in the margin.¹ Public Acts, 1886, p. 560; now § 6494 of the General [***290] Statutes. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State v. Palko*, 121 Conn. 669; 186 Atl. 657. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

¹ [HN1] "Sec. 6494. *Appeals by the state in criminal cases*. Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

A statute of Vermont (G. L. 2598) was given the same effect and upheld as constitutional in *State v. Felch*, 92 Vt. 477; 105 Atl. 23.

Other statutes, conferring a right of appeal more or less limited in scope, are collected in the American Law Institute Code of Criminal Procedure, June 15, 1930, p. 1203.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the *Fourteenth Amendment of the Constitution of the United States*. Upon the overruling of the objection the trial proceeded. The jury returned a verdict of murder in the first degree, and the court

sentenced the defendant to the punishment of [*322] death. The Supreme Court of Errors affirmed the judgment of conviction, 122 Conn. 529; 191 Atl. 320, adhering to a decision announced in 1894, *State v. Lee*, 65 Conn. 265; 30 Atl. 1110, which upheld the challenged statute. Cf. *State v. Muolo*, 118 Conn. 373; 172 Atl. 875. The case is here upon appeal. 28 U. S. C., § 344.

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the *Fourteenth Amendment of the Federal Constitution*.

The argument for appellant is that whatever is forbidden by the *Fifth Amendment* is forbidden by the *Fourteenth* also. [HN2] The *Fifth Amendment*, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The *Fourteenth Amendment* ordains, [HN3] "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the *Fifth Amendment*, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. Thirty-five years ago a like argument was made to this court in *Dreyer v. Illinois*, 187 U.S. 71, 85, and was passed without consideration of its merits as unnecessary to a decision. The question is now here.

We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions. The subject was much considered in [**151] *Kepner v. United States*, 195 U.S. 100, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined [*323] to jeopardy in a new and independent case. It forbade jeopardy in the same case if the new trial was at the instance of the government and not upon defendant's motion. Cf. *Trono v. United States*, 199 U.S. 521. All this may be assumed for the purpose of the case at hand, though the dissenting opinions (195 U.S. 100, 134, 137) show how much was to be said in favor of a different ruling. Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions

302 U.S. 319, *323; 58 S. Ct. 149, **151;
82 L. Ed. 288, ***290; 1937 U.S. LEXIS 549

subject to the *Fifth Amendment*, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to [***291] the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels, *Snyder v. Massachusetts*, 291 U.S. 97, 114, must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other.

[***LEdHR2] [2]We have said that in appellant's view the *Fourteenth Amendment* is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original *bill of rights (Amendments I to VIII)* if done by the federal government is now equally unlawful by force of the *Fourteenth Amendment* if done by a state. There is no such general rule.

[HN4] The *Fifth Amendment* provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado v. California*, 110 U.S. 516; *Gaines v. Washington*, 277 U.S. 81, 86. The *Fifth Amendment* provides also that no person shall be [*324] compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining v. New Jersey*, 211 U.S. 78, 106, 111, 112. Cf. *Snyder v. Massachusetts*, *supra*, p. 105; *Brown v. Mississippi*, 297 U.S. 278, 285. The *Sixth Amendment* calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker v. Sauvinet*, 92 U.S. 90; *Maxwell v. Dow*, 176 U.S. 581; *New York Central R. Co. v. White*, 243 U.S. 188, 208; *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 232. As to the *Fourth Amendment*, one should refer to *Weeks v. United States*, 232 U.S. 383, 398, and as to other provisions of the Sixth, to *West v. Louisiana*, 194 U.S. 258.

On the other hand, the *due process clause of 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, *De Jonge v. Oregon*, 299 U.S. 353, 364; *Herndon v. Lowry*, 301 U.S. 242, 259; or the like freedom of the press, *Grosjean v. American Press Co.*, 297 U.S. 233; *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707; or the free exercise of religion, *Hamilton v. Regents*, 293 U.S. 245, 262; cf. *Grosjean v. American Press Co.*, *supra*; *Pierce v. Society of Sisters*, 268 U.S. 510; or the right of peaceable assembly, without which speech would be unduly trammelled, *De Jonge v. Oregon*, *supra*; *Herndon v. Lowry*, *supra*; or the right of one accused of crime to the benefit of counsel, *Powell v. Alabama*, 287 U.S. 45. In these and other situations [***292] [HN5] immunities that are valid as against the federal government<=\$=J> by force of the specific [*325] pledges [**152] of particular amendments² have been found to be implicit in the concept of ordered liberty, and thus, through the *Fourteenth Amendment*, become valid as against the states.

2 *First Amendment*: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The 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. [HN6] 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. 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." *Snyder v. Massachusetts*, *supra*, p. 105; *Brown v. Mississippi*, *supra*, p. 285; *Hebert v. Louisiana*, 272 U.S. 312, 316. Few would be so narrow or provincial as to maintain that a fair and enlightened system of

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justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey*, *supra*. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who [*326] would limit its scope, or destroy it altogether.³ No doubt there would remain the need to give protection against torture, physical or mental. *Brown v. Mississippi*, *supra*. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

3 See, e. g. Bentham, Rationale of Judicial Evidence, Book IX, Pt. 4, c. III; Glueck, Crime and Justice, p. 94; cf. Wigmore, Evidence, vol. 4, § 2251.

Compulsory self-incrimination is part of the established procedure in the law of Continental Europe. Wigmore, *supra*, p. 824; Garner, Criminal Procedure in France, 25 Yale L. J. 255, 260; Sherman, Roman Law in the Modern World, vol. 2, pp. 493, 494; Stumberg, Guide to the Law and Legal Literature of France, p. 184. Double jeopardy too is not everywhere forbidden. Radin, Anglo American Legal History, p. 228.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal *bill of rights* and brought within the *Fourteenth Amendment* by a process of absorption. These in their origin were effective against the federal government alone. [HN7] 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. *Twining v. New Jersey*, *supra*, p. 99.⁴ This is [***293] true, for illustration, of freedom of thought, and speech. [*327] Of that freedom one may say that it [HN8] is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political [**153] and legal. So

it has come about that the domain of liberty, withdrawn by the *Fourteenth Amendment* from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.⁵ The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. Cf. *Near v. Minnesota ex rel. Olson*, *supra*; *De Jonge v. Oregon*, *supra*. [HN9] Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott v. McNeal*, 154 U.S. 34; *Blackmer v. United States*, 284 U.S. 421. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore v. Dempsey*, 261 U.S. 86; *Mooney v. Holohan*, 294 U.S. 103. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell v. Alabama*, *supra*, pp. 67, 68. 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.

4 ". . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

5 The cases are brought together in Warren, *The New Liberty under the 14th Amendment*, 39 Harv. L. Rev. 431.

[*328] Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unflinching throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the

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statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? *Hebert v. Louisiana, supra*. The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State v. Felch, 92 Vt. 477; 105 Atl. 23; State v. Lee, supra*. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had [***294] been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, *State v.*

Carabetta, 106 Conn. 114; 127 Atl. 394, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

[**LEdHR3] [3]2. The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.

[*329] There is argument in his behalf that the privileges and immunities clause of the *Fourteenth Amendment* as well as the due process clause has been flouted by the judgment.

Maxwell v. Dow, supra, p. 584, gives all the answer that is necessary.

The judgment is

Affirmed.

MR. JUSTICE BUTLER dissents.

APPENDIX 38



REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE

No. 76-811

SUPREME COURT OF THE UNITED STATES

438 U.S. 265; 98 S. Ct. 2733; 57 L. Ed. 2d 750; 1978 U.S. LEXIS 5; 17 Fair Empl. Prac. Cas. (BNA) 1000; 17 Empl. Prac. Dec. (CCH) P8402

October 12, 1977, Argued

June 28, 1978, Decided

PRIOR HISTORY: CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Bakke v. Regents of University of Cal., 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152, 1976 Cal. LEXIS 336 (1976)

DISPOSITION: 18 Cal. 3d 34, 553 P. 2d 1152, affirmed in part and reversed in part.

SUMMARY:

A white male who had been denied admission to the medical school at the University of California at Davis for two consecutive years, instituted an action for declaratory and injunctive relief against the Regents of the University in the Superior Court of Yolo County, California, alleging the invalidity--under the *equal protection clause of the Fourteenth Amendment*, a provision of the California Constitution, and the proscription in Title VI of the Civil Rights Act of 1964 (42 USCS 2000d et seq.) against racial discrimination in any program receiving federal financial assistance--of the medical school's special admissions program under which only disadvantaged members of certain minority races were considered for 16 of the 100 places in each year's class, whereas members of any race could qualify under the school's general admissions program for the other 84 places in the class, the plaintiff having been denied admission to the school under the general admissions program even though applicants with substantially lower

entrance examination scores had been admitted under the special admissions program. Finding that the special admissions program operated as a racial quota because minority applicants in the special program were rated only against one another and 16 places in the class of 100 were reserved for them, the trial court (1) declared that the school could not take race into account in making admissions decisions, (2) held that the challenged admissions program violated the federal and state constitutions and Title VI, but (3) refused to order the plaintiff's admission because he had failed to prove that he would have been admitted but for the existence of the special program. On direct appeal, the Supreme Court of California affirmed the trial court's judgment insofar as it determined that the special admissions program was invalid under the *equal protection clause*, but reversed it insofar as it denied an injunction ordering that the plaintiff be admitted to the medical school, the California Supreme Court having ruled that the University had the burden of demonstrating that the plaintiff would not have been admitted even in the absence of the special admissions program, and the University having conceded its inability to carry that burden (18 Cal 3d 34, 553 P2d 1152).

On certiorari, the United States Supreme Court affirmed in part and reversed in part. Although unable to agree on an opinion as to the major issues, five members of the court agreed that the California Supreme Court's judgment must be affirmed insofar as it held that the

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medical school's special admissions program was unlawful and insofar as it directed that the plaintiff must be admitted, and five members of the court agreed that the California Supreme Court's judgment must be reversed insofar as it prohibited the defendant from according any consideration to race in its future admissions process.

Powell, J., announced the judgment of the court and delivered an opinion (joined in minor part--as to holdings that the suit was not collusive and the plaintiff had standing to sue, and as to the conclusion that the California Supreme Court's judgment must be reversed insofar as it enjoined the defendant from ever giving any consideration to the race of any applicant--by Brennan, White, Marshall, and Blackmun, JJ.) expressing the view that (1) it was not necessary to determine whether a private right of action existed under Title VI of the Civil Rights Act, since the question had not been considered in the courts below; (2) Title VI proscribed only those racial classifications that would violate the *equal protection clause* or the *Fifth Amendment*; (3) for purposes of the *equal protection clause*, racial and ethnic distinctions of any sort were inherently suspect and thus called for the most exacting judicial examination, racial and ethnic classifications being subject to stringent examination without regard to whether the group discriminated against was a discrete and insular minority (White, J., joined the opinion on this point also); (4) when a burdensome classification (including a preferential classification to remedy past discrimination) touched upon an individual's race or ethnic background, he was entitled to a judicial determination that the burden he was asked to bear on that basis was precisely tailored to serve a compelling governmental interest; (5) since in the case at bar there was no determination by the legislature or a responsible administrative agency that the University had engaged in a discriminatory practice requiring remedial efforts, and since the special admissions program totally foreclosed some individuals from enjoying the state-provided benefit of admission to the medical school solely because of their race, the classification must be regarded as suspect, and thus was permissible only if supported by a substantial state purpose or interest, and only if the classification was necessary to the accomplishment of such purpose or the safeguarding of such interest; (6) the special admissions program could not be justified as serving the purposes of (a) assuring within the student body a specified percentage of a particular racial group, since such racial preference was facially invalid as discrimination for its

own sake, (b) countering the effects of "societal discrimination," since the government has a substantial interest in correcting the effects of specific, identified discrimination only, (c) increasing the number of physicians who would practice in communities currently underserved, there being virtually no evidence that the special admissions program was either needed or geared to promote such goal, or (d) obtaining the educational benefits that flowed from an ethnically diverse student body, since even though such diversity was a constitutionally permissible goal in view of the *First Amendment's* special concern for academic freedom, nevertheless the defendant's program--reserving a fixed number of seats in each class solely on the basis of race, whereas the admissions programs of other universities properly took race into account as only one of the factors for consideration in achieving educational diversity through programs involving individual, competitive comparison of all applicants--was not necessary to promote the interest of diversity; and (7) thus, the defendant's special admissions program violated the *Fourteenth Amendment*, the California Supreme Court's judgment being proper as to its invalidation of the program and its ordering the admission of the plaintiff, but being improper insofar as it enjoined the defendant from ever giving any consideration to race in its admissions process.

In a joint opinion, Brennan, White, Marshall, and Blackmun, JJ., concurred in the judgment in part (as to the reversal of the judgment below insofar as it prohibited the University from establishing race-conscious programs in the future) and dissented in part (as to the affirmance of the judgment below insofar as it held that the special admissions program was unlawful), expressing the view that (1) Title VI of the Civil Rights Act prohibited only those uses of racial criteria that would violate the *Fourteenth Amendment* if employed by a state or its agencies, and did not bar the voluntary preferential treatment of racial minorities as a means of remedying past societal discrimination, to the extent that such action was consistent with the *Fourteenth Amendment*; (2) while racial classifications were not per se invalid under the *equal protection clause*, nevertheless racial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to the achievement of those objectives, and any statute must be stricken that stigmatized any group or that singled out those least well represented in the political process to bear the brunt of a

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benign program; (3) the University's purpose of remedying the effects of past societal discrimination was sufficiently important to justify the use of the voluntary, race-conscious admissions programs, since there was a sound basis for concluding that minority underrepresentation was substantial and chronic, and that the handicap of past discrimination was impeding access of minorities to the medical school; (4) the University's program did not stigmatize any discrete group or individual, either nonminority applicants who were excluded from the special admissions program or the program's beneficiaries or their race, the special program setting aside a reasonable percentage of class positions for only qualified minority applicants; and (5) thus, the University's program was valid and could not be said to violate the Constitution simply because it set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants--there being no difference between the two approaches for purposes of constitutional adjudication, since there was no distinction between adding a set number of points to the admissions rating of disadvantaged minority applicants, with the expectation that it would result in the admission of an approximately-determined number of qualified minority applicants, and setting a fixed number of places for such applicants, as was done in the case at bar.

White, J., in a separate opinion, expressed the view that Title VI of the Civil Rights Act of 1964 was not enforceable by a private action, since (1) there was no express provision in Title VI for private actions, and (2) to allow a private cause of action would, in terms both of the Civil Rights Act as a whole and Title VI in particular, be inconsistent with the underlying purposes of the legislative scheme and contrary to the legislative intent.

Marshall, J., in a separate opinion, stated that (1) in light of the history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order, (2) neither the history of the *Fourteenth Amendment* nor past Supreme Court decisions supported the conclusion that a University could not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors, and (3) affirmative action programs of the type used by the defendant should not be held to be unconstitutional.

Blackmun, J., in a separate opinion, observed that (1) admissions programs for institutions of higher learning were basically a responsibility for academicians and for administrators and the specialists they employ, and (2) it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful.

Stevens, J., joined by Burger, Ch. J., Stewart, J., and Rehnquist, J., concurring in the judgment in part (insofar as it affirmed the judgment below) and dissenting in part (insofar as the court purported to do anything other than affirm the judgment below), expressed the view that (1) the only issue before the court was the validity of the defendant's admissions program as applied to deny admission to the plaintiff, it not being appropriate to consider whether race could ever be used as a factor in an admissions program, (2) it was not necessary to consider whether the defendant's admissions program violated equal protection principles, since 601 of the Civil Rights Act of 1964 (*42 USCS 2000d*) clearly prohibited the exclusion, on the basis of race, of "any" individual from a federally funded program, regardless of whether or not the exclusion carried with it a racial stigma or resulted from an "affirmative action" program, and since the defendant's special admissions program clearly violated Title VI of the Act by excluding the plaintiff from the medical school because of his race, and (3) the defendant's contention that Title VI could not be enforced by a private litigant was unpersuasive in the context of the case, since the question had not been raised in the lower courts, it also appearing that the view that a private action for injunctive or declaratory relief could be maintained under Title VI was supported by judicial authority, subsequent action by Congress, and the legislative history of Title VI.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

RIGHTS §6

admission to medical school -- discrimination against whites --

Headnote:[1A][1B][1C][1D][1E]

A state university medical school's special admissions program under which only disadvantaged members of certain minority races were considered for 16 of the 100 places in each year's class, whereas members

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of any race could qualify under the school's general admissions program for the other 84 places in the class, will be held to be unlawful by the United States Supreme Court--and a state court judgment directing school officials to admit the plaintiff, a white applicant who had been denied admission to the school under the general admissions program, even though applicants with substantially lower entrance examination scores had been admitted under the special admissions program, will be affirmed by the Supreme Court--where (1) one Justice of the Supreme Court is of the opinion that the special admissions program violated the *equal protection clause of the Fourteenth Amendment*, since the program totally excluded nonminority applicants from consideration regardless of their qualifications, and since the program's racial classification was not shown to be necessary to promote a substantial state interest, and (2) four other Justices are of the view that the special admissions program violated Title VI of the Civil Rights Act of 1964 (42 USCS 2000d et seq.), since the plaintiff had been excluded from the medical school because of his race. [Per Powell, J., Stevens, J., Burger, Ch. J., Stewart, J., and Rehnquist, J. Dissenting: Brennan, White, Marshall, and Blackmun, JJ.]

[***LEdHN2]

ERROR §1677

RIGHTS §6

admission to medical school -- discrimination against whites --

Headnote:[2A][2B][2C][2D]

On review of a state court judgment which (a) invalidated a state university medical school's special admissions program under which only disadvantaged members of certain minority races were considered for 16 of the 100 places in each year's class, whereas members of any race could qualify under the school's general admissions program for the other 84 places in the class, and (b) enjoined the university from ever according any consideration to race in its admissions process, the United States Supreme Court will reverse the judgment insofar as it prohibits the university from according any consideration to race in its future admissions program, where (1) one Justice of the Supreme Court is of the opinion that even though the particular admissions program involved in the case at bar violated the *equal*

protection clause of the Fourteenth Amendment, nevertheless race could be taken into account as a factor in an admissions program, and (2) four other Justices are of the view that the admissions program involved in the instant case was constitutional. [Per Powell, Brennan, White, Marshall, and Blackmun, JJ.]

[***LEdHN3]

SUIT §31

collusive suit --

Headnote:[3A][3B]

A white person's state court action challenging the validity of a state university medical school's special admissions program under which only disadvantaged members of certain minority races were considered for 16 of the 100 places in each year's class, whereas members of any race could qualify under the school's general admissions program for the other 84 places in the class--the plaintiff having been denied admission to the school under the general admissions program even though applicants with substantially lower entrance examination scores were admitted under the special admissions program--is not "collusive," even though prior to the actual filing of the suit, the plaintiff discussed his intentions with the assistant to the school's dean of admissions, who expressed sympathy for the plaintiff's position and offered advice on litigation strategy, where there was no indication that the assistant's views were those of the school or that anyone else at the school even was aware of the assistant's correspondence and conversations with the plaintiff.

[***LEdHN4]

COURTS §235

PARTIES §3

jurisdiction -- standing --

Headnote:[4A][4B]

With regard to the United States Supreme Court's jurisdiction, under Article III of the Constitution, to review a judgment of the highest court of a state which held that a state university medical school's special admissions program under which only disadvantaged members of certain minority races were considered for 16

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of the 100 places in each year's class violated the *equal protection clause of the Fourteenth Amendment*, and that the school must prove that the plaintiff--a white applicant who had been denied admission under the school's general admissions program even though applicants with substantially lower entrance examination scores were admitted under the special admissions program--would not have been admitted even in the absence of the special admissions program, and which state-court judgment directed that the plaintiff must be admitted after the school conceded its inability to carry its burden of proof, the plaintiff does not lack standing on the ground that he never showed that his injury (exclusion from the school) would be redressed by a favorable decision, and the school did not "fabricate" jurisdiction by conceding inability to meet its burden of proof, where (1) there was no reason to question the school's concession, which was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record, and (2) even if the plaintiff had been unable to prove that he would have been admitted in the absence of the special admissions program, it would not follow that he lacked standing, the state trial court having found an injury that was likely to be redressed by favorable decision of the plaintiff's claim (apart from failure to be admitted) in the school's decision not to permit the plaintiff to compete for all 100 places in the class simply because of his race, and the question of the plaintiff's admission vel non thus being merely one of relief; nor is it fatal to the plaintiff's standing that he was not a "disadvantaged" applicant, since despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element, white disadvantaged students never being considered under the special program, and the school acknowledging that its goal in devising the program was to increase minority enrollment.

[***LEdHN5]

PARTIES §3

standing --

Headnote:[5A][5B]

The constitutional element of standing is the plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim.

[***LEdHN6]

RIGHTS §4.5

Civil Rights Act -- Title VI -- equal protection --

Headnote:[6A][6B][6C]

Title VI of the Civil Rights Act of 1964 (*42 USCS 2000d et seq.*), which proscribes racial discrimination in any program receiving federal financial assistance, proscribes only those racial classifications that would violate the *equal protection clause of the Fourteenth Amendment*. [Per Powell, Brennan, White, Marshall, and Blackmun.]

[***LEdHN7]

RIGHTS §6

state university -- admissions program --

Headnote:[7]

With regard to state universities, the state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.

SYLLABUS

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering class of 100 students -- the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of

minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be "disadvantaged," he would be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected since no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than respondent's. After his second rejection, respondent filed this action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the *Equal Protection Clause of the Fourteenth Amendment*, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, *inter alia*, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Petitioner cross-claimed for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial

quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that petitioner could not take race into account in making admissions decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have been admitted but for the special program. The California Supreme Court, applying a strict-scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds the court held that petitioner's special admissions program violated the *Equal Protection Clause*. Since petitioner could not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis.

Held: The judgment below is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions program, but is reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions.

MR. JUSTICE POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the *Equal Protection Clause* if employed by a State or its agencies. Pp. 281-287.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the *Equal Protection Clause*. Pp. 287-320.

3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted. P. 320.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE,
MR. JUSTICE MARSHALL, and MR. JUSTICE

BLACKMUN concluded:

1. Title VI proscribes only those racial classifications that would violate the *Equal Protection Clause* if employed by a State or its agencies. Pp. 328-355.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions. Pp. 355-379.

MR. JUSTICE STEVENS, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 408-421.

COUNSEL: Archibald Cox argued the cause for petitioner. With him on the briefs were Paul J. Mishkin, Jack B. Owens, and Donald L. Reidhaar.

Reynold H. Colvin argued the cause and filed briefs for respondent.

Solicitor General McCree argued the cause for the United States as amicus curiae. With him on the briefs were Attorney General Bell, Assistant Attorney General Days, Deputy Solicitor General Wallace, Brian K. Landsberg, Jessica Dunsay Silver, Miriam R. Eisenstein, and Vincent F. O'Rourke. *

* Briefs of amici curiae urging reversal were filed by Slade Gorton, Attorney General, and James B. Wilson, Senior Assistant Attorney General, for the State of Washington et al.; by E. Richard Larson, Joel M. Gora, Charles C. Marson, Sanford Jay Rosen, Fred Okrand, Norman Dorsen, Ruth Bader Ginsburg, and Frank Askin for the American Civil Liberties Union et al.; by Edgar S. Cahn, Jean Camper Cahn, and Robert S. Catz for the Antioch School of Law; by William Jack Chow for the Asian American Bar Assn. of the Greater Bay Area; by A. Kenneth Pye, Robert

B. McKay, David E. Feller, and Ernest Gellhorn for the Association of American Law Schools; by John Holt Myers for the Association of American Medical Colleges; by Jerome B. Falk and Peter Roos for the Bar Assn. of San Francisco et al.; by Ephraim Margolin for the Black Law Students Assn. at the University of California, Berkeley School of Law; by John T. Baker for the Black Law Students Union of Yale University Law School; by Annamay T. Sheppard and Jonathan M. Hyman for the Board of Governors of Rutgers, State University of New Jersey, et al.; by Robert J. Willey for the Cleveland State University Chapter of the Black American Law Students Assn.; by John Mason Harding, Albert J. Rosenthal, Daniel Steiner, Iris Brest, James V. Siena, Louis H. Pollak, and Michael I. Sovern for Columbia University et al.; by Herbert O. Reid for Howard University; by Harry B. Reese and L. Orin Slagle for the Law School Admission Council; by Albert E. Jenner, Jr., Stephen J. Pollak, Burke Marshall, Norman Redlich, Robert A. Murphy, and William E. Caldwell for the Lawyers' Committee for Civil Rights Under Law; by Alice Daniel and James E. Coleman, Jr., for the Legal Services Corp.; by Nathaniel R. Jones, Nathaniel S. Colley, and Stanley Goodman for the National Assn. for the Advancement of Colored People; by Jack Greenberg, James M. Nabrit III, Charles S. Ralston, Eric Schnapper, and David E. Kendall for the NAACP Legal Defense and Educational Fund, Inc.; by Stephen V. Bomse for the National Assn. of Minority Contractors et al.; by Richard B. Sobol, Marian Wright Edelman, Stephen P. Berzon, and Joseph L. Rauh, Jr., for the National Council of Churches of Christ in the United States et al.; by Barbara A. Morris, Joan Bertin Lowy, and Diana H. Greene for the National Employment Law Project, Inc.; by Herbert O. Reid and J. Clay Smith, Jr., for the National Medical Assn., Inc., et al.; by Robert Hermann for the Puerto Rican Legal Defense and Education Fund et al.; by Robert Allen Sedler, Howard Lesnick, and Arval A. Morris for the Society of American Law Teachers; for the American Medical Student Assn.; and for the Council on Legal Education Opportunity.

Briefs of amici curiae urging affirmance were filed by Lawrence A. Poltrock and Wayne B.

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Giampietro for the American Federation of Teachers; by Abraham S. Goldstein, Nathan Z. Dershowitz, Arthur J. Gajarsa, Thaddeus L. Kowalski, Anthony J. Fornelli, Howard L. Greenberger, Samuel Rabinove, Themis N. Anastos, Julian E. Kulas, and Alan M. Dershowitz for the American Jewish Committee et al.; by McNeill Stokes and Ira J. Smotherman, Jr., for the American Subcontractors Assn.; by Philip B. Kurland, Daniel D. Polsby, Larry M. Lavinsky, Arnold Forster, Dennis Rapps, Anthony J. Fornelli, Leonard Greenwald, and David I. Ashe for the Anti-Defamation League of B'nai B'rith et al.; by Charles G. Bakaly and Lawrence B. Kraus for the Chamber of Commerce of the United States; by Roger A. Clark, Jerome K. Tankel, and Glen R. Murphy for the Fraternal Order of Police et al.; by Judith R. Cohn for the Order Sons of Italy in America; by Ronald A. Zumbun, John H. Findley, and William F. Harvey for the Pacific Legal Foundation; by Benjamin Vinar and David I. Caplan for the Queens Jewish Community Council et al.; and by Jennings P. Felix for Young Americans for Freedom.

Briefs of amici curiae were filed by Matthew W. Finkin for the American Assn. of University Professors; by John W. Finley, Jr., Michael Blinick, John Cannon, Leonard J. Theberge, and Edward H. Dowd for the Committee on Academic Nondiscrimination and Integrity et al.; by Kenneth C. McGuiness, Robert E. Williams, Douglas S. McDowell, and Ronald M. Green for the Equal Employment Advisory Council; by Charles E. Wilson for the Fair Employment Practice Comm'n of California; by Mario G. Obledo for Jerome A. Lackner, Director of the Department of Health of California, et al.; by Vilma S. Martinez, Peter D. Roos, and Ralph Santiago Abascal for the Mexican American Legal Defense and Educational Fund et al.; by Eva S. Goodwin for the National Assn. of Affirmative Action Officers; by Lennox S. Hinds for the National Conference of Black Lawyers; by David Ginsburg for the National Fund for Minority Engineering Students; by A. John Wabaunsee, Walter R. Echo-Hawk, and Thomas W. Fredericks for the Native American Law Students of the University of California at Davis et al.; by Joseph A. Broderick, Calvin Brown,

LeMarquis DeJarmon, James E. Ferguson II, Harry E. Groves, John H. Harmon, William A. Marsh, Jr., and James W. Smith for the North Carolina Assn. of Black Lawyers; by Leonard F. Walentynowicz for the Polish American Congress et al.; by Daniel M. Luevano and John E. McDermott for the UCLA Black Law Students Assn. et al.; by Henry A. Waxman pro se; by Leo Branton, Jr., Ann Fagan Ginger, Sam Rosenwein, and Laurence R. Sperber for Price M. Cobbs, M. D., et al.; by John S. Nolan for Ralph J. Galliano; and by Daniel T. Spittler for Timothy J. Hoy.

JUDGES: POWELL, J., announced the Court's judgment and filed an opinion expressing his views of the case, in Parts I, III-A, and V-C of which WHITE, J., joined; and in Parts I and V-C of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., filed an opinion concurring in the judgment in part and dissenting in part, post, p. 324. WHITE, J., post, p. 379, MARSHALL, J., post, p. 387, and BLACKMUN, J., post, p. 402, filed separate opinions. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, post, p. 408.

OPINION BY: POWELL

OPINION

[*269] [***758] [**2737] MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission [*270] of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d et seq., and the *Equal Protection Clause of the Fourteenth* [**2738] *Amendment*. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission [***759] to the Medical School, holding that he had not carried his

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burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any [*271] applicant. + It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

+ MR. JUSTICE STEVENS views the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. *Post*, at 408-411. It must be remembered, however, that petitioner here cross-complained in the trial court for a declaratory judgment that its special program was constitutional and it lost. The trial court's judgment that the special program was unlawful was affirmed by the California Supreme Court in an opinion which left no doubt that the reason for its holding was petitioner's use of race in consideration of *any candidate's* application. Moreover, in explaining the scope of its holding, the court quite clearly stated that petitioner was prohibited from taking race into account in any way in making admissions decisions:

"In addition, the University may properly as it in fact does, consider other factors in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals. In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate, in view of the dissent's misinterpretation, that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission." *18 Cal. 3d 34, 54-55, 553 P. 2d 1152, 1166 (1976)* (footnote omitted).

This explicit statement makes it unreasonable

to assume that the reach of the California court's judgment can be limited in the manner suggested by MR. JUSTICE STEVENS.

[***LEdHR1A] [1A]For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

[*272] [***LEdHR2A] [2A]I also conclude for the reasons stated in the following opinion that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.

I ++

++ MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join Parts I and V-C of this opinion. MR. JUSTICE WHITE also joins Part III-A of this opinion.

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians [***760] but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical School class.¹ The special [**2739] program consisted of [*273] a separate admissions system operating in coordination with the regular admissions process.

¹ Material distributed to applicants for the class entering in 1973 described the special admissions

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program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force Program unless they are from disadvantaged backgrounds. Our goals are: 1) A short range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and 2) Our long-range goal is to stimulate career interest in health professions among junior high and high school students.

"After receiving all pertinent information selected applicants will receive a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee.

"Long-range goals will be approached by meeting with counselors and students of schools with large minority populations, as well as with local youth and adult community groups.

"Applications for financial aid are available only *after* the applicant has been accepted and can only be awarded after registration. Financial aid is available to students in the form of scholarships and loans. In addition to the Regents' Scholarships and President's Scholarship programs, the medical school participates in the Health Professions Scholarship Program, which makes funds available to students who otherwise might not be able to pursue a medical education. Other scholarships and awards are available to students who meet special eligibility qualifications. Medical students are also eligible to participate in the Federally Insured Student Loan Program and the American Medical Association Education and Research Foundation

Loan Program.

"Applications for Admission are available from:

"Admissions Office

School of Medicine

University of California

Davis, California 95616"

Record 195. The letter distributed the following year was virtually identical, except that the third paragraph was omitted.

Under the regular admissions procedure, a candidate could submit his application to the Medical School beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications,² the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. *Id.*, at 63. About [*274] one out of six applicants was invited for a personal interview. *Ibid.* Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other [***761] biographical data. *Id.*, at 62. The ratings were added together to arrive at each candidate's "benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis.³ The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." *Id.*, at 63-64.

2 For the 1973 entering class of 100 seats, the Davis Medical School received 2,464 applications. *Id.*, at 117. For the 1974 entering

class, 3,737 applications were submitted. *Id.*, at 289.

3 That is, applications were considered and acted upon as they were received, so that the process of filling the class took place over a period of months, with later applications being considered against those still on file from earlier in the year. *Id.*, at 64.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. *Id.*, at 163. On the 1973 application form, [**2740] candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.*, at 65-66, 146, 197, 203-205, 216-218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disadvantaged" [*275] was ever produced, *id.*, at 163-164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation. ⁴ Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974. ⁵ Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, *id.*, at 388, but could reject recommended special candidates for failure to meet course requirements or other specific

deficiencies. *Id.*, at 171-172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16. *Id.*, at 164, 166.

4 The chairman normally checked to see if, among other things, the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group. *Id.*, at 65-66.

5 For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white. *Id.*, at 133-134.

From [***762] the year of the increase in class size -- 1971 -- through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, [*276] and 37 Asians, for a total of 44 minority students. ⁶ Although disadvantaged whites applied to the special program in large numbers, see n. 5, *supra*, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

6 The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:

	Special Admissions Program				General Admissions				Total
	Blacks	Chicanos	Asians	Total	Blacks	Chicanos	Asians	Total	
1970	5	3	0	8	0	0	4	4	12
1971	4	9	2	15	1	0	8	9	24
1972	5	6	5	16	0	0	11	11	27
1973	6	8	2	16	0	2	13	15	31

1974	6	7	3	16	0	4	5	9	25
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Id., at 216-218. Sixteen persons were admitted under the special program in 1974, *ibid.*, but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

[**2741] Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years Bakke's application was considered under the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical school." *Id.*, at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. *Id.*, at 69. There were four special admissions slots unfilled at that time, however, for which Bakke was not considered. *Id.*, at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. *Id.*, at 259.

[*277] Bakke's 1974 application was completed early in the year. *Id.*, at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." *Id.*, at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found Bakke "rather limited in his approach" to the problems of the medical profession and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." *Id.*, at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. *Id.*, at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise [***763] his discretion to place Bakke on the waiting list. *Id.*, at 64. In both years, applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's.⁷

7 The following table compares Bakke's science grade point average, overall grade point average, and MCAT scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

	Class En- tering in 1973		MCAT (Percentiles)			Gen. Infor.
	SGPA	OGPA	Verbal	Quanti- tative	Science	
Bakke	3.44	3.46	96	94	97	72
Average of regular admittees	3.51	3.49	81	76	83	69
Average of special admittees	2.62	2.88	46	24	35	33

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Class En- tering in 1974	MCAT (Percentiles)					
	SGPA	OGPA	Verbal	Quanti- tative	Science	Gen. Infor.
Bakke	3.44	3.46	96	94	97	72
Average of regular admittees	3.36	3.29	69	67	82	72
Average of special admittees	2.42	2.62	34	30	37	18

Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the special rating system apparently gave credit for overcoming "disadvantage." *Id.*, at 181, 388.

[***LEdHR3A] [3A]After the second rejection, Bakke filed the instant suit in the Superior Court of California. ⁸ He sought mandatory, injunctive, [*2742] and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the [*278] school on the basis of his race, in violation of his rights under the *Equal Protection Clause of the Fourteenth Amendment*, ⁹ Art. I, § 21, of the *California Constitution*, ¹⁰ and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d. ¹¹ The University [***764] cross-complained for a declaration that its special admissions program was lawful. The trial [*279] court found that the special program operated as a racial quota, because minority applicants in the special program were rated only against one another, Record 388, and 16 places in the class of 100 were reserved for them. *Id.*, at 295-296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

8 [***LEdHR3B] [3B]Prior to the actual filing of the suit, Bakke discussed his intentions with Peter C. Storandt, Assistant to the Dean of Admissions at the Davis Medical School. *Id.*, at 259-269. Storandt expressed sympathy for Bakke's position and offered advice on litigation strategy. Several *amici* imply that these discussions render Bakke's suit "collusive." There is no indication, however, that Storandt's views were those of the Medical School or that anyone else at the school even was aware of Storandt's correspondence and conversations with Bakke. Storandt is no longer with the University.

9 "[Nor] shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

10 "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

This section was recently repealed and its provisions added to Art. I, § 7, of the State Constitution.

11 Section 601 of Title VI, 78 Stat. 252, provides as follows:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal

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financial assistance."

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." *18 Cal. 3d 34, 39, 553 P. 2d 1152, 1156 (1976)*. The California court accepted the findings of the trial court with respect to the University's program.¹² Because the special admissions program involved a racial classification, the Supreme Court held itself bound to apply strict scrutiny. *Id.*, at 49, 553 P. 2d, at 1162-1163. It then turned to the goals the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, *id.*, at 53, 553 P. 2d, at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or the federal statutory grounds cited in the trial court's judgment, the California court held [*280] that the *Equal Protection Clause of the Fourteenth Amendment* required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." *Id.*, at 55, 553 P. 2d, at 1166.

¹² Indeed, the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process. *18 Cal. 3d, at 44, 553 P. 2d, at 1159*.

[**2743] [***LEdHR4A] [4A] [***LEdHR5A] [5A] Turning to Bakke's appeal, the court ruled that since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program.¹³ *Id.*, at 63-64, 553 P. 2d, at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e-17 (1970 ed., Supp. V), see, e. g., *Franks v. Bowman Transportation Co.*, 424

U.S. 747, 772 (1976). *18 Cal. 3d, at 63-64, 553 P. 2d, at 1172*. On this basis, [***765] the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. App. A to Application for Stay 48. In its petition for rehearing below, however, the University conceded its inability to carry that burden. App. B to Application for Stay A19-A20.¹⁴ The [*281] California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. *18 Cal. 3d, at 64, 553 P. 2d, at 1172*. That order was stayed pending review in this Court. *429 U.S. 953 (1976)*. We granted certiorari to consider the important constitutional issue. *429 U.S. 1090 (1977)*.

13 [***LEdHR4B] [4B] Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.

14 Several *amici* suggest that Bakke lacks standing, arguing that he never showed that his injury -- exclusion from the Medical School -- will be redressed by a favorable decision, and that the petitioner "fabricated" jurisdiction by conceding its inability to meet its burden of proof. Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected. First, there appears to be no reason to question the petitioner's concession. It was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record. Cf. *Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281 (1917).

[***LEdHR5B] [5B] Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence the constitutional requirements of Art. III were met. The question of Bakke's

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admission *vel non* is merely one of relief.

Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant. Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. White disadvantaged students were never considered under the special program, and the University acknowledges that its goal in devising the program was to increase minority enrollment.

II

In this Court the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the *Equal Protection Clause*. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue. 434 U.S. 900 (1977).

A

At the outset we face the question whether a right of action for private parties exists under Title VI. Respondent argues that there is a private right of action, invoking [*2744] the test set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1975). He contends [*282] that the statute creates a federal right in his favor, that legislative history reveals an intent to permit private actions,¹⁵ [***766] that such actions would further the remedial purposes of the statute, and that enforcement of federal rights under the Civil Rights Act generally is not relegated to the States. In addition, he cites several lower court decisions which have recognized or assumed the existence of a private right of action.¹⁶ Petitioner denies the existence of a private right of action, arguing that the sole function of § 601, see n. 11, *supra*, was to establish a predicate for administrative action under § 602, 78 Stat. 252, 42 U. S. C. § 2000d-1.¹⁷ In its view, administrative curtailment of federal funds under that section was the only sanction to be imposed upon recipients that [*283] violated § 601. Petitioner also points out that Title VI contains no explicit grant of a private right of action, in contrast to Titles II, III, IV, and VII, of the same statute, 42 U. S. C. §§ 2000a-3 (a), 2000b-2, 2000c-8, and 2000e-5 (f) (1970 *ed. and Supp. V*).¹⁸

15 See, e. g., 110 Cong. Rec. 5255 (1964) (remarks of Sen. Case).

16 E. g., *Bossier Parish School Board v. Lemon*, 370 F.2d 847, 851-852 (CA5), cert. denied, 388 U.S. 911 (1967); *Natonabah v. Board of Education*, 355 F.Supp. 716, 724 (NM 1973); cf. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (CA7 1977) (Title V of Rehabilitation Act of 1973, 29 U. S. C. § 790 *et seq.* (1976 *ed.*)); *Piascik v. Cleveland Museum of Art*, 426 F.Supp. 779, 780 n. 1 (ND Ohio 1976) (Title IX of Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.* (1976 *ed.*)).

17 Section 602, as set forth in 42 U. S. C. § 2000d-1, reads as follows:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or

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refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report." 18 Several comments in the debates cast doubt on the existence of any intent to create a private right of action. For example, Representative Gill stated that no private right of action was contemplated:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong. Rec. 2467 (1964). Accord, *id.*, at 7065 (remarks of Sen. Keating); 6562 (remarks of Sen. Kuchel).

We find it unnecessary to resolve this question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this Court [***767] has been hesitant to review questions not addressed below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940). See also *Massachusetts v. Westcott*, 431 U.S. 322 [**2745] (1977); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Cf. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). We therefore do not address this difficult issue. Similarly, we need not pass [*284] upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies. We assume, only for the purposes of this case, that respondent has a right of action under Title VI. See *Lau v. Nichols*, 414 U.S. 563, 571 n. 2 (1974) (STEWART, J., concurring in result).

B

The language of § 601, 78 Stat. 252, like that of the *Equal Protection Clause*, is majestic in its sweep:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected

to discrimination under any program or activity receiving Federal financial assistance."

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976), quoting *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a purely colorblind scheme,¹⁹ without regard to the reach of the *Equal Protection* [*285] *Clause*, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

19 For example, Senator Humphrey stated as follows:

"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not." *Id.*, at 6547.

See also *id.*, at 12675 (remarks of Sen. Allott); 6561 (remarks of Sen. Kuchel); 2494, 6047 (remarks of Sen. Pastore). But see *id.*, at 15893 (remarks of Rep. MacGregor); 13821 (remarks of Sen. Saltonstall); 10920 (remarks of Sen. Javits); 5266, 5807 (remarks of Sen. Keating).

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color [***768] blindness pronouncements cited in the margin at n. 19,

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generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs.²⁰ There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

²⁰ See, e. g., *id.*, at 7064-7065 (remarks of Sen. Ribicoff); 7054-7055 (remarks of Sen. Pastore); 6543-6544 (remarks of Sen. Humphrey); 2595 (remarks of Rep. Donohue); 2467-2468 (remarks of Rep. Celler); 1643, 2481-2482 (remarks of Rep. Ryan); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, pp. 24-25 (1963).

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example, [**2746] Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill:

"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food [*286] surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of [higher] education financed by Federal funds. It would, in short, *assure the existing right to equal treatment* in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong. Rec. 1519 (1964) (emphasis added).

Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles.²¹

²¹ See, e. g., 110 Cong. Rec. 2467 (1964) (remarks of Rep. Lindsay). See also *id.*, at 2766 (remarks of Rep. Matsunaga); 2731-2732 (remarks of Rep. Dawson); 2595 (remarks of Rep. Donohue); 1527-1528 (remarks of Rep. Celler).

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral

sense of the Nation." *Id.*, at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard: "Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333. Other Senators expressed similar views.²²

²² See, e. g., *id.*, at 12675, 12677 (remarks of Sen. Allott); 7064 (remarks of Sen. Pell); 7057, 7062-7064 (remarks of Sen. Pastore); 5243 (remarks of Sen. Clark).

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure,²³ but proponents of the bill merely replied that the meaning of [*287] "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens -- Negroes -- the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees." *Id.*, at 6553.²⁴

²³ See, e. g., *id.*, at 6052 (remarks of Sen. Johnston); 5863 (remarks of Sen. Eastland); 5612 (remarks of Sen. Ervin); 5251 (remarks of Sen. Talmadge); 1632 (remarks of Rep. Dowdy); 1619 (remarks of Rep. Abernethy).

²⁴ See also *id.*, at 7057, 13333 (remarks of Sen. Ribicoff); 7057 (remarks of Sen. Pastore); 5606-5607 (remarks of Sen. Javits); 5253, 5863-5864, 13442 (remarks of Sen. Humphrey).

[***769] [***LEdHR6A] [6A] In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the *Equal Protection Clause* or the *Fifth Amendment*.

III

A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state

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universities are reviewable under the *Fourteenth Amendment*. See, e. g., *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). For his part, respondent does not argue that all racial or ethnic classifications are *per se* invalid. See, e. g., *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Lee v. Washington*, 390 U.S. 333, 334 [*2747] (1968) (Black, Harlan, and STEWART, JJ., concurring); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been [*288] applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "rights established [by the *Fourteenth Amendment*] are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

En route to this crucial battle over [***770] the scope of judicial review,²⁵ the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.²⁶

25 That issue has generated a considerable amount of scholarly controversy. See, e. g., Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559 (1975); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro*, 61 Nw. U. L. Rev. 363 (1966); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 Va. L. Rev. 955 (1974); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 Va. L. Rev. 925 (1974); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of*

Racial Minorities, 1974 Sup. Ct. Rev. 1; Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. Rev. 343 (1974); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. Chi. L. Rev. 653 (1975); Sedler, *Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California*, 17 Santa Clara L. Rev. 329 (1977); Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U. Pitt. L. Rev. 285 (1977).

26 Petitioner defines "quota" as a requirement which must be met but can never be exceeded, regardless of the quality of the minority applicants. Petitioner declares that there is no "floor" under the total number of minority students admitted; completely unqualified students will not be admitted simply to meet a "quota." Neither is there a "ceiling," since an unlimited number could be admitted through the general admissions process. On this basis the special admissions program does not meet petitioner's definition of a quota.

The court below found -- and petitioner does not deny -- that white applicants could not compete for the 16 places reserved solely for the special admissions program. *18 Cal. 3d, at 44, 553 P. 2d, at 1159*. Both courts below characterized this as a "quota" system.

[*289] This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.²⁷

27 Moreover, the University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to

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discriminate. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-265 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976); see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The guarantees of the *Fourteenth Amendment* extend to all persons. Its language [**2748] is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the *Fourteenth Amendment* are, by its terms, guaranteed to the individual. The rights established are personal rights," *Shelley v. Kraemer*, *supra*, at 22. Accord, *Missouri ex rel. Gaines v. Canada*, *supra*, at 351; *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U.S. 151, 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something [***771] else when [*290] applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co.*, *supra*, at 152-153, n. 4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious.²⁸ See, e. g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Carrington v. Rash*, 380 U.S. 89, 94-97 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, e. g., *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (age); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (wealth); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

" Distinctions between citizens solely because of

their ancestry are by their very nature odious to a free people [*291] whose institutions are founded upon the doctrine of equality." *Hirabayashi*, 320 U.S., at 100.

"[All] legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Korematsu*, 323 U.S., at 216.

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

28 After *Carolene Products*, the first specific reference in our decisions to the elements of "discreteness and insularity" appears in *Minersville School District v. Gobitis*, 310 U.S. 586, 606 (1940) (Stone, J., dissenting). The next does not appear until 1970. *Oregon v. Mitchell*, 400 U.S. 112, 295 n. 14 (STEWART, J., concurring in part and dissenting in part). These elements have been relied upon in recognizing a suspect class in only one group of cases, those involving aliens. E. g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the *Fourteenth Amendment* was that its "one pervading purpose" was "the freedom of the slave race, the security and firm establishment [***772] of that freedom, and the protection of the newly-made freeman and citizen from the [**2749] oppressions of those who had formerly exercised dominion over him." *Slaughter-House Cases*, 16 Wall. 36, 71 (1873). The *Equal Protection Clause*, however, was "[virtually] strangled in infancy by post-civil-war judicial reactionism."²⁹ It was relegated to decades of relative desuetude while the *Due Process Clause of the Fourteenth Amendment*, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, e. g., *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905). In that cause, the *Fourteenth Amendment's* "one pervading purpose" was displaced. See, e. g., *Plessy v. Ferguson*, 163 U.S. 537 (1896). It

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was only as the era of substantive due process came to a close, see, e. g., *Nebbia v. New York* [*292] 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that the *Equal Protection Clause* began to attain a genuine measure of vitality, see, e. g., *United States v. Carolene Products*, 304 U.S. 144 (1938); *Skinner v. Oklahoma ex rel. Williamson*, *supra*.

29 Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 381 (1949).

By that time it was no longer possible to peg the guarantees of the *Fourteenth Amendment* to the struggle for equality of one racial minority. During the dormancy of the *Equal Protection Clause*, the United States had become a Nation of minorities.³⁰ Each had to struggle³¹ -- and to some extent struggles still³² -- to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said -- perhaps unfairly in many cases -- that a shared characteristic was a willingness to disadvantage other groups.³³ As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese); *Truax v. Raich*, 239 U.S. 33, 41 (1915) (Austrian resident aliens); *Korematsu, supra* (Japanese); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in [*293] *Yick Wo*, "are universal in [***773] their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U.S., at 369.

30 M. Jones, *American Immigration* 177-246 (1960).

31 J. Higham, *Strangers in the Land* (1955); G. Abbott, *The Immigrant and the Community* (1917); P. Roberts, *The New Immigration* 66-73, 86-91, 248-261 (1912). See also E. Fenton, *Immigrants and Unions: A Case Study* 561-562 (1975).

32 "Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive,

middle-management, and other job levels because of discrimination based upon their religion and/or national origin." 41 CFR § 60-50.1 (b) (1977).

33 E. g., P. Roberts, *supra*, n. 31, at 75; G. Abbott, *supra* n. 31, at 270-271. See generally n. 31, *supra*.

Although many of the Framers of the *Fourteenth Amendment* conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," *Slaughter-House Cases, supra*, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons, "the 39th Congress was intent upon establishing [**2750] in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 296 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. See *Runyon v. McCrary*, 427 U.S. 160, 192-202 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that among the Framers were many who would have applauded a reading of the *Equal Protection Clause* that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. See, e. g., Cong. Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); *id.*, at 2891-2892 (remarks of Sen. Conness); *id.*, 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (*Fourteenth Amendment* "[protects] classes from class legislation"). See also Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 60-63 (1955).

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the *Equal Protection Clause* with the view of assuring to all persons "the protection of [*294] equal laws," *Yick Wo, supra*, at 369, in a Nation confronting a legacy of slavery and racial discrimination. See, e. g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Hills v. Gautreaux*, 425 U.S. 284 (1976). Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the

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"majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that "[over] the years, this Court has consistently repudiated '[distinctions] between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967), quoting *Hirabayashi*, 320 U.S., at 100.

[**LEdHR2B] [2B]Petitioner urges us to adopt for the first time a more restrictive view of the *Equal Protection Clause* and hold that discrimination against [***774] members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." ³⁴ [*295] The clock of our liberties, however, cannot be turned back to 1868. *Brown v. Board of Education*, *supra*, at 492; accord, *Loving v. Virginia*, *supra*, at 9. It is far too late to argue that the guarantee of equal protection [**2751] to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. ³⁵ "The *Fourteenth Amendment* is not directed solely against discrimination due to a 'two-class theory' -- that is, based upon differences between 'white' and Negro." *Hernandez*, 347 U.S., at 478.

34 In the view of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. See, *e. g.*, *post*, at 361, 362. The *Equal Protection Clause* is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of

allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity -- a medical school faculty -- unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

35 Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution." A. Bickel, *The Morality of Consent* 133 (1975).

Once the artificial line of a "two-class theory" of the *Fourteenth Amendment* is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance [*296] of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude [***775]" and which would not. ³⁶ Courts would be asked to evaluate

the extent of the prejudice and consequent [*297] harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political [**2752] analysis necessary to produce such rankings simply does not lie within the judicial competence -- even if they otherwise were politically feasible and socially desirable.³⁷

36 [***LEdHR2C] [2C]As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See Part V, *infra*. But I disagree with much that is said in their opinion.

They would require as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups by "society at large," *post*, at 369 (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude -- as we hold that it was -- that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program." *Post*, at 365-366.

The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal discrimination in this country against various

racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants -- nothing is said about Asians, *cf.*, *e. g.*, *post*, at 374 n. 57 -- would have made better scores. Not one word in the record supports this conclusion, and the authors of the opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since if it may be concluded *on this record* that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it, in any area of social intercourse. See Part IV-B, *infra*.

37 Mr. Justice Douglas has noted the problems associated with such inquiries:

"The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [Cf. *Plessy v. Ferguson*, 163 U.S. 537, 549, 552 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt v. Painter*, 339 U.S. 629, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also

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constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, e. g., *Yick Wo v. Hopkins*, 118 U.S. 356; *Terrace v. Thompson*, 263 U.S. 197; *Oyama v. California*, 332 U.S. 633. This Court has not sustained a racial classification since the wartime cases of *Korematsu v. United States*, 323 U.S. 214, and *Hirabayashi v. United States*, 320 U.S. 81, involving curfews and relocations imposed upon Japanese-Americans.

"Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints." *DeFunis v. Odegaard*, 416 U.S. 312, 337-340 (1974) (dissenting opinion) (footnotes omitted).

[*298] Moreover, [***776] there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. See *United Jewish Organizations v. Carey*, 430 U.S., at 172-173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the *Equal Protection Clause* to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate [*299] racial and ethnic antagonisms rather than alleviate them. *United Jewish Organizations, supra*, at 173-174 (BRENNAN, J., concurring in part). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from [**2753] one generation to the next, a critical feature of its coherent interpretation. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 650-651 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and [***777] place." A. Cox, *The Role of the Supreme Court in American Government* 114 (1976).

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu v. United States*, 323 U.S. 214 (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process.³⁸ When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitutional guarantees that right to every person regardless of his background. *Shelley v. Kraemer*, 334 U.S., at 22; *Missouri ex rel. Gaines v. Canada*, 305 U.S., at 351.

38 R. Dahl, *A Preface to Democratic Theory* (1956); Posner, *supra* n. 25, at 27.

[*300] C

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Petitioner contends that on several occasions this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. *E. g.*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *Green v. County School Board*, 391 U.S. 430 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement. ³⁹ Moreover, the scope of [***778] the remedies was not permitted to exceed the extent of the [*301] violations. *E. g.*, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 [**2754] (1977); *Milliken v. Bradley*, 418 U.S. 717 (1974); see *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). See also *Austin Independent School Dist. v. United States*, 429 U.S. 990, 991-995 (1976) (POWELL, J., concurring). Here, there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification.

³⁹ Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: *Offermann v. Nitkowski*, 378 F.2d 22 (CA2 1967); *Wanner v. County School Board*, 357 F.2d 452 (CA4 1966); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (CA1 1965). Of these, *Wanner* involved a school system held to have been *de jure* segregated and enjoined from maintaining segregation; racial districting was deemed necessary. 357 F.2d, at 454. Cf. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). In *Barksdale* and *Offermann*, courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. See *Keyes v. School District No. 1*, 413 U.S. 189, 240-250 (1973) (POWELL, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education.

Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

The employment discrimination cases also do not advance petitioner's cause. For example, in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), we approved a retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination -- not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary "to make [the victims] whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 763, quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *E. g.*, *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (CA2 1973); *Carter v. Gallagher*, 452 F.2d 315 (CA8 1972), modified on rehearing en banc, *id.*, at 327. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. *E. g.*, *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (CA3), cert. denied, 404 U.S. 854 (1971); ⁴⁰ *Associated General [*302] Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (CA1 1973), cert. denied, 416 U.S. 957 (1974); cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). But we have never approved preferential classifications in the absence of [***779] proved constitutional or statutory violations. ⁴¹

⁴⁰ Every decision upholding the requirement of preferential hiring under the authority of Exec. Order No. 11246, 3 CFR 339 (1964-1965 Comp.), has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy. *Contractors Association of Eastern Pennsylvania; Southern Illinois Builders*

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Assn. v. Ogilvie, 471 F.2d 680 (CA7 1972); *Joyce v. McCrane*, 320 F.Supp. 1284 (NJ 1970); *Weiner v. Cuyahoga Community College District*, 19 Ohio St. 2d 35, 249 N. E. 2d 907, cert. denied, 396 U.S. 1004 (1970). See also *Rosetti Contracting Co. v. Brennan*, 508 F.2d 1039, 1041 (CA7 1975); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (CA1 1973), cert. denied, 416 U.S. 957 (1974); *Northeast Constr. Co. v. Romney*, 157 U. S. App. D. C. 381, 383, 390, 485 F.2d 752, 754, 761 (1973).

41 This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c (1970 ed., Supp. V). In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, e. g., *South Carolina v. Katzenbach*, 383 U.S. 301, 308-310 (1966) (§ 5), and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976).

Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.

Nor is petitioner's view as to the applicable standard supported by the fact that [**2755] gender-based classifications are not subjected to this level of scrutiny. E. g., *Califano v. Webster*, 430 U.S. 313, 316-317 (1977); *Craig v. Boren*, 429 U.S. 190, 211 n. (1976) (POWELL, J., concurring). Gender-based distinctions are less likely to create the analytical and practical [*303] problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two

possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. See, e. g., *Califano v. Goldfarb*, 430 U.S. 199, 212-217 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.

Petitioner also cites *Lau v. Nichols*, 414 U.S. 563 (1974), in support of the proposition that discrimination favoring racial or ethnic minorities has received judicial approval without the exacting inquiry ordinarily accorded "suspect" classifications. In *Lau*, we held that the failure of the San Francisco school system to provide remedial English instruction for some 1,800 students of oriental ancestry who spoke no English amounted to a violation of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, and the regulations promulgated thereunder. Those regulations required remedial instruction where inability to understand English excluded children of foreign ancestry from participation in educational [***780] programs. 414 U.S., at 568. Because we found that the students in *Lau* were denied "a meaningful opportunity to participate in the educational program," *ibid.*, we remanded for the fashioning of a remedial order.

[*304] *Lau* provides little support for petitioner's argument. The decision rested solely on the statute, which had been construed by the responsible administrative agency to reach educational practices "which have the effect of subjecting individuals to discrimination," *ibid.* We stated: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.*, at 566. Moreover, the "preference" approved did not result in the denial of the relevant benefit -- "meaningful opportunity to participate

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in the educational program" -- to anyone else. No other student was deprived by that preference of the ability to participate in San Francisco's school system, and the applicable regulations required similar assistance for all students who suffered similar linguistic deficiencies. *Id.*, at 570-571 (STEWART, J., concurring in result).

In a similar vein, ⁴² petitioner contends that our recent decision in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), indicates a willingness to approve racial classifications designed to benefit certain minorities, without denominating the classifications as "suspect." The State of New York had redrawn its reapportionment plan to meet objections of the Department of Justice under § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c (1970 ed., Supp. V). Specifically, voting districts were redrawn to enhance the electoral power [*305] of certain "nonwhite" voters found to have been the victims of unlawful "dilution" under the original reapportionment plan. *United Jewish Organizations*, like *Lau*, properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity -- meaningful participation in the electoral process.

⁴² Petitioner also cites our decision in *Morton v. Mancari*, 417 U.S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is *sui generis*. *Id.*, at 554. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion." *Ibid.*

In this case, unlike *Lau* and *United Jewish Organizations*, there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner's special admissions program is quite different from the

remedial measures approved [***781] in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit -- admission to the Medical School -- they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. *E. g.*, *McLaurin v. Oklahoma State Regents*, 339 U.S., at 641-642.

IV

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 721-722 (1973) (footnotes omitted); *Loving v. Virginia*, 388 U.S., at 11; *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). The special admissions [*306] program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination; ⁴³ (iii) increasing [**2757] the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

⁴³ A number of distinct subgoals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said that preferences for Negro applicants may compensate for harm done them personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, *supra* n. 25, at 581-586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, *The Case for Black Reparations* (1973). That justification for racial or ethnic preference has been subjected

to much criticism. *E. g.*, Greenawalt, *supra* n. 25, at 581; Posner, *supra* n. 25, at 16-17, and n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, *supra* n. 25, at 391. For purposes of analysis these subgoals need not be considered separately.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased prediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

[*307] A

If petitioner's purpose is to assure [***782] within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. *E. g.*, *Loving v. Virginia*, *supra*, at 11; *McLaughlin v. Florida*, *supra*, at 196; *Brown v. Board of Education*, 347 U.S. 483 (1954).

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*,

attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, *e. g.*, *Teamsters v. United States*, 431 U.S. 324, 367-376 (1977); *United Jewish Organizations*, 430 U.S., at 155-156; *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the [*308] extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations,⁴⁴ it cannot be [*309] said that [***783] [**2758] the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

44 MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See *post*, at 363-366, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):

"Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by

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Congress is the removal of *artificial, arbitrary, and unnecessary barriers* to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.*, at 431 (emphasis added).

Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," *ibid.*, or lacks "a manifest relationship to the employment in question," *id.*, at 432. See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803, 805-806 (1973). Nothing in this record -- as opposed to some of the general literature cited by MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN -- even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in n. 7, *supra*, is without educational justification.

Moreover, the presumption in *Griggs* -- that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute -- was based on legislative determinations, wholly absent here, that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination:

"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, *supra*, at 429-430. See, e. g., H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 26 (1963) ("Testimony supporting the fact of discrimination in employment is overwhelming"). See generally Vaas, Title VII: The Legislative History, 7 B. C. Ind. & Com. L. Rev. 431 (1966). The Court emphasized that "the Act does not command that any person be hired simply because he was

formerly the subject of discrimination, or because he is a member of a minority group." 401 U.S., at 430-431. Indeed, § 703 (j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U. S. C. § 2000e-2 (j). Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.⁴⁵ Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); n. 41, *supra*. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, e. g., *Califano v. Webster*, 430 U.S., at 316-321; *Califano* [*310] v. *Goldfarb*, 430 U.S., at 212-217. Lacking this capability, petitioner has not carried its burden of justification on this issue.

45 For example, the University is unable to explain its selection of only the four favored groups -- Negroes, Mexican-Americans, American Indians, and Asians -- for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n. 37, *supra*.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions [***784] program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their

pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. Cf. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of [**2759] health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal. 46 The court below addressed this failure of proof:

"The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority [*311] communities than the average white doctor. (See Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role* (1975) 42 U. Chi. L. Rev. 653, 688.) Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive." 18 Cal. 3d, at 56, 553 P. 2d, at 1167.

46 The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential

classification is likely to have any significant effect on the problem.⁴⁷

47 It is not clear that petitioner's two-track system, even if adopted throughout the country, would substantially increase representation of blacks in the medical profession. That is the finding of a recent study by Sleeth & Mishell, *Black Under-Representation in United States Medical Schools*, 297 New England J. of Med. 1146 (1977). Those authors maintain that the cause of black underrepresentation lies in the small size of the national pool of qualified black applicants. In their view, this problem is traceable to the poor premedical experiences of black undergraduates, and can be remedied effectively only by developing remedial programs for black students before they enter college.

D

[***785] The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible [*312] goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the *First Amendment*. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

"It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (concurring in result).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967):

[**2760] "Our Nation is deeply committed to

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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* 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."

The atmosphere of "speculation, experiment and creation" -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body.⁴⁸ As the Court [*313] noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

48 The president of Princeton University has described some of the benefits derived from a diverse student body:

"[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'

....

"In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding

and personal growth." Bowen, *Admissions and the Relevance of Race*, *Princeton Alumni Weekly* 7, 9 (Sept. 26, 1977).

Thus, [***786] in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the *First Amendment*. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt v. Painter*, 339 *U.S.*, at 634, the [*314] Court made a similar point with specific reference to legal education:

"The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background -- whether it be ethnic, geographic, culturally advantaged or disadvantaged -- may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.⁴⁹

49 Graduate admissions decisions, like those at the undergraduate level, are concerned with "assessing the potential contributions to the society of each individual candidate following his or her graduation -- contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or government affairs and the keenest critic of all things organized, the solitary scholar and the concerned parent." *Id.*, at 10.

Ethnic diversity, however, is only one element in a range of factors a university [**2761] properly may

consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges -- and the courts below have held -- that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the *Fourteenth Amendment*. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the [*315] program's racial classification is necessary to promote this interest. *In re Griffiths*, 413 U.S., at 721-722.

V

A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student [***787] body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.⁵⁰

⁵⁰ See Manning, *The Pursuit of Fairness in Admissions to Higher Education*, in Carnegie Council on Policy Studies in Higher Education, *Selective Admissions in Higher Education* 19, 57-59 (1977).

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end

of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

[*316] The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the *First Amendment*, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

"In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . .

"In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. . . . [See Appendix hereto.]

"In Harvard College admissions the Committee has not set target-quotas for [**2762] the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But [***788] that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many [*317] types and categories of students." App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae* 2-3.

In such an admissions program,⁵¹ race or ethnic background may be deemed a "plus" in a particular

applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a [*318] particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

51 The admissions program at Princeton has been described in similar terms:

"While race is not in and of itself a consideration in determining basic qualifications, and while there are obviously significant differences in background and experience among applicants of every race, in some situations race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished -- and against what odds. Similarly, such factors as family circumstances and previous educational opportunities may be relevant, either in conjunction with race or ethnic background (with which they may be associated) or on their own." Bowen, *supra* n. 48, at 8-9.

For an illuminating discussion of such flexible admissions systems, see Manning, *supra* n. 50, at 57-59.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the

wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment [***789] under the *Fourteenth Amendment*.⁵²

52 The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. Nowhere in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN is this denial even addressed.

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated -- but no less effective -- means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions [**2763] program where race or ethnic background is simply one element -- to be weighed fairly against other elements -- in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." *McLeod v. Dilworth*, 322 U.S. 327, 329 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith [*319] would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See, e. g., *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Swain v. Alabama*, 380 U.S. 202 (1965).⁵³

53 Universities, like the prosecutor in *Swain*, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a

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systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

There also are strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. Petitioner's program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[justice] must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

B

[**LEdHR1B] [1B]In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred [*320] applicants [***790] have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the *Fourteenth Amendment*. *Shelley v. Kraemer*, 334 U.S., at 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid

under the *Fourteenth Amendment* must be affirmed.

C

[**LEdHR7] [7]In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI

[**LEdHR1C] [1C]With respect to respondent's entitlement to an injunction directing his admission [**2764] to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed.⁵⁴

54 There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in *Part V, supra*. Cf. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284-287 (1977). In *Mt. Healthy*, there was considerable doubt whether protected *First Amendment* activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection -- purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S., at 265-266. No one can say how -- or even if -- petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in *Mt. Healthy*. In sum, a remand would result in fictitious recasting of past conduct.

[*321] APPENDIX TO OPINION OF POWELL,
J.

Harvard College Admissions Program ⁵⁵

55 This statement appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae*.

For the past 30 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate [***791] through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational [*322] experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 *et seq.* (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty -- perhaps 150 or so out of an entering class of over 1,100 -- the Committee seeks --

variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College]. . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 104-105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result [**2765] was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, [*323] minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a [***792] Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly [heterogeneous] environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of

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isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But [*324] that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

CONCUR BY: BRENNAN (In Part); WHITE (In Part); MARSHALL (In Part); BLACKMUN (In Part); STEVENS (In Part)

DISSENT BY: BRENNAN (In Part); WHITE (In Part); MARSHALL (In Part); BLACKMUN (In Part); STEVENS (In Part)

DISSENT

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concurring in the judgment in part and dissenting in part.

The Court today, in reversing in part the judgment of the Supreme Court of [**2766] California, affirms the constitutional power of Federal and State Governments to act affirmatively [***793] to achieve equal opportunity for all. The difficulty of the issue presented -- whether government may use race-conscious programs to redress the continuing effects of past discrimination -- [*325] and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d et seq., prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Allan Bakke's rights have been violated and that he must, therefore, be admitted to the Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account in university admissions, the particular special admissions program used by petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary to achieve petitioner's stated goals. Accordingly, these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke "is entitled to an order that he be admitted to the University." 18 Cal. 3d 34, 64, 553 P. 2d 1152, 1172 (1976).

[***LEdHR2D] [2D] [***LEdHR6B] [6B]We agree with MR. JUSTICE POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the *Equal Protection Clause of the Fourteenth Amendment* itself. We also agree that the effect of the California Supreme Court's affirmance of the judgment of the Superior Court of California would be to prohibit the University from establishing in the future affirmative-action programs that take race into account. See *ante*, at 271 n. Since we conclude that the affirmative admissions program at the Davis [*326] Medical School is constitutional, we would reverse the

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judgment below in all respects. MR. JUSTICE POWELL agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.¹

1 We also agree with MR. JUSTICE POWELL that a plan like the "Harvard" plan, see *ante*, at 316-318, is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.

I

Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies [***794] into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our "American Dilemma." Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The *Fourteenth Amendment*, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the *Equal Protection Clause* of the Amendment was largely moribund so that, as late as [**2767] 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the "last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927). Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal"² status before the law, a status [*327] always separate but seldom equal. Not until 1954 -- only 24 years ago -- was this odious doctrine interred by our decision in *Brown v. Board of Education*, 347 U.S. 483 (*Brown I*), and its progeny,³ which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution. Even then inequality was not eliminated with "all deliberate speed." *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). In 1968⁴ and again in 1971,⁵ for example, we were forced to remind school boards of their obligation to eliminate

racial discrimination root and branch. And a glance at our docket⁶ and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past.

2 See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

3 *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54 (1958); *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971 (1954); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Holmes v. Atlanta*, 350 U.S. 879 (1955); *Gayle v. Browder*, 352 U.S. 903 (1956).

4 See *Green v. County School Board*, 391 U.S. 430 (1968).

5 See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33 (1971); *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971).

6 See, e. g., cases collected in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 663 n. 5 (1978).

Against this background, claims that law must be "colorblind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot -- and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the *Fourteenth Amendment* to private parties who receive federal funds -- let color blindness become myopia [***795] which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

[*328] II

The threshold question we must decide is whether Title VI of the Civil Rights Act of 1964 bars recipients of federal funds from giving preferential consideration to disadvantaged members of racial minorities as part of a program designed to enable such individuals to surmount the obstacles imposed by racial discrimination.⁷ We join Parts I and V-C of our Brother POWELL's opinion and three of us agree with his conclusion in Part II that this case does not require us to resolve the question whether there is a private right of action under Title VI.⁸

7 Section 601 of Title VI provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d.

8 MR. JUSTICE WHITE believes we should address the private-right-of-action issue. Accordingly, he has filed a separate opinion stating his view that there is no private right of action under Title VI. See *post*, p. 379.

[**LEdHR6C] [6C]In our view, Title VI prohibits only those uses of racial criteria that would violate the *Fourteenth Amendment* if employed by a [**2768] State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the *Fourteenth Amendment*. The legislative history of Title VI, administrative regulations interpreting the statute, subsequent congressional and executive action, and the prior decisions of this Court compel this conclusion. None of these sources lends support to the proposition that Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life.

A

The history of Title VI -- from President Kennedy's request that Congress grant executive departments and agencies authority [*329] to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals -- reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.

This purpose was first expressed in President Kennedy's June 19, 1963, message to Congress proposing the legislation that subsequently became the Civil Rights Act of 1964.⁹ [*330] Representative [***796] Celler, the Chairman of the House Judiciary Committee, and the floor manager of the legislation in the House, introduced

Title VI in words unequivocally expressing the intent to provide the Federal Government with the means of assuring that its funds were not used to subsidize racial discrimination inconsistent with the standards imposed by the *Fourteenth* and *Fifth Amendments* upon state and federal action.

"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of [higher] education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong. Rec. 1519 (1964).

[**2769] It was clear to Representative Celler that Title VI, apart from the fact that it reached all federally funded activities even in the absence of sufficient state or federal control to invoke the *Fourteenth* or *Fifth Amendments*, was not placing new substantive limitations upon the use of racial criteria, but rather was designed to extend to such activities "the existing right to equal treatment" enjoyed by Negroes under those Amendments, and he later specifically defined the purpose of Title VI in this way:

"In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money [*331] and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the *14th amendment*, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.

"It is for these reasons that we bring forth title VI. The enactment [***797] of title VI will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions." *Id.*, at 2467.

Representative Celler also filed a memorandum setting forth the legal basis for the enactment of Title VI which reiterated the theme of his oral remarks: "In

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exercising its authority to fix the terms on which Federal funds will be disbursed . . . , Congress clearly has power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution." *Id.*, at 1528.

9 "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also

"Many statutes providing Federal financial assistance, however, define with such precision both the Administrator's role and the conditions upon which specified amounts shall be given to designated recipients that the amount of administrative discretion remaining -- which might be used to withhold funds if discrimination were not ended -- is at best questionable. No administrator has the unlimited authority to invoke the Constitution in opposition to the mandate of the Congress. Nor would it always be helpful to require unconditionally -- as is often proposed -- the withdrawal of all Federal funds from programs urgently needed by Negroes as well as whites; for this may only penalize those who least deserve it without ending discrimination.

"Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance -- by way of grant, loan, contract, guaranty, insurance, or otherwise -- to any program or activity in which racial discrimination occurs. This would not permit the Federal Government to cut off all Federal aid of all kinds as a means of punishing an area for the discrimination occurring therein --

but it would clarify the authority of any administrator with respect to Federal funds or financial assistance and discriminatory practices." 109 Cong. Rec. 11161 (1963).

Other sponsors of the legislation agreed with Representative Celler that the function of Title VI was to end the Federal Government's complicity in conduct, particularly the segregation or exclusion of Negroes, inconsistent with the standards to be found in the antidiscrimination provisions of the Constitution. Representative Lindsay, also a member of the Judiciary Committee, candidly acknowledged, in the course of explaining why Title VI was necessary, that it did not create any new standard of equal treatment beyond that contained in the Constitution:

"Both the Federal Government and the States are under constitutional mandates not to discriminate. Many have raised the question as to whether legislation is required at all. Does not the Executive already have the power in the distribution of Federal funds to apply those conditions which will enable the Federal Government itself to live up to the mandate of the Constitution and to require [*332] States and local government entities to live up to the Constitution, most especially the 5th and 14th amendments?" *Id.*, at 2467.

He then explained that legislation was needed to authorize the termination of funding by the Executive Branch because existing legislation seemed to contemplate the expenditure of funds to support racially segregated institutions. *Ibid.* The views of Representatives Celler and Lindsay concerning the purpose and function of Title VI were shared by other sponsors and proponents of the legislation in the House. 10 Nowhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution.

10 See, e. g., 110 Cong. Rec. 2732 (1964) (Rep. Dawson); *id.*, at 2481-2482 (Rep. Ryan); *id.*, at 2766 (Rep. Matsunaga); *id.*, at 2595 (Rep. Donahue).

The Senate's consideration of Title VI reveals an identical understanding concerning the purpose and scope of the legislation. Senator Humphrey, the Senate floor manager, opened the Senate debate with a

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section-by-section analysis of the Civil Rights Act in which he succinctly stated the purpose of Title VI:

"The purpose of title VI is to make sure that funds of the United States are [**2770] not used to support racial discrimination. In many instances the practices of segregation or discrimination, which title VI seeks to end, are [***798] unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (C. A. 4, 1963), [cert. denied, 376 U.S. 938 (1964)]. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply [*333] designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." *Id.*, at 6544.

Senator Humphrey, in words echoing statements in the House, explained that legislation was needed to accomplish this objective because it was necessary to eliminate uncertainty concerning the power of federal agencies to terminate financial assistance to programs engaging in racial discrimination in the face of various federal statutes which appeared to authorize grants to racially segregated institutions. *Ibid.* Although Senator Humphrey realized that Title VI reached conduct which, because of insufficient governmental action, might be beyond the reach of the Constitution, it was clear to him that the substantive standard imposed by the statute was that of the *Fifth* and *Fourteenth Amendments*.

Senate supporters of Title VI repeatedly expressed agreement with Senator Humphrey's description of the legislation as providing the explicit authority and obligation to apply the standards of the Constitution to all recipients of federal funds. Senator Ribicoff described the limited function of Title VI:

"Basically, there is a constitutional restriction against discrimination in the use of Federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction." *Id.*, at 13333.

Other strong proponents of the legislation in the Senate repeatedly expressed their intent to assure that federal funds would only be spent in accordance with constitutional standards. See remarks of Senator Pastore, *id.*, at 7057, 7062; Senator Clark, *id.*, at 5243; Senator

Allott, *id.*, at 12675, 12677. ¹¹

¹¹ There is also language in 42 U. S. C. § 2000d-5, enacted in 1966, which supports the conclusion that Title VI's standard is that of the Constitution. *Section 2000d-5* provides that "for the purpose of determining whether a local educational agency is in compliance with [Title VI], compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be compliance with [Title VI], insofar as the matters covered in the order or judgment are concerned." This provision was clearly intended to avoid subjecting local educational agencies simultaneously to the jurisdiction of the federal courts and the federal administrative agencies in connection with the imposition of remedial measures designed to end school segregation. Its inclusion reflects the congressional judgment that the requirements imposed by Title VI are identical to those imposed by the Constitution as interpreted by the federal courts.

[*334] Respondent's contention that Congress intended Title VI to bar affirmative-action programs designed to enable minorities disadvantaged by the effects of discrimination to participate in federally financed programs is also refuted by an examination of the type of conduct which [***799] Congress thought it was prohibiting by means of Title VI. The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes. Senator Humphrey set the theme in his speech presenting Title VI to the Senate:

"Large sums of money are contributed by the United States each year for the construction, operation, and maintenance of segregated schools.

....

" [**2771] Similarly, under the Hill-Burton Act, Federal grants are made to hospitals which admit whites

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only or Negroes only. . . .

"In higher education also, a substantial part of the Federal grants to colleges, medical schools and so forth, in the South is still going to segregated institutions.

[*335] "Nor is this all. In several States, agricultural extension services, supported by Federal funds, maintain racially segregated offices for Negroes and whites. . . .

". . . Vocational training courses, supported with Federal funds, are given in segregated schools and institutions and often limit Negroes to training in less skilled occupations. In particular localities it is reported that Negroes have been cut off from relief rolls, or denied surplus agricultural commodities, or otherwise deprived of the benefit of federally assisted programs, in retaliation for their participation in voter registration drives, sit-in demonstrations and the like." *Id.*, at 6543-6544.

See also the remarks of Senator Pastore (*id.*, at 7054-7055); Senator Ribicoff (*id.*, at 7064-7065); Senator Clark (*id.*, at 5243, 9086); Senator Javits (*id.*, at 6050, 7102).¹²

¹² As has already been seen, the proponents of Title VI in the House were motivated by the identical concern. See remarks of Representative Celler (110 Cong. Rec. 2467 (1964)); Representative Ryan (*id.*, at 1643, 2481-2482); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, Additional Views of Seven Representatives 24-25 (1963).

The conclusion to be drawn from the foregoing is clear. Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support. It was aware that there were many federally funded programs and institutions which discriminated against minorities in a manner inconsistent with the standards of the *Fifth* and *Fourteenth Amendments* but whose activities might not involve sufficient state or federal action so as to be in violation of these Amendments. Moreover, Congress believed that it was questionable whether the Executive Branch possessed legal authority to terminate the funding of activities on the ground that they discriminated racially against Negroes in a manner violative of the standards

contained in the *Fourteenth* [***800] and *Fifth* [*336] *Amendments*. Congress' solution was to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority and the obligation to terminate its financial support of any activity which employed racial criteria in a manner condemned by the Constitution.

Of course, it might be argued that the Congress which enacted Title VI understood the Constitution to require strict racial neutrality or color blindness, and then enshrined that concept as a rule of statutory law. Later interpretation and clarification of the Constitution to permit remedial use of race would then not dislodge Title VI's prohibition of race-conscious action. But there are three compelling reasons to reject such a hypothesis.

First, no decision of this Court has ever adopted the proposition that the Constitution must be colorblind. See *infra*, at 355-356.

Second, even if it could be argued in 1964 that the Constitution might conceivably require color blindness, Congress surely would not have chosen to codify such a view unless the Constitution clearly required it. The legislative history of Title VI, as well as the statute itself, reveals a desire to induce voluntary compliance with the requirement of nondiscriminatory treatment.¹³ See § 602 of the Act, *42 U. S. C. § 2000d-1* (no funds shall be terminated unless and until it has been "determined that compliance cannot be secured by voluntary means"); H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 25 [**2772] (1963); 110 Cong. Rec. 13700 (1964) (Sen. Pastore); *id.*, at 6546 (Sen. Humphrey). It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations. Yet a reading of Title VI as prohibiting all action predicated upon race which adversely [*337] affects any individual would require recipients guilty of discrimination to await the imposition of such remedies by the Executive Branch. Indeed, such an interpretation of Title VI would prevent recipients of federal funds from taking race into account even when necessary to bring their programs into compliance with federal constitutional requirements. This would be a remarkable reading of a statute designed to eliminate constitutional violations, especially in light of judicial decisions holding that under certain

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circumstances the remedial use of racial criteria is not only permissible but is constitutionally required to eradicate constitutional violations. For example, in *Board of Education v. Swann*, 402 U.S. 43 (1971), the Court held that a statute forbidding the assignment of students on the basis of race was unconstitutional because it would hinder the implementation of remedies necessary to accomplish the desegregation of a school system: "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.*, at 46. Surely Congress did not intend [***801] to prohibit the use of racial criteria when constitutionally required or to terminate the funding of any entity which implemented such a remedy. It clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution rather than requiring the recipient to await a judicial adjudication of unconstitutionality and the judicial imposition of a racially oriented remedy.

13 See separate opinion of MR. JUSTICE WHITE, *post*, at 382-383, n. 2.

Third, the legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine. Although it is clear from the debates that the supporters of Title VI intended to ban uses of race prohibited by the Constitution and, more specifically, the maintenance of segregated [*338] facilities, they never precisely defined the term "discrimination," or what constituted an exclusion from participation or a denial of benefits on the ground of race. This failure was not lost upon its opponents. Senator Ervin complained:

"The word 'discrimination,' as used in this reference, has no contextual explanation whatever, other than the provision that the discrimination 'is to be against' individuals participating in or benefiting from federally assisted programs and activities on the ground specified. With this context, the discrimination condemned by this reference occurs only when an individual is treated unequally or unfairly because of his race, color, religion, or national origin. What constitutes unequal or unfair treatment? Section 601 and section 602 of title VI do not say. They leave the determination of that question to the executive department or agencies administering each

program, without any guideline whatever to point out what is the congressional intent." 110 Cong. Rec. 5612 (1964).

See also remarks of Representative Abernethy (*id.*, at 1619); Representative Dowdy (*id.*, at 1632); Senator Talmadge (*id.*, at 5251); Senator Sparkman (*id.*, at 6052). Despite these criticisms, the legislation's supporters refused to include in the statute or even provide in debate a more explicit definition of what Title VI prohibited.

The explanation for this failure is clear. Specific definitions were undesirable, in the views of the legislation's principal backers, because Title VI's standard was that of the Constitution and one that could and should be administratively and judicially applied. [**2773] See remarks of Senator Humphrey (*id.*, at 5253, 6553); Senator Ribicoff (*id.*, at 7057, 13333); Senator Pastore (*id.*, at 7057); Senator Javits (*id.*, at 5606-5607, 6050).¹⁴ Indeed, there was a strong emphasis throughout [*339] Congress' consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination. [***802] Attorney General Robert Kennedy testified that regulations had not been written into the legislation itself because the rules and regulations defining discrimination might differ from one program to another so that the term would assume different meanings in different contexts.¹⁵ This determination to preserve flexibility in the administration of Title VI was shared by the legislation's supporters. When Senator Johnston offered an amendment that would have expressly authorized federal grantees to take race into account in placing children in adoptive and foster homes, Senator Pastore opposed the amendment, which was ultimately defeated by a 56-29 vote, on the ground that federal administrators could be trusted to act reasonably and that there was no danger that they would prohibit the use of racial criteria under such circumstances. *Id.*, at 13695.

14 These remarks also reflect the expectations of Title VI's proponents that the application of the Constitution to the conduct at the core of their concern -- the segregation of Negroes in federally funded programs and their exclusion from the full benefits of such programs -- was clear. See *supra*, at 333-336; *infra*, at 340-342, n. 17.

15 Testimony of Attorney General Kennedy in Hearings before the Senate Committee on the

Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess., 398-399 (1963).

Congress' resolve not to incorporate a static definition of discrimination into Title VI is not surprising. In 1963 and 1964, when Title VI was drafted and debated, the courts had only recently applied the *Equal Protection Clause* to strike down public racial discrimination in America, and the scope of that Clause's nondiscrimination principle was in a state of flux and rapid evolution. Many questions, such as whether the *Fourteenth Amendment* barred only *de jure* discrimination or in at least some circumstances reached *de facto* discrimination, had not yet received an authoritative judicial resolution. The congressional debate reflects an awareness of the evolutionary [*340] change that constitutional law in the area of racial discrimination was undergoing in 1964.¹⁶

¹⁶ See, e. g., 110 Cong. Rec. 6544, 13820 (1964) (Sen. Humphrey); *id.*, at 6050 (Sen. Javits); *id.*, at 12677 (Sen. Allott).

In sum, Congress' equating of Title VI's prohibition with the commands of the *Fifth* and *Fourteenth Amendments*, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution. Thus, any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history. The cryptic nature of the language employed in Title VI merely reflects Congress' concern with the then-prevalent use of racial standards as a means of excluding or disadvantaging Negroes and its determination to prohibit absolutely such discrimination. We have recently held that "[when] aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976), quoting *United States v. American Trucking Assns.*, 310 U.S. 534, 543-544 (1940). This is especially so when, as is the case [***803] here, the literal application of what is believed to be the [**2774] plain language of the statute, assuming that it is so plain, would lead to results in direct

conflict with Congress' unequivocally expressed legislative purpose.¹⁷

¹⁷ Our Brother STEVENS finds support for a colorblind theory of Title VI in its legislative history, but his interpretation gives undue weight to a few isolated passages from among the thousands of pages of the legislative history of Title VI. See *id.*, at 6547 (Sen. Humphrey); *id.*, at 6047, 7055 (Sen. Pastore); *id.*, at 12675 (Sen. Allott); *id.*, at 6561 (Sen. Kuchel). These fragmentary comments fall far short of supporting a congressional intent to prohibit a racially conscious admissions program designed to assist those who are likely to have suffered injuries from the effects of past discrimination. In the first place, these statements must be read in the context in which they were made. The concern of the speakers was far removed from the incidental injuries which may be inflicted upon nonminorities by the use of racial preferences. It was rather with the evil of the segregation of Negroes in federally financed programs and, in some cases, their arbitrary exclusion on account of race from the benefits of such programs. Indeed, in this context there can be no doubt that the *Fourteenth Amendment* does command color blindness and forbids the use of racial criteria. No consideration was given by these legislators, however, to the permissibility of racial preference designed to redress the effects of injuries suffered as a result of one's color. Significantly one of the legislators, Senator Pastore, and perhaps also Senator Kuchel, who described Title VI as proscribing decisionmaking based upon skin color, also made it clear that Title VI does not outlaw the use of racial criteria in all circumstances. See *supra*, at 339-340; 110 Cong. Rec. 6562 (1964). See also *id.*, at 2494 (Rep. Celler). Moreover, there are many statements in the legislative history explicitly indicating that Congress intended neither to require nor to prohibit the remedial use of racial preferences where not otherwise required or prohibited by the Constitution. Representative MacGregor addressed directly the problem of preferential treatment:

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of

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misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level close to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically." *Id.*, at 15893.

Other legislators explained that the achievement of racial balance in elementary and secondary schools where there had been no segregation by law was not compelled by Title VI but was rather left to the judgment of state and local communities. See, e. g., *id.*, at 10920 (Sen. Javits); *id.*, at 5807, 5266 (Sen. Keating); *id.*, at 13821 (Sens. Humphrey and Saltonstall). See also, *id.*, at 6562 (Sen. Kuchel); *id.*, at 13695 (Sen. Pastore).

Much the same can be said of the scattered remarks to be found in the legislative history of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq. (1970 ed. and Supp. V), which prohibits employment discrimination on the basis of race in terms somewhat similar to those contained in Title VI, see 42 U. S. C. § 2000e-2 (a)(1) (unlawful "to fail or refuse to hire" any applicant "because of such individual's race, color, religion, sex, or national origin . . ."), to the effect that any deliberate attempt by an employer to maintain a racial balance is not required by the statute and might in fact violate it. See, e. g., 110 Cong. Rec. 7214 (1964) (Sens. Clark and Case); *id.*, at 6549 (Sen. Humphrey); *id.*, at 2560 (Rep. Goodell). Once again, there is no indication that Congress intended to bar the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination. Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their work force as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress

intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends. The former may well be contrary to the requirements of the *Fourteenth Amendment* (where state action is involved), while the latter presents very different constitutional considerations. Indeed, as discussed *infra*, at 353, this Court has construed Title VII as requiring the use of racial preferences for the purpose of hiring and advancing those who have been adversely affected by past discriminatory employment practices, even at the expense of other employees innocent of discrimination. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 767-768 (1976). Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute. See *id.*, at 762-770; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). There is no more indication in the legislative history of Title VII than in that of Title VI that Congress desired to prohibit such affirmative action to the extent that it is permitted by the Constitution, yet judicial decisions as well as subsequent executive and congressional action clearly establish that Title VII does not forbid race-conscious remedial action. See *infra*, at 353-355, and n. 28.

[*341] [***804] [**2775] B

Section 602 of Title VI, 42 U. S. C. § 2000d-1, instructs federal agencies to promulgate regulations interpreting Title [*342] VI. These regulations, which, under the terms of the statute, require Presidential approval, are entitled to considerable deference in construing Title VI. See, e. g., *Lau v. Nichols*, [*343] 414 U.S. 563 (1974); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). Consequently, it is most significant that the Department of Health, Education, and Welfare (HEW), which provides much of the federal assistance to institutions of higher education, has adopted regulations requiring affirmative measures designed to enable racial minorities which have been previously discriminated against by a federally funded institution or program to overcome the effects of such actions and authorizing the voluntary

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undertaking of affirmative-action programs by federally funded institutions that have not been guilty of prior discrimination in order to overcome the effects of conditions which have adversely affected the degree of participation by persons of a particular race.

Title 45 *CFR* § 80.3 (b)(6)(i) (1977) provides:

"In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."

Title 45 *CFR* § 80.5 (i) (1977) elaborates upon this requirement:

"In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6 (d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3 (b)(6) for such applicant or recipient to take additional steps to make the benefits [*344] fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special [***805] arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served."

These regulations clearly establish that where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution, race-conscious action is not only permitted but required to accomplish the remedial objectives of Title VI.¹⁸ Of course, there is no evidence that the Medical School has been guilty of past discrimination and consequently these regulations would not compel it to employ a program of preferential admissions in behalf of racial minorities. It would be difficult to explain from the language of Title VI, however, much less from its legislative history, why the statute *compels* race-conscious remedies where a recipient institution has engaged in past discrimination but *prohibits* such remedial action where racial minorities, as a result of the effects of past discrimination

imposed by entities other than the recipient, are excluded from the benefits of federally funded programs. HEW was fully aware of the incongruous nature of such an interpretation of Title VI.

18 HEW has stated that the purpose of these regulations is "to specify that affirmative steps to make services more equitably available are not prohibited and that such steps are required when necessary to overcome the consequences of prior discrimination." 36 *Fed. Reg.* 23494 (1971). Other federal agencies which provide financial assistance pursuant to Title VI have adopted similar regulations. See Supplemental Brief for United States as *Amicus Curiae* 16 n. 14.

[**2776] Title 45 *CFR* § 80.3 (b)(6)(ii) (1977) provides:

"Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted [*345] in limiting participation by persons of a particular race, color, or national origin."

An explanatory regulation explicitly states that the affirmative action which § 80.3 (b)(6)(ii) contemplates includes the use of racial preferences:

"Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." 45 *CFR* § 80.5 (j) (1977).

This interpretation of Title VI is fully consistent with the statute's emphasis upon voluntary remedial action and reflects the views of an [***806] agency¹⁹ responsible for achieving its objectives.²⁰

19 Moreover, the President has delegated to the

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Attorney General responsibility for coordinating the enforcement of Title VI by federal departments and agencies and has directed him to "assist the departments and agencies in accomplishing effective implementation." Exec. Order No. 11764, 3 CFR 849 (1971-1975 Comp.). Accordingly, the views of the Solicitor General, as well as those of HEW, that the use of racial preferences for remedial purposes is consistent with Title VI are entitled to considerable respect. 20 HEW administers at least two explicitly race-conscious programs. Details concerning them may be found in the Office of Management and Budget, 1977 Catalogue of Federal Domestic Assistance 205-206, 401-402. The first program, No. 13.375, "Minority Biomedical Support," has as its objectives:

"To increase the number of ethnic minority faculty, students, and investigators engaged in biomedical research. To broaden the opportunities for participation in biomedical research of ethnic minority faculty, students, and investigators by providing support for biomedical research programs at eligible institutions."

Eligibility for grants under this program is limited to (1) four-year colleges, universities, and health professional schools with over 50% minority enrollments; (2) four-year institutions with significant but not necessarily over 50% minority enrollment provided they have a history of encouragement and assistance to minorities; (3) two-year colleges with 50% minority enrollment; and (4) American Indian Tribal Councils. Grants made pursuant to this program are estimated to total \$ 9,711,000 for 1977.

The second program, No. 13.880, entitled "Minority Access To Research Careers," has as its objective to "assist minority institutions to train greater numbers of scientists and teachers in health related fields." Grants under this program are made directly to individuals and to institutions for the purpose of enabling them to make grants to individuals.

[*346] The Court has recognized that the construction of a statute by those charged with its execution is particularly deserving of respect where Congress has directed its attention to the administrative

construction and left it unaltered. Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 381; *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). Congress recently took just this kind of action when it considered an amendment to the Departments of Labor and Health, Education, and Welfare appropriation bill for 1978, which would have restricted significantly the remedial use of race in programs funded by the appropriation. The amendment, as originally submitted by Representative Ashbrook, provided that "[none] of the funds appropriated in this Act may be used to initiate, carry out or enforce any program of affirmative action or any other system of quotas or goals in regard to admission policies or employment practices which encourage or require any discrimination on the basis of race, creed, religion, sex or age." 123 Cong. Rec. 19715 [*347] (1977). In support of the measure, Representative Ashbrook argued that the 1964 Civil Rights Act never authorized the imposition of affirmative action and that this was a creation of the bureaucracy. *Id.*, at 19722. He explicitly stated, however, that [**2777] he favored permitting universities to adopt affirmative-action programs giving consideration to racial identity but opposed the imposition of such programs by the Government. *Id.*, at 19715. His amendment was itself amended to reflect this position by only barring the *imposition* of race-conscious remedies by HEW:

"None of the funds appropriated in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, [***807] standard, guideline, recommendation, or order issued by the Secretary of Health, Education, and Welfare which for purposes of compliance with any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity." *Id.*, at 19722.

This amendment was adopted by the House. *Ibid.* The Senate bill, however, contained no such restriction upon HEW's authority to impose race-conscious remedies and the Conference Committee, upon the urging of the Secretary of HEW, deleted the House provision from the bill. ²¹ More significant for present purposes, however, is the fact that even the proponents of imposing limitations upon HEW's implementation of Title VI did not challenge the right of federally funded educational

institutions voluntarily to extend preferences to racial minorities.

21 H. R. Conf. Rep. No. 95-538, p. 22 (1977); 123 Cong. Rec. 26188 (1977). See H. J. Res. 662, 95th Cong., 1st Sess. (1977); Pub. L. 95-205, 91 Stat. 1460.

[*348] Finally, congressional action subsequent to the passage of Title VI eliminates any possible doubt about Congress' views concerning the permissibility of racial preferences for the purpose of assisting disadvantaged racial minorities. It confirms that Congress did not intend to prohibit and does not now believe that Title VI prohibits the consideration of race as part of a remedy for societal discrimination even where there is no showing that the institution extending the preference has been guilty of past discrimination nor any judicial finding that the particular beneficiaries of the racial preference have been adversely affected by societal discrimination.

Just last year Congress enacted legislation²² explicitly requiring that no grants shall be made "for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." The statute defines the term "minority business enterprise" as "a business, at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." The term "minority group members" is defined in explicitly racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Although the statute contains an exemption from this requirement "to the extent that the Secretary determines otherwise," this escape clause was provided only to deal with the possibility that certain areas of the country might not contain sufficient qualified "minority business enterprises" to permit compliance with the quota provisions of the legislation.²³

22 91 Stat. 117, 42 U. S. C. § 6705 (f)(2) (1976 ed.).

23 123 Cong. Rec. 7156 (1977); *id.*, at 5327-5330.

The legislative history of this race-conscious legislation reveals that it represents a deliberate attempt to deal with [*349] the excessive rate of unemployment

[***808] among minority citizens and to encourage the development of viable minority controlled enterprises.²⁴ [*2778] It was believed that such a "set-aside" was required in order to enable minorities, still "new on the scene" and "relatively small," to compete with larger and more established companies which would always be successful in underbidding minority enterprises. 123 Cong. Rec. 5327 (1977) (Rep. Mitchell). What is most significant about the congressional consideration of the measure is that although the use of a racial quota or "set-aside" by a recipient of federal funds would constitute a direct violation of Title VI if that statute were read to prohibit race-conscious action, no mention was made during the debates in either the House or the Senate of even the possibility that the quota provisions for minority contractors might in any way conflict with or modify Title VI. It is inconceivable that such a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative-action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964." 42 U. S. C. § 6709 (1976 ed.). Thus Congress was fully aware of the applicability of Title VI to the funding of public works projects. Under these circumstances, the enactment of the 10% "set-aside" for minority enterprises reflects a congressional judgment that the remedial use of race is permissible under Title VI. We have repeatedly recognized that subsequent legislation reflecting an interpretation of an earlier Act is entitled to great weight in determining the meaning of the earlier statute. *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 380-381; [*350] *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). See also *United States v. Stewart*, 311 U.S. 60, 64-65 (1940).²⁵

24 See *id.*, at 7156 (1977) (Sen. Brooke).

25 In addition to the enactment of the 10% quota provision discussed *supra*, Congress has also passed other Acts mandating race-conscious measures to overcome disadvantages experienced by racial minorities. Although these statutes have less direct bearing upon the meaning of Title VI, they do demonstrate that Congress believes race-conscious remedial measures to be both permissible and desirable under at least some

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circumstances. This in turn undercuts the likelihood that Congress intended to limit voluntary efforts to implement similar measures. For example, § 7 (a) of the National Science Foundation Authorization Act, 1977, provides:

"The Director of the National Science Foundation shall initiate an intensive search for qualified women, members of minority groups, and handicapped individuals to fill executive level positions in the National Science Foundation. In carrying out the requirement of this subsection, the Director shall work closely with organizations which have been active in seeking greater recognition and utilization of the scientific and technical capabilities of minorities, women, and handicapped individuals. The Director shall improve the representation of minorities, women, and handicapped individuals on advisory committees, review panels, and all other mechanisms by which the scientific community provides assistance to the Foundation." 90 Stat. 2056, note following 42 U. S. C. § 1873 (1976 ed.).

Perhaps more importantly, the Act also authorizes the funding of Minority Centers for Graduate Education. Section 7 (c)(2) of the Act, 90 Stat. 2056, requires that these Centers:

"(A) have substantial minority student enrollment;

"(B) are geographically located near minority population centers;

"(C) demonstrate a commitment to encouraging and assisting minority students, researchers, and faculty;

....

"(F) will serve as a regional resource in science and engineering for the minority community which the Center is designed to serve; and

"(G) will develop joint educational programs with nearby undergraduate institutions of higher education which have a substantial minority student enrollment."

Once again, there is no indication in the legislative history of this Act or elsewhere that Congress saw any inconsistency between the race-conscious nature of such legislation and the meaning of Title VI. And, once again, it is unlikely in the extreme that a Congress which believed that it had commanded recipients of federal funds to be absolutely colorblind would itself expend federal funds in such a race-conscious manner. See also the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U. S. C. § 801 et seq. (1976 ed.), 49 U. S. C. § 1657a et seq. (1976 ed.); the Emergency School Aid Act, 20 U. S. C. § 1601 et seq. (1976 ed.).

[***809] [**2779] C

Prior decisions of this Court also strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible. In *Lau v. Nichols*, 414 U.S. 563 (1974), the Court held that the failure of the San Francisco school system to provide English-language instruction to students of Chinese ancestry who do not speak English, or to provide them with instruction in Chinese, constituted a violation of Title VI. The Court relied upon an HEW regulation which stipulates that a recipient of federal funds "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 CFR § 80.3 (b)(2) (1977). It interpreted this regulation as requiring San Francisco to extend the same educational benefits to Chinese-speaking students as to English-speaking students, even though there was no finding or allegation that the city's failure to do so was a result of a purposeful design to discriminate on the basis of race.

Lau is significant in two related respects. First, it indicates that in at least some circumstances agencies responsible for the administration of Title VI may require recipients who have not been guilty of any constitutional violations to depart from a policy of color blindness and to be cognizant of the impact of their actions upon racial minorities. Secondly, *Lau* clearly requires that institutions receiving federal funds be accorded considerable latitude in voluntarily undertaking

race-conscious action designed to remedy the exclusion of significant numbers [*352] of minorities from the benefits of federally funded programs. Although this Court has not yet considered the question, presumably, by analogy to our decisions construing Title VII, a medical school would not be in violation of Title VI under *Lau* because of the serious underrepresentation of racial minorities in its student body as long as it could demonstrate that its entrance requirements correlated sufficiently with the performance of minority students in medical school and the medical profession.²⁶ It [***810] would be inconsistent with *Lau* and the emphasis of Title VI and the HEW regulations on voluntary action, however, to require that an institution wait to be adjudicated to be in violation of the law before being permitted to voluntarily undertake corrective action based upon a good-faith and reasonable belief that the failure of certain racial minorities to satisfy entrance requirements is not a measure of their ultimate performance as doctors but a result of the lingering effects of past societal discrimination.

²⁶ Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington v. Davis*, 426 U.S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. However, even accepting *Lau's* implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent [*353] in the least. First, for the reasons discussed *supra*, at 336-350, regardless of whether Title VI's prohibitions extend beyond the [**2780] Constitution's, the evidence fails to establish, and, indeed, compels the rejection of, the proposition that Congress intended to prohibit recipients of federal funds from voluntarily employing race-conscious measures to

eliminate the effects of past societal discrimination against racial minorities such as Negroes. Secondly, *Lau* itself, for the reasons set forth in the immediately preceding paragraph, strongly supports the view that voluntary race-conscious remedial action is permissible under Title VI. If discriminatory racial impact alone is enough to demonstrate at least a prima facie Title VI violation, it is difficult to believe that the Title would forbid the Medical School from attempting to correct the racially exclusionary effects of its initial admissions policy during the first two years of the School's operation.

The Court has also declined to adopt a "colorblind" interpretation of other statutes containing nondiscrimination provisions similar to that contained in Title VI. We have held under Title VII that where employment requirements have a disproportionate impact upon racial minorities they constitute a statutory violation, even in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job.²⁷ More significantly, the Court has required that preferences be given by employers [***811] to members of racial minorities as a remedy for past violations of Title VII, even where there has been no finding that the employer has acted with a discriminatory intent.²⁸ Finally, we have construed the Voting [*354] Rights Act of 1965, [**2781] 42 U. S. C. § 1973 *et seq.* (1970 *ed. and Supp. V*), which contains a provision barring any voting procedure or qualification that denies or abridges "the right of [*355] any citizen of the United States to vote on account of race or color," as permitting States to voluntarily take race into account in a way that fairly represents the voting strengths of different racial groups in order to comply with the commands of the statute, even where the result is a gain for one racial group at the expense of others.²⁹

²⁷ *Ibid.*; *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

²⁸ *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Teamsters v. United States*, 431 U.S. 324 (1977). Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race. Prior to the 1972 amendments to Title VII (Equal Employment Opportunity Act of 1972, 86 Stat. 103) a number of Courts of Appeals approved

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race-conscious action to remedy the effects of employment discrimination. See, e. g., *Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (CA5 1969); *United States v. Electrical Workers*, 428 F.2d 144, 149-150 (CA6), cert. denied, 400 U.S. 943 (1970); *United States v. Sheetmetal Workers*, 416 F.2d 123 (CA8 1969). In 1965, the President issued Exec. Order No. 11246, 3 CFR 339 (1964-1965 Comp.), which as amended by Exec. Order No. 11375, 3 CFR 684 (1966-1970 Comp.), required federal contractors to take affirmative action to remedy the disproportionately low employment of racial minorities in the construction industry. The Attorney General issued an opinion concluding that the race consciousness required by Exec. Order No. 11246 did not conflict with Title VII:

"It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria." 42 Op. Atty. Gen. 405, 411 (1969).

The federal courts agreed. See, e. g., *Contractors Assn. of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (CA3), cert. denied, 404 U.S. 854 (1971) (which also held, 442 F.2d, at 173, that race-conscious affirmative action was permissible under Title VI); *Southern Illinois Builders Assn. v. Ogilvie*, 471 F.2d 680 (CA7 1972). Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Exec. Order No. 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action. See Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723, 747-757 (1972). The section-by-section analysis of the 1972 amendments to Title VII

undertaken by the Conference Committee Report on H. R. 1746 reveals a resolve to accept the then (as now) prevailing judicial interpretations of the scope of Title VII:

"In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of the Equal Employment Opportunity Act of 1972, p. 1844 (Comm. Print 1972).

29 *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). See also *id.*, at 167-168 (opinion of WHITE, J.).

These prior decisions are indicative of the Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to attain this [***812] objective. There is no justification for departing from this course in the case of Title VI and frustrating the clear judgment of Congress that race-conscious remedial action is permissible.

We turn, therefore, to our analysis of the *Equal Protection Clause of the Fourteenth Amendment*.

III

A

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring), summed up by the shorthand phrase "[our] Constitution is color-blind," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the *Equal Protection Clause*. Indeed, [*356] we have expressly rejected this proposition on a number of occasions.

Our cases have always implied that an "overriding statutory purpose," *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), could be found that would justify racial classifications. See, e. g., *ibid.*; *Loving v. Virginia*, 388

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U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100-101 (1943). More recently, in *McDaniel v. Barresi, 402 U.S. 39 (1971)*, this Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was *per se* invalid because it was not colorblind. And in *North Carolina Board of Education v. Swann* we held, again unanimously, that a statute mandating colorblind school-assignment plans could not stand "against the background of segregation," since such a limit on remedies would "render illusory the promise of *Brown [I]*." 402 U.S., at 45-46.

We conclude, therefore, that racial classifications are not *per se* invalid under the *Fourteenth Amendment*. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

B

Respondent argues that racial classifications are always suspect and, consequently, that this Court should weigh the importance of the objectives served by Davis' special admissions program to see if they are compelling. In addition, he asserts that this Court must inquire whether, in its judgment, there are alternatives to racial classifications which would suit Davis' purposes. Petitioner, on the other hand, states that our proper role is simply to accept petitioner's determination that the racial [**2782] classifications used by [***813] its program are reasonably related to what it tells us are its benign [*357] purposes. We reject petitioner's view, but, because our prior cases are in many respects inapposite to that before us now, we find it necessary to define with precision the meaning of that inexact term, "strict scrutiny."

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.³⁰ See, e. g., *San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972)*. But no fundamental right is involved here. See *San Antonio, supra, at 29-36*. Nor do whites as a class have any of the "traditional indicia of suspectness:

the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*, at 28; see *United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938)*.³¹

30 We do not pause to debate whether our cases establish a "two-tier" analysis, a "sliding scale" analysis, or something else altogether. It is enough for present purposes that strict scrutiny is applied at least in some cases.

31 Of course, the fact that whites constitute a political majority in our Nation does not necessarily mean that active judicial scrutiny of racial classifications that disadvantage whites is inappropriate. Cf. *Castaneda v. Partida, 430 U.S. 482, 499-500 (1977); id., at 501 (MARSHALL, J., concurring)*.

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant and therefore prohibited." *Hirabayashi, supra, at 100*. Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize -- because they are drawn on the presumption that one race is inferior to another or because they put the weight of government [*358] behind racial hatred and separatism -- are invalid without more. See *Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886)*;³² accord, *Strauder v. West Virginia, 100 U.S. 303, 308 (1880); Korematsu v. United States, supra, at 223; Oyama v. California, 332 U.S. 633, 663 (1948) (Murphy, J., concurring); Brown I, 347 U.S. 483 (1954); McLaughlin v. Florida, supra, at 191-192; Loving v. Virginia, supra, at 11-12; Reitman v. Mulkey, 387 U.S. 369, 375-376 (1967); United Jewish Organizations v. Carey, 430 U.S. 144, 165 (1977) (UJO) (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.); [***814] *id., at 169 (opinion concurring in part)*.³³*

32 "[The] conclusion cannot be resisted, that no reason for [the refusal to issue permits to Chinese] exists except hostility to the race and nationality to which the petitioners belong The discrimination is, therefore, illegal"

33 Indeed, even in *Plessy v. Ferguson* the Court recognized that a classification by race that presumed one race to be inferior to another would

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have to be condemned. See *163 U.S.*, at 544-551.

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases. 34 "[The] mere [****2783**] recitation of a benign, compensatory purpose is not an automatic shield [***359**] which protects against any inquiry into the actual purposes underlying a statutory scheme." *Califano v. Webster*, 430 U.S. 313, 317 (1977), quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). Instead, a number of considerations -- developed in gender-discrimination cases but which carry even more force when applied to racial classifications -- lead us to conclude that racial classifications designed to further remedial purposes "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Califano v. Webster*, *supra*, at 317, quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976). 35

34 Paradoxically, petitioner's argument is supported by the cases generally thought to establish the "strict scrutiny" standard in race cases, *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944). In *Hirabayashi*, for example, the Court, responding to a claim that a racial classification was rational, sustained a racial classification solely on the basis of a conclusion in the double negative that it could not say that facts which might have been available "could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States." 320 U.S., at 101. A similar mode of analysis was followed in *Korematsu*, see 323 U.S., at 224, even though the Court stated there that racial classifications were "immediately suspect" and should be subject to "the most rigid scrutiny." *Id.*, at 216.

35 We disagree with our Brother POWELL's suggestion, *ante*, at 303, that the presence of "rival groups which can claim that they, too, are entitled to preferential treatment" distinguishes the gender cases or is relevant to the question of scope of judicial review of race classifications. We are not asked to determine whether groups other than those favored by the Davis program

should similarly be favored. All we are asked to do is to pronounce the constitutionality of what Davis has done.

But, were we asked to decide whether any given rival group -- German-Americans for example -- must constitutionally be accorded preferential treatment, we do have a "principled basis," *ante*, at 296, for deciding this question, one that is well established in our cases: The Davis program expressly sets out four classes which receive preferred status. *Ante*, at 274. The program clearly distinguishes whites, but one cannot reason from this a conclusion that German-Americans, as a national group, are singled out for invidious treatment. And even if the Davis program had a differential impact on German-Americans, they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German-Americans. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-265 (1977); *Washington v. Davis*, 426 U.S. 229, 238-241 (1976). If this could not be shown, then "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable," *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966), and the only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded. See *ibid.*; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 38-39 (1973) (applying *Katzenbach* test to state action intended to remove discrimination in educational opportunity). Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

[*360] [***815] First, race, like, "gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (dissenting opinion). While a carefully tailored statute designed to remedy past discrimination could avoid these vices, see *Califano v. Webster*, *supra*; *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, *supra*, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past

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discrimination and paternalistic stereotyping is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. Cf. *Schlesinger v. Ballard*, *supra*, at 508; *UJO*, *supra*, at 174, and n. 3 (opinion concurring in part); *Califano v. [**2784] Goldfarb*, 430 U.S. 199, 223 (1977) (STEVENS, J., concurring in judgment). See also *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975). State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own. See *UJO*, *supra*, at 172 (opinion concurring in part); *ante*, at 298 (opinion of POWELL, J.).

Second, race, like gender and illegitimacy, see *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not *per se* invalid because it divides classes on the basis of an immutable characteristic, see *supra*, at 355-356, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or [*361] wrongdoing," *Weber*, *supra*, at 175; *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.), and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual. See *UJO*, 430 U.S., at 173 (opinion concurring in part); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 566 (1947) (Rutledge, J., dissenting).

Because this principle is so deeply rooted it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: The "natural consequence of our governing processes [may well be] that the most 'discrete and insular' of whites . . . will be called upon to bear the immediate, direct costs of benign [***816] discrimination." *UJO*, *supra*, at 174 (opinion concurring in part). Moreover, it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics. See, e. g., *Weber*, *supra*. Thus, even if the concern for

individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the *Fourteenth Amendment*. See *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736 (1964).

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the *Fourteenth Amendment* should be [*362] strict -- not "strict' in theory and fatal in fact,"³⁶ because it is stigma that causes fatality -- but strict and searching nonetheless.

36 Gunther, *The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

IV

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.

[**2785] A

At least since *Green v. County School Board*, 391 U.S. 430 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the *Equal Protection Clause* simply by ending its unlawful acts and adopting a neutral stance. Three years later, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and its companion cases, *Davis v. School Comm'rs of Mobile County*, 402 U.S. 33 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); and *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), reiterated that racially neutral remedies for

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past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions. See, e. g., *Charlotte-Mecklenburg, supra*, at 28. And the Court further held both that courts could enter desegregation orders which assigned students and faculty by reference to race, *Charlotte-Mecklenburg, supra*; *Davis, supra*; *United States v. [***817] Montgomery County Board of Ed.*, 395 U.S. 225 (1969), and that local school boards could voluntarily adopt desegregation [*363] plans which made express reference to race if this was necessary to remedy the effects of past discrimination. *McDaniel v. Barresi, supra*. Moreover, we stated that school boards, even in the absence of a judicial finding of past discrimination, could voluntarily adopt plans which assigned students with the end of creating racial pluralism by establishing fixed ratios of black and white students in each school. *Charlotte-Mecklenburg, supra*, at 16. In each instance, the creation of unitary school systems, in which the effects of past discrimination had been "eliminated root and branch," *Green, supra*, at 438, was recognized as a compelling social goal justifying the overt use of race.

Finally, the conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination. Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Teamsters v. United States*, 431 U.S. 324 (1977). Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. See *id.*, at 357-362. Nor is it an objection to such relief that preference for minorities will upset the settled expectations of nonminorities. See *Franks, supra*. In addition, we have held that Congress, to remove barriers to equal opportunity, can and has required employers to use test criteria that fairly reflect the qualifications of minority applicants [*364] vis-a-vis nonminority applicants, even if this means interpreting

the qualifications of an applicant in light of his race. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 435 (1975).³⁷

37 In *Albemarle*, we approved "differential validation" of employment tests. See 422 U.S., at 435. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a minority corresponded in "potential for employment" to a 60 for whites, the test could not be used consistently with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices.

These cases cannot be distinguished simply by the presence of judicial findings of [**2786] discrimination, for race-conscious remedies have been approved where such findings [***818] have not been made. *McDaniel v. Barresi, supra*; *UJO*; see *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974). See also *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.³⁸

38 Indeed, Titles VI and VII of the Civil Rights Act of 1964 put great emphasis on voluntarism in remedial action. See *supra*, at 336-338. And, significantly, the Equal Employment Opportunity Commission has recently proposed guidelines authorizing employers to adopt racial preferences as a remedial measure where they have a reasonable basis for believing that they might otherwise be held in violation of Title VII. See 42 Fed. Reg. 64826 (1977).

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[*365] Nor can our cases be distinguished on the ground that the entity using explicit racial classifications itself had violated § 1 of the Fourteenth Amendment or an antidiscrimination regulation, for again race-conscious remedies have been approved where this is not the case. See *UJO*, 430 U.S., at 157 (opinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.);³⁹ *id.*, at 167 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.);⁴⁰ cf. *Califano v. Webster*, *supra*, at 317; *Kahn v. Shevin*, *supra*. Moreover, the presence or absence of past discrimination by universities or employers is largely irrelevant to resolving respondent's constitutional claims. The claims of those burdened by the race-conscious actions of a university or employer who has never been adjudged in violation of an antidiscrimination law are not any more or less entitled to deference than the claims of the burdened nonminority workers in *Franks v. Bowman Transportation Co.*, *supra*, in which the employer had violated Title VII, for in each case the employees are innocent of past discrimination. And, although it might be argued that, where an employer has violated an antidiscrimination law, the expectations of nonminority workers are themselves products of discrimination and hence "tainted," see *Franks*, *supra*, at 776, and therefore more easily upset, the same argument can be made with respect to respondent. If it was reasonable to conclude -- as we hold that it was -- that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, than there is a reasonable likelihood that, but for pervasive racial discrimination, [*366] respondent would have failed to qualify for admission even in the absence of Davis' [***819] special admissions program.⁴¹

39 "[The] [Voting Rights] Act's prohibition . . . is not dependent upon proving past unconstitutional apportionments . . ."

40 "[The] State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."

41 Our cases cannot be distinguished by suggesting, as our Brother POWELL does, that in none of them was anyone deprived of "the relevant benefit." *Ante*, at 304. Our school cases have deprived whites of the neighborhood school of their choice; our Title VII cases have deprived nondiscriminating employees of their settled seniority expectations; and *UJO* deprived the Hassidim of bloc-voting strength. Each of these

injuries was constitutionally cognizable as is respondent's here.

Thus, our cases under Title VII of the Civil Rights Act have held that, in order to [**2787] achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination.⁴²

42 We do not understand MR. JUSTICE POWELL to disagree that providing a remedy for past racial prejudice can constitute a compelling purpose sufficient to meet strict scrutiny. See *ante*, at 305. Yet, because petitioner is a corporation administering a university, he would not allow it to exercise such power in the absence of "judicial, legislative, or administrative findings of constitutional or statutory violations." *Ante*, at 307. While we agree that reversal in this case would follow *a fortiori* had Davis been guilty of invidious racial discrimination or if a federal statute mandated that universities refrain from applying any admissions policy that had a disparate and unjustified racial impact, see, e. g., *McDaniel v. Barresi*, 402 U.S. 39 (1971); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), we do not think it of constitutional significance that Davis has not been so adjudged.

Generally, the manner in which a State chooses to delegate governmental functions is for it to decide. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in result). California, by constitutional provision, has chosen to place authority over the operation of the University of California in the Board of Regents. See *Cal. Const.*, Art. 9, § 9 (a). Control over the University is to be found not in the legislature, but rather in the Regents who have

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been vested with full legislative (including policymaking), administrative, and adjudicative powers by the citizens of California. See *ibid.*; *Ishimatsu v. Regents*, 266 Cal. App. 2d 854, 863-864, 72 Cal. Rptr. 756, 762-763 (1968); *Goldberg v. Regents*, 248 Cal. App. 2d 867, 874, 57 Cal. Rptr. 463, 468 (1967); 30 Op. Cal. Atty. Gen. 162, 166 (1957) ("The Regents, not the legislature, have the general rule-making or policy-making power in regard to the University"). This is certainly a permissible choice, see *Sweezy*, *supra*, and we, unlike our Brother POWELL, find nothing in the *Equal Protection Clause* that requires us to depart from established principle by limiting the scope of power the Regents may exercise more narrowly than the powers that may constitutionally be wielded by the Assembly.

Because the Regents can exercise plenary legislative and administrative power, it elevates form over substance to insist that Davis could not use race-conscious remedial programs until it had been adjudged in violation of the Constitution or an antidiscrimination statute. For, if the *Equal Protection Clause* required such a violation as a predicate, the Regents could simply have promulgated a regulation prohibiting disparate treatment not justified by the need to admit only qualified students, and could have declared Davis to have been in violation of such a regulation on the basis of the exclusionary effect of the admissions policy applied during the first two years of its operation. See *infra*, at 370.

[*367] Title VII was enacted pursuant to Congress' power under the *Commerce Clause* and § 5 of the *Fourteenth* [***820] *Amendment*. To the extent that Congress acted under the *Commerce Clause* power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the *Due Process Clause of the Fifth Amendment* precisely to the same extent as are the States by § 1 of the *Fourteenth Amendment*.⁴³ Therefore, to the extent that Title VII rests on the *Commerce Clause* power, our decisions such as *Franks* and [*368] *Teamsters v. United States*, 431 U.S. 324 (1977), implicitly recognize that the affirmative use of race is consistent with the equal protection component of the *Fifth Amendment* [**2788] and therefore with the *Fourteenth Amendment*. To the extent

that Congress acted pursuant to § 5 of the *Fourteenth Amendment*, those cases impliedly recognize that Congress was empowered under that provision to accord preferential treatment to victims of past discrimination in order to overcome the effects of segregation, and we see no reason to conclude that the States cannot voluntarily accomplish under § 1 of the *Fourteenth Amendment* what Congress under § 5 of the *Fourteenth Amendment* validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional pre-emption of the subject matter. Nothing whatever in the legislative history of either the *Fourteenth Amendment* or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. "To use the *Fourteenth Amendment* as a sword against such State power would stultify that Amendment." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).⁴⁴ We therefore [*369] conclude that Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria.

43 "Equal protection analysis in the *Fifth Amendment* area is the same as that under the *Fourteenth Amendment*." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (*per curiam*), citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975).

44 *Railway Mail Assn.* held that a state statute forbidding racial discrimination by certain labor organizations did not abridge the Association's due process rights secured by the *Fourteenth Amendment* because that result "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." 326 U.S., at 94. That case thus established the principle that a State voluntarily could go beyond what the *Fourteenth Amendment* required in eliminating private racial discrimination.

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Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or [***821] that of society at large. There is no question that Davis' program is valid under this test.

Certainly, on the basis of the undisputed factual submissions before this Court, Davis had a sound basis for believing that the problem of underrepresentation of minorities was substantial and chronic and that the problem was attributable to handicaps imposed on minority applicants by past and present racial discrimination. Until at least 1973, the practice of medicine in this country was, in fact, if not in law, largely the prerogative of whites.⁴⁵ In 1950, for example, while Negroes [*370] constituted 10% of the [**2789] total population, Negro physicians constituted only 2.2% of the total number of physicians.⁴⁶ The overwhelming majority of these, moreover, were educated in two predominantly Negro medical schools, Howard and Meharry.⁴⁷ By 1970, the gap between the proportion of Negroes in medicine and their proportion in the population had widened: The number of Negroes employed in medicine remained frozen at 2.2%⁴⁸ while the Negro population had increased to 11.1%.⁴⁹ The number of Negro admittees to predominantly white medical schools, moreover, had declined in absolute numbers during the years 1955 to 1964. Odegaard 19.

45 According to 89 schools responding to a questionnaire sent to 112 medical schools (all of the then-accredited medical schools in the United States except Howard and Meharry), substantial efforts to admit minority students did not begin until 1968. That year was the earliest year of involvement for 34% of the schools; an additional 66% became involved during the years 1969 to 1973. See C. Odegaard, *Minorities in Medicine: From Receptive Passivity to Positive Action, 1966-1976*, p. 19 (1977) (hereinafter Odegaard). These efforts were reflected in a significant increase in the percentage of minority M. D. graduates. The number of American Negro graduates increased from 2.2% in 1970 to 3.3% in 1973 and 5.0% in 1975. Significant percentage increases in the number of Mexican-American,

American Indian, and mainland Puerto Rican graduates were also recorded during those years. *Id.*, at 40.

The statistical information cited in this and the following notes was compiled by Government officials or medical educators, and has been brought to our attention in many of the briefs. Neither the parties nor the *amici* challenge the validity of the statistics alluded to in our discussion.

46 D. Reitzes, *Negroes and Medicine*, pp. xxvii, 3 (1958).

47 Between 1955 and 1964, for example, the percentage of Negro physicians graduated in the United States who were trained at these schools ranged from 69.0% to 75.8%. See Odegaard 19.

48 U.S. Dept. of Health, Education, and Welfare, *Minorities and Women in the Health Fields 7* (Pub. No. (HRA) 75-22, May 1974).

49 U.S. Dept. of Commerce, Bureau of the Census, *1970 Census*, vol. 1, pt. 1, Table 60 (1973).

Moreover, Davis had very good reason to believe that the national pattern of underrepresentation of minorities in medicine would be perpetuated if it retained a single admissions standard. For example, the entering classes in 1968 and 1969, the years in which such a standard was used, included only 1 Chicano and 2 Negroes out of the 50 admittees for each year. Nor is there any relief from this pattern of underrepresentation in the statistics for the regular admissions program in later years.⁵⁰

50 See *ante*, at 276 n. 6 (opinion of POWELL, J.).

Davis clearly could conclude that the serious and persistent underrepresentation of minorities in medicine depicted by these statistics is the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, [***822] purposeful discrimination against minorities in education [*371] and in society generally, as well as in the medical profession. From the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity. Under slavery, penal sanctions were imposed upon anyone attempting to educate Negroes.⁵¹ After enactment of the *Fourteenth Amendment* the States continued to deny

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Negroes equal educational opportunity, enforcing a strict policy of segregation that itself stamped Negroes as inferior, *Brown I*, 347 U.S. 483 (1954), that relegated minorities to inferior educational institutions,⁵² and that denied them intercourse in the mainstream of professional life necessary to advancement. See *Sweatt v. Painter*, 339 U.S. 629 (1950). Segregation was not limited to public facilities, moreover, but was enforced by criminal penalties against private action as well. Thus, as late as 1908, this Court enforced a state criminal conviction against a private college for teaching Negroes together with whites. *Berea College v. Kentucky*, 211 U.S. 45. See also *Plessy v. Ferguson*, 163 U.S. 537 (1896).

51 See, e. g., R. Wade, *Slavery in the Cities: The South 1820-1860*, pp. 90-91 (1964).

52 For an example of unequal facilities in California schools, see *Soria v. Oxnard School Dist. Board*, 386 F.Supp. 539, 542 (CD Cal. 1974). See also R. Kluger, *Simple Justice* (1976).

Green v. County School Board, 391 U.S. 430 (1968), gave explicit recognition to the fact that the habit of discrimination and the cultural tradition of race prejudice cultivated by centuries of legal slavery and segregation were not immediately dissipated when *Brown I*, *supra*, announced the constitutional principle that equal educational opportunity and participation in all aspects of American life could not be denied on the basis of race. Rather, massive official and private resistance prevented, and to a lesser extent still prevents, attainment of equal opportunity in education at all levels and in [*2790] the professions. The generation of minority students applying to Davis Medical School since it opened in 1968 -- most of whom [*372] were born before or about the time *Brown I* was decided -- clearly have been victims of this discrimination. Judicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minority applicants;⁵³ many minority group members living in California, moreover, were born and reared in school districts in Southern States segregated by law.⁵⁴ Since separation of schoolchildren by race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," *Brown I*, *supra*, [***823] at 494, the conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance

to *Brown I*, or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination, cf. *Reitman v. Mulkey*, 387 U.S. 369 (1967), and yet come to the starting line with an education equal to whites.⁵⁵

53 See, e. g., *Crawford v. Board of Education*, 17 Cal. 3d 280, 551 P. 2d 28 (1976); *Soria v. Oxnard School Dist. Board*, *supra*; *Spangler v. Pasadena City Board of Education*, 311 F.Supp. 501 (CD Cal. 1970); C. Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975*, pp. 136-177 (1976).

54 For example, over 40% of American-born Negro males aged 20 to 24 residing in California in 1970 were born in the South, and the statistic for females was over 48%. These statistics were computed from data contained in Census, *supra* n. 49, pt. 6, California, Tables 139, 140.

55 See, e. g., O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L. J. 699, 729-731 (1971).

Moreover, we need not rest solely on our own conclusion that Davis had sound reason to believe that the effects of past discrimination were handicapping minority applicants to the Medical School, because the Department of Health, Education, and Welfare, the expert agency charged by Congress with promulgating regulations enforcing Title VI of the Civil Rights Act of 1964, see *supra*, at 341-343, has also reached the conclusion that race may be taken into account in situations [*373] where a failure to do so would limit participation by minorities in federally funded programs, and regulations promulgated by the Department expressly contemplate that appropriate race-conscious programs may be adopted by universities to remedy unequal access to university programs caused by their own or by past societal discrimination. See *supra*, at 344-345, discussing 45 CFR §§ 80.3 (b)(6)(ii) and 80.5 (j) (1977). It cannot be questioned that, in the absence of the special admissions program, access of minority students to the Medical School would be severely limited and, accordingly, race-conscious admissions would be deemed an appropriate response under these federal regulations. Moreover, the Department's regulatory policy is not one that has gone unnoticed by Congress. See *supra*, at 346-347. Indeed, although an amendment to an

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appropriations bill was introduced just last year that would have prevented the Secretary of Health, Education, and Welfare from mandating race-conscious programs in university admissions, proponents of this measure, significantly, did not question the validity of voluntary implementation of race-conscious admissions criteria. See *ibid.* In these circumstances, the conclusion implicit in the regulations -- that the lingering effects of past discrimination continue to make race-conscious remedial programs appropriate means for ensuring equal educational opportunity in universities -- deserves considerable judicial deference. See, e. g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *UJO*, 430 U.S., at 175-178 (opinion concurring in part).⁵⁶

56 Congress and the Executive have also adopted a series of race-conscious programs, each predicated on an understanding that equal opportunity cannot be achieved by neutrality because of the effects of past and present discrimination. See *supra*, at 348-349.

[**2791] C

The second prong of our test -- whether the Davis program stigmatizes any discrete group or individual and whether race [*374] is reasonably used in light of the program's objectives -- is clearly satisfied by the Davis program.

***824] It is not even claimed that Davis' program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program. It does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together. True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage -- less than their proportion of the California population⁵⁷ -- of otherwise underrepresented qualified minority applicants.
58

57 Negroes and Chicanos alone constitute approximately 22% of California's population. This percentage was computed from data

contained in Census, *supra*, n. 49, pt. 6, California, sec. 1, 6-4, and Table 139.

58 The constitutionality of the special admissions program is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California, see *ibid.*, and to those minority applicants deemed qualified for admission and deemed likely to contribute to the Medical School and the medical profession. Record 67. This is consistent with the goal of putting minority applicants in the position they would have been in if not for the evil of racial discrimination. Accordingly, this case does not raise the question whether even a remedial use of race would be unconstitutional if it admitted unqualified minority applicants in preference to qualified applicants or admitted, as a result of preferential consideration, racial minorities in numbers significantly in excess of their proportional representation in the relevant population. Such programs might well be inadequately justified by the legitimate remedial objectives. Our allusion to the proportional percentage of minorities in the population of the State administering the program is not intended to establish either that figure or that population universe as a constitutional benchmark. In this case, even respondent, as we understand him, does not argue that, if the special admissions program is otherwise constitutional, the allotment of 16 places in each entering class for special admittees is unconstitutionally high.

[*375] Nor was Bakke in any sense stamped as inferior by the Medical School's rejection of him. Indeed, it is conceded by all that he satisfied those criteria regarded by the school as generally relevant to academic performance better than most of the minority members who were admitted. Moreover, there is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This

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distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.

In addition, there is simply no [***825] evidence that the Davis program discriminates intentionally or unintentionally against any minority group which it purports to benefit. The program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted. [**2792] Nor can the program reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior. The Davis program does not simply advance less qualified applicants; rather, it compensates applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of [*376] state-fostered discrimination. Once admitted, these students must satisfy the same degree requirements as regularly admitted students; they are taught by the same faculty in the same classes; and their performance is evaluated by the same standards by which regularly admitted students are judged. Under these circumstances, their performance and degrees must be regarded equally with the regularly admitted students with whom they compete for standing. Since minority graduates cannot justifiably be regarded as less well qualified than nonminority graduates by virtue of the special admissions program, there is no reasonable basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.

D

We disagree with the lower courts' conclusion that the Davis program's use of race was unreasonable in light of its objectives. First, as petitioner argues, there are no practical means by which it could achieve its ends in the foreseeable future without the use of race-conscious measures. With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population and therefore far outnumber minorities in absolute terms at every socioeconomic level.⁵⁹ For

example, of a class of recent medical school applicants from families with less than \$ 10,000 income, at least 71% were white.⁶⁰ Of all 1970 families headed by a [*377] person *not* a high school graduate which included related children under 18, 80% were white and 20% were racial minorities.⁶¹ Moreover, while race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than do disadvantaged whites.⁶² These statistics graphically illustrate that the University's purpose to integrate its [***826] classes by compensating for past discrimination could not be achieved by a general preference for the economically disadvantaged or the children of parents of limited education unless such groups were to make up the entire class.

59 See Census, *supra* n. 49, Sources and Structure of Family Income, pp. 1-12.

60 This percentage was computed from data presented in B. Waldman, Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U. S. Medical Schools 34 (Table A-15), 42 (Table A-23) (Association of American Medical Colleges 1977).

61 This figure was computed from data contained in Census, *supra* n. 49, pt. 1, United States Summary, Table 209.

62 See Waldman, *supra* n. 60, at 10-14 (Figures 1-5).

Second, the Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program. True, the procedure by which disadvantage is detected is informal, but we have never insisted that educators conduct their affairs through adjudicatory proceedings, and such [**2793] insistence here is misplaced. A case-by-case inquiry into the extent to which each individual applicant has been affected, either directly or indirectly, by racial discrimination,

438 U.S. 265, *377; 98 S. Ct. 2733, **2793;
57 L. Ed. 2d 750, ***826; 1978 U.S. LEXIS 5

would seem to be, as a practical matter, virtually impossible, despite the fact that there are excellent reasons for concluding that such effects generally exist. When individual measurement is impossible or extremely impractical, there is nothing to prevent a State [*378] from using categorical means to achieve its ends, at least where the category is closely related to the goal. Cf. *Gaston County v. United States*, 395 U.S. 285, 295-296 (1969); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). And it is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great. See *Teamsters v. United States*, 431 U.S. 324 (1977).

E

Finally, Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. Furthermore, the extent of the preference inevitably depends on how many minority applicants the particular school is seeking to admit in any particular year so long as the number of qualified minority applicants exceeds that number. There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of [***827] places for such applicants as was done here.⁶³

⁶³ The excluded white applicant, despite MR. JUSTICE POWELL's contention to the contrary, *ante*, at 318 n. 52, receives no more or less "individualized consideration" under our approach than under his.

[*379] The "Harvard" program, see *ante*, at

316-318, as those employing it readily concede, openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students. That the Harvard approach does not also make public the extent of the preference and the precise workings of the system while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of *Fourteenth Amendment* adjudication. It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." If it is, any State, including California, is free to adopt it in preference to a less acceptable alternative, just as it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program. But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.

V

Accordingly, we would reverse the judgment of the Supreme Court of California holding the Medical School's special admissions program unconstitutional and directing respondent's admission, as well as that [**2794] portion of the judgment enjoining the Medical School from according any consideration to race in the admissions process.

MR. JUSTICE WHITE.

I write separately concerning the question of whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action [*380] exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer. If in fact no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider respondent's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See *United States v. Griffin*, 303 U.S. 226, 229 (1938).¹ Furthermore, just as it is inappropriate to address constitutional [***828] issues without determining whether statutory grounds urged before us are dispositive, it is at least questionable practice to adjudicate a novel and difficult statutory issue without first considering whether we have jurisdiction to decide

438 U.S. 265, *380; 98 S. Ct. 2733, **2794;
57 L. Ed. 2d 750, ***828; 1978 U.S. LEXIS 5

it. Consequently, I address the question of whether respondent may bring suit under Title VI.

1 It is also clear from *Griffin* that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties" 303 U.S., at 229. See also *Mount Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 278 (1977); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

In *Lau v. Nichols*, 414 U.S. 563 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But the existence of a private cause of action was not at issue. In addition, the understanding of MR. JUSTICE STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School District, a theory not alleged by the present respondent. *Id.*, at 571 n. 2. Furthermore, the plaintiffs in *Lau* alleged jurisdiction under 42 U. S. C. § 1983 rather than directly under the provisions of Title VI, as does the plaintiff in this case. Although the Court undoubtedly had an obligation to consider the jurisdictional question, this is surely not the first instance in which the Court has bypassed a jurisdictional problem not presented by the parties. Certainly the Court's silence on the jurisdictional question, when considered in the context of the indifference of the litigants to it and the fact that jurisdiction was alleged under § 1983, does not foreclose a reasoned conclusion that Title VI affords no private cause of action.

A private cause of action under Title VI, in terms both of [*381] the Civil Rights Act as a whole and that Title, would not be "consistent with the underlying purposes of the legislative scheme" and would be contrary to the legislative intent. *Cort v. Ash*, 422 U.S. 66, 78 (1975). Title II, 42 U. S. C. § 2000a *et seq.*, dealing with public accommodations, and Title VII, 42 U. S. C. § 2000e *et seq.* (1970 *ed. and Supp. V*), dealing with employment, proscribe private discriminatory conduct that as of 1964 neither the Constitution nor other federal statutes had been construed to forbid. Both Titles

carefully provided for private actions as well as for official participation in enforcement. Title III, 42 U. S. C. § 2000b *et seq.*, and Title IV, 42 U. S. C. § 2000c *et seq.* (1970 *ed. and Supp. V*), dealing with public facilities and public education, respectively, authorize suits by the Attorney General to eliminate racial discrimination in these areas. Because suits to end discrimination in public facilities and public education were already available under 42 U. S. C. § 1983, it was, of course, unnecessary to provide for private actions under Titles III and IV. But each Title carefully provided that its provisions for public actions would not adversely affect pre-existing private remedies. §§ 2000b-2 and 2000c-8.

The role of Title VI was to terminate federal financial support for public and private institutions or programs that discriminated on the basis of race. Section 601, 42 U. S. C. § 2000d, imposed the proscription that no person, on the grounds of race, color, or national origin, was to be excluded from or discriminated against under any program or activity receiving federal financial assistance. But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI.

It is also evident from the face of § 602, 42 U. S. C. § 2000d-1, that Congress intended the departments and agencies [*382] to define and to refine, by rule or regulation, the general proscription of § 601, subject only to judicial review [***829] of agency action in accordance with established procedures. Section 602 provides for enforcement: Every federal department or agency furnishing financial support is to implement the proscription by appropriate rule or regulation, each of which requires approval by the President. Termination of funding as a sanction for noncompliance is authorized, but *only* after a hearing and after the failure of voluntary means to secure compliance. Moreover, termination may not take place until the department or agency involved files with the appropriate committees of the House and Senate a full written report of the circumstances and the grounds for such action and 30 days have elapsed thereafter. Judicial review was provided, at least for actions terminating financial assistance.

Termination of funding was regarded by Congress as a serious enforcement step, and the legislative history is

replete with assurances that it would not occur until every possibility for conciliation had been exhausted.² To allow a private [*383] individual to sue to cut off funds under Title VI would compromise these assurances and short circuit the procedural preconditions provided in Title VI. If the Federal Government may not cut off funds except pursuant to an agency rule, approved by the President, and presented to the appropriate committee of Congress for a layover period, and after voluntary means to achieve compliance have failed, it is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites themselves.

2 "Yet, before that principle [that 'Federal funds are not to be used to support racial discrimination'] is implemented to the detriment of any person, agency, or State, regulations giving notice of what conduct is required must be drawn up by the agency administering the program. . . . Before such regulations become effective, they must be submitted to and approved by the President.

"Once having become effective, there is still a long road to travel before any sanction whatsoever is imposed. Formal action to compel compliance can only take place after the following has occurred: first, there must be an unsuccessful attempt to obtain voluntary compliance; second, there must be an administrative hearing; third, a written report of the circumstances and the grounds for such action must be filed with the appropriate committees of the House and Senate; and fourth, 30 days must have elapsed between such filing and the action denying benefits under a Federal program. Finally, even that action is by no means final because it is subject to judicial review and can be further postponed by judicial action granting temporary relief pending review in order to avoid irreparable injury. It would be difficult indeed to concoct any additional safeguards to incorporate in such a procedure." 110 Cong. Rec. 6749 (1964) (Sen. Moss).

"[The] authority to cut off funds is hedged about with a number of procedural restrictions. . . . [There follow details of the preliminary steps.]

"In short, title VI is a reasonable, moderate, cautious, carefully worked out solution to a

situation that clearly calls for legislative action." *Id.*, at 6544 (Sen. Humphrey). "Actually, *no action whatsoever* can be taken against anyone until the Federal agency involved has advised the appropriate person of his failure to comply with nondiscrimination requirements and until voluntary efforts to secure compliance have failed." *Id.*, at 1519 (Rep. Celler) (emphasis added). See also remarks of Sen. Ribicoff (*id.*, at 7066-7067); Sen. Proxmire (*id.*, at 8345); Sen. Kuchel (*id.*, at 6562). These safeguards were incorporated into 42 U. S. C. § 2000d-1.

Furthermore, although Congress intended Title VI to end federal financial support for racially discriminatory policies of not only public but also private institutions and programs, it is extremely unlikely that Congress, [**2796] without a word indicating that it intended to do so, [***830] contemplated creating an independent, private statutory cause of action against all private as well as public agencies that might be in violation of the section. There is no doubt that Congress regarded private litigation as an important tool to attack discriminatory practices. It does not at all follow, however, that Congress anticipated new private actions under Title VI itself. Wherever a discriminatory program was a public undertaking, such as a public school, private remedies were already available under other statutes, and a private remedy under Title VI was [*384] unnecessary. Congress was well aware of this fact. Significantly, there was frequent reference to *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (CA4 1963), cert. denied, 376 U.S. 938 (1964), throughout the congressional deliberations. See, e. g., 110 Cong. Rec. 6544 (1964) (Sen. Humphrey). *Simkins* held that under appropriate circumstances, the operation of a private hospital with "massive use of public funds and extensive state-federal sharing in the common plan" constituted "state action" for the purposes of the *Fourteenth Amendment* 323 F.2d, at 967.. It was unnecessary, of course, to create a Title VI private action against private discriminators where they were already within the reach of existing private remedies. But when they were not -- and *Simkins* carefully disclaimed holding that "every subvention by the federal or state government automatically involves the beneficiary in 'state action,'" *ibid.*³ -- it is difficult [*385] to believe that Congress *silently* created a *private* remedy to terminate conduct that previously had been entirely beyond the reach of federal law.

3 This Court has never held that the mere receipt of federal or state funds is sufficient to make the recipient a federal or state actor. In *Norwood v. Harrison*, 413 U.S. 455 (1973), private schools that received state aid were held subject to the *Fourteenth Amendment's* ban on discrimination, but the Court's test required "tangible financial aid" with a "significant tendency to facilitate, reinforce, and support private discrimination." *Id.*, at 466. The mandate of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), to sift facts and weigh circumstances of governmental support in each case to determine whether private or state action was involved, has not been abandoned for an automatic rule based on receipt of funds.

Contemporaneous with the congressional debates on the Civil Rights Act was this Court's decision in *Griffin v. School Board*, 377 U.S. 218 (1964). Tuition grants and tax concessions were provided for parents of students in private schools, which discriminated racially. The Court found sufficient state action, but carefully limited its holding to the circumstances presented: "[Closing] the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws." *Id.*, at 232.

Hence, neither at the time of the enactment of Title VI, nor at the present time to the extent this Court has spoken, has mere receipt of state funds created state action. Moreover, *Simkins* has not met with universal approval among the United States Courts of Appeals. See cases cited in *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000, 1004 (1975) (WHITE, J., dissenting from denial of certiorari).

For those who believe, contrary to my views, that Title VI was intended to create a stricter standard of color blindness than the Constitution itself requires, the result of no private cause of action follows even more readily. In that case Congress must be seen to have banned degrees of discrimination, as well as types of discriminators, not previously [***831] reached by law. A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III

and IV) would not leave for inference a vast new extension of private enforcement power. And a Congress so exceptionally concerned with the satisfaction of procedural preliminaries before confronting fund recipients with the choice of a cutoff or of stopping discriminating would not permit private parties to pose precisely that same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.

Significantly, in at least three instances legislators who played a major role in the [**2797] passage of Title VI explicitly stated that a private right of action under Title VI does not exist.⁴ [*386] As an "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," *Cort v. Ash*, 422 U.S., at 78, clearer statements cannot be imagined, and under *Cort*, "an explicit purpose to deny such cause of action [is] controlling." *Id.*, at 82. Senator Keating, for example, proposed a private "right to sue" for the "person suffering from discrimination"; but the Department of Justice refused to include it, and the Senator acquiesced.⁵ These are not neutral, ambiguous statements. They indicate the absence of a legislative intent to create a private remedy. Nor do any of these statements make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as MR. JUSTICE STEVENS and the three Justices who join his opinion apparently would. See *post*, at 419-420, n. 26. Indeed, it would be odd if they did, since the practical effect of either type of private cause of action would be identical. If private suits to enjoin conduct allegedly violative of § 601 were permitted, recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of Title VI or refusing federal funds and thereby escaping from the statute's jurisdictional predicate.⁶ This is precisely the same choice as would confront recipients if suit were brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law.

4 "Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim." 110 Cong. Rec. 2467 (1964) (Rep. Gill).

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57 L. Ed. 2d 750, ***831; 1978 U.S. LEXIS 5

"[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination." *Id.*, at 6562 (Sen. Kuchel).

"Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill. However, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department." *Id.*, at 7065 (Sen. Keating).

5 *Ibid.*

6 As Senator Ribicoff stated: "Sometimes those eligible for Federal assistance may elect to reject such aid, unwilling to agree to a nondiscrimination requirement. If they choose that course, the responsibility is theirs." *Id.*, at 7067.

[*387] This Court has always required [***832] "that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). See also *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 418-420 (1975). A private cause of action under Title VI is unable to satisfy either prong of this test.

Because each of my colleagues either has a different view or assumes a private cause of action, however, the merits of the Title VI issue must be addressed. My views in that regard, as well as my views with respect to the equal protection issue, are included in the joint opinion that my Brothers BRENNAN, MARSHALL, and BLACKMUN and I have filed.⁷

7 I also join Parts I, III-A, and V-C of MR. JUSTICE POWELL's opinion.

MR. JUSTICE MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an

applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the [**2798] Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

I

A

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, [*388] the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.¹

1 The history recounted here is perhaps too well known to require documentation. But I must acknowledge the authorities on which I rely in retelling it. J. Franklin, *From Slavery to Freedom* (4th ed. 1974) (hereinafter Franklin); R. Kluger, *Simple Justice* (1975) (hereinafter Kluger); C. Woodward, *The Strange Career of Jim Crow* (3d ed. 1974) (hereinafter Woodward).

The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that

[***833] "[he] has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never

offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither." Franklin 88.

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a [*389] course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art. I, § 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, Art. I, § 9, and a fugitive slave clause requiring that when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, § 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed, Americans "proudly accepted the challenge and responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks." Franklin 100.

The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave [*2799] Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in *Dred Scott v. Sandford*, 19 How. 393 (1857), holding that the Missouri Compromise -- which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri -- was unconstitutional because it deprived slave owners of their property without due process. The Court declared that under the Constitution a slave was property, and "[the] right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United [*390] States . . ." *Id.*, at 451. The Court further concluded that Negroes were not

intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . ." *Id.*, at 407.

B

The status of the Negro as property was officially erased by his [***834] emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." *Slaughter-House Cases*, 16 Wall. 36, 70 (1873). Despite the passage of the *Thirteenth*, *Fourteenth*, and *Fifteenth Amendments*, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the *Fifteenth Amendment* by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed [*391] in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the disabilities that prevented him from taking his

place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." Woodward 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. See, e. g., *Slaughter-House Cases*, *supra*; *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1876). Then in the notorious *Civil Rights Cases*, 109 U.S. 3 (1883), [**2800] the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theatres and other places of public amusement." *Id.*, at 10. According to the Court, the *Fourteenth Amendment* gave Congress the power to proscribe only discriminatory action [***835] by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. *Id.*, at 24-25. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that [*392] state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . ." *Id.*, at 25. As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race . . . -- what had already been done in every State of the Union for the white race -- to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61.

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy v. Ferguson*, 163 U.S. 537 (1896). In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the *Fourteenth Amendment* was not intended "to abolish distinctions based upon

color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.*, at 544. Ignoring totally the realities of the positions of the two races, the Court remarked:

"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." *Id.*, at 551.

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560. He expressed his fear that if like laws were enacted in other [*393] States, "the effect would be in the highest degree mischievous." *Id.*, at 563. Although slavery would have disappeared, the States would retain the power "to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens . . ." *Ibid.*

The fears of Mr. Justice Harlan were soon to be realized. In the wake of *Plessy*, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for [***836] Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after *Plessy*, the Charlestown News and Courier printed a parody of Jim Crow laws:

"If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be [**2801] Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court -- and a Jim Crow Bible for colored

witnesses to kiss." Woodward 68.

The irony is that before many years had passed, with the exception of the Jim Crow witness stand, "all the improbable applications of the principle suggested by the editor in derision had been put into practice -- down to and including the Jim Crow Bible." *Id.*, at 69.

Nor were the laws restricting the rights of Negroes limited [*394] solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was "not humiliating but a benefit" and that he was "rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against." Kluger 91.

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools -- and thereby denied the opportunity to become doctors, lawyers, engineers, and the like -- is also well established. It is of course true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to *Brown v. Board of Education*, 347 U.S. 483 (1954). See, e. g., *Morgan v. Virginia*, 328 U.S. 373 (1946); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

[*395] [***837] II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. ² The Negro child's mother is over three times more likely to die of complications in childbirth, ³ and the infant mortality rate for Negroes is nearly twice that for whites. ⁴ The median income of the Negro family is only 60% that of the median of a white family, ⁵ and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites. ⁶

2 U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 65 (1977) (Table 94).

3 *Id.*, at 70 (Table 102).

4 *Ibid.*

5 U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 107, p. 7 (1977) (Table 1).

6 *Id.*, at 20 (Table 14).

[**2802] When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, ⁷ and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. ⁸ A Negro male who completes four years of college can expect a median annual income of merely \$ 110 more than a white male who has only a high school diploma. ⁹ Although Negroes [*396] represent 11.5% of the population, ¹⁰ they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors. ¹¹

7 U.S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, January 1978, p. 170 (Table 44).

8 *Ibid.*

9 U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 105, p. 198 (1977) (Table 47).

10 U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract, *supra*, at 25 (Table 24).

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57 L. Ed. 2d 750, ***837; 1978 U.S. LEXIS 5

11 *Id.*, at 407-408 (Table 662) (based on 1970 census).

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

III

I do not believe that the *Fourteenth Amendment* requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by [***838] giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that

"in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy" *Slaughter-House Cases*, 16 Wall., at 72.

It is plain that the *Fourteenth Amendment* was not intended to prohibit measures designed to remedy the effects of the [*397] Nation's past treatment of Negroes. The Congress that passed the *Fourteenth Amendment* is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. Act of July 16, 1866, ch. 200, 14 Stat. 173; see *supra*, at 391. Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, 14 Stat. 174; see also Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen,

and to the exclusion of all other persons" Cong. Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). See also *id.*, at 634-635 (remarks of Rep. Ritter); *id.*, at App. 78, 80-81 (remarks of Rep. Chanler). Indeed, the bill was bitterly opposed on the ground that it "undertakes to make the negro in some respects . . . superior . . . and gives them favors that the poor white boy in the North cannot get." *Id.*, at 401 (remarks of Sen. McDougall). See also *id.*, at 319 (remarks of Sen. Hendricks); *id.*, at 362 (remarks of Sen. Saulsbury); *id.*, at 397 (remarks of Sen. Willey); *id.*, at 544 (remarks of Rep. Taylor). The bill's supporters defended it -- not by rebutting the claim of special treatment -- but by pointing to the need for such treatment:

[**2803] "The very discrimination it makes between 'destitute and suffering' negroes, and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection." *Id.*, at App. 75 (remarks of Rep. Phelps).

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. *Id.*, at 421, 688. President Johnson vetoed this bill and also a subsequent bill that contained some modifications; one of his principal [*398] objections to both bills was that they gave special benefits to Negroes. 8 Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1897). Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. Cong. Globe, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the *Fourteenth Amendment*, it is inconceivable that the *Fourteenth Amendment* was intended to prohibit all race-conscious relief measures. It "would be a distortion of the policy manifested in [***839] that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color," *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 94 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to

achieve.

B

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school-assignment decisions. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971). We noted, moreover, that a

"flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann*, the Constitution does not compel any particular degree of [*399] racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device -- even as a starting point -- contravenes the implicit command of *Green v. County School Board*, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy." *Board of Education v. Swann*, 402 U.S. 43, 46 (1971).

As we have observed, "[any] other approach would freeze the status quo that is the very target of all desegregation processes." *McDaniel v. Barresi*, *supra*, at 41.

Only last Term, in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in *UJO* to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In another case last Term, *Califano v. Webster*, 430 U.S. 313 [**2804] (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women." *Id*

., at 317, quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n. 8 (1977) (plurality opinion). We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests [***840] that a university cannot similarly act to remedy past discrimination.¹² It is true that [*400] in both *UJO* and *Webster* the use of the disfavored classification was predicated on legislative or administrative action, but in neither case had those bodies made findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. Rather, the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination.

12 Indeed, the action of the University finds support in the regulations promulgated under Title VI by the Department of Health, Education, and Welfare and approved by the President, which authorize a federally funded institution to take affirmative steps to overcome past discrimination against groups even where the institution was not guilty of prior discrimination. 45 CFR § 80.3 (b)(6)(ii) (1977).

IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but

also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has [*401] not been realized for the Negro; because of his skin color he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the *Fourteenth Amendment* where it is necessary to remedy the effects of past discrimination. In the *Civil Rights Cases*, *supra*, the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." *109 U.S.*, at 25; see *supra*, at 392. We cannot in light of the history of the last century yield to that view. Had the Court in that decision and others been willing to "do for human liberty and the fundamental rights of American citizenship, what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," *109 U.S.*, at 53 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Most importantly, had the Court [***841] been willing in 1896, in *Plessy v. Ferguson*, to hold that the *Equal Protection Clause* forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that [**2805] the principle that the "Constitution is colorblind" appeared only in the opinion of the lone dissenter. *163 U.S.*, at 559. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, *by law*, an individual could be given "special" treatment based on the color of his skin.

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing [*402] to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the

number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take "*affirmative action* to overcome the effects of conditions which resulted in limiting participation . . . by persons of a particular race, color, or national origin." Supplemental Brief for United States as *Amicus Curiae* 16 (emphasis added). I cannot even guess the number of state and local governments that have set up affirmative-action programs, which may be affected by today's decision.

I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. *Now*, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.

MR. JUSTICE BLACKMUN.

I participate fully, of course, in the opinion, *ante*, p. 324, that bears the names of my Brothers BRENNAN, WHITE, MARSHALL, and myself. I add only some general observations that hold particular significance for me, and then a few comments on equal protection.

[*403] I

At least until the early 1970's, apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students [***842] in the United States were members of what we now refer to as minority groups. In addition, approximately three-fourths of our Negro physicians were trained at only two medical schools. If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious.

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of*

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Education, 347 U.S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination [**2806] of the type we address today will be an ugly feature of history that is instructive but that is behind us.

The number of qualified, indeed highly qualified, applicants for admission to existing medical schools in the United States far exceeds the number of places available. Wholly apart from racial and ethnic considerations, therefore, the selection process inevitably results in the denial of admission to many *qualified* persons, indeed, to far more than the number of those who are granted admission. Obviously, it is a denial to the deserving. This inescapable fact is brought into sharp focus here because Allan Bakke is not himself charged with discrimination and yet is the one who is disadvantaged, and because the Medical School of the University of California at Davis itself is not charged with historical discrimination.

One theoretical solution to the need for more minority [*404] members in higher education would be to enlarge our graduate schools. Then all who desired and were qualified could enter, and talk of discrimination would vanish. Unfortunately, this is neither feasible nor realistic. The vast resources that apparently would be required simply are not available. And the need for more professional graduates, in the strict numerical sense, perhaps has not been demonstrated at all.

There is no particular or real significance in the 84-16 division at Davis. The same theoretical, philosophical, social, legal, and constitutional considerations would necessarily apply to the case if Davis' special admissions program had focused on any lesser number, that is, on 12 or 8 or 4 places or, indeed, on only 1.

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to

those having connections with celebrities, the famous, and the powerful.

Programs of admission to institutions [***843] of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this. The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds. For me, therefore, interference by the judiciary must be the rare exception and not the rule.

II

I, of course, accept the propositions that (a) *Fourteenth Amendment* rights are personal; (b) racial and ethnic distinctions [*405] where they are stereotypes are inherently suspect and call for exacting judicial scrutiny; (c) academic freedom is a special concern of the *First Amendment*; and (d) the *Fourteenth Amendment* has expanded beyond its original 1868 concept and now is recognized to have reached a point where, as MR. JUSTICE POWELL states, *ante*, at 293, quoting from the Court's opinion in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976), it embraces a "broader principle."

This enlargement does not mean for me, however, that the *Fourteenth Amendment* has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original *Fourteenth Amendment* tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

I emphasize in particular that the decided cases are not easily to be brushed aside. [**2807] Many, of course, are not precisely on point, but neither are they off point. Racial factors have been given consideration in the school desegregation cases, in the employment cases, in *Lau v. Nichols*, 414 U.S. 563 (1974), and in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). To be sure, some of these may be "distinguished" on the ground that victimization was directly present. But who

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is to say that victimization is not present for some members of today's minority groups, although it is of a lesser and perhaps different degree. The petitioners in *United Jewish Organizations* certainly complained bitterly of their reapportionment treatment, and I rather doubt that they regard the "remedy" there imposed as one that was "to improve" the group's ability to participate, as MR. JUSTICE POWELL describes it, *ante*, at 305. And surely in *Lau v. Nichols* we looked to ethnicity.

[*406] I am not convinced, as MR. JUSTICE POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work. Because of my conviction that admission programs are primarily for the educators, I am willing to accept the [***844] representation that the Harvard program is one where good faith in its administration is practiced as well as professed. I agree that such a program, where race or ethnic background is only one of many factors, is a program better formulated than Davis' two-track system. The cynical, of course, may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly. I need not go that far, for despite its two-track aspect, the Davis program, for me, is within constitutional bounds, though perhaps barely so. It is surely free of stigma, and, as in *United Jewish Organizations*, I am not willing to infer a constitutional violation.

It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs. We may excuse some of these on the ground that they have specific constitutional protection or, as with Indians, that those benefited are wards of the Government. Nevertheless, these preferences exist and may not be ignored. And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.

I add these only as additional components on the edges of the central question as to which I join my Brothers BRENNAN, WHITE, and MARSHALL in our more general approach. It is gratifying to know that the

Court at least finds it constitutional for an academic institution to take race and ethnic background into consideration as one factor, among many, in [*407] the administration of its admissions program. I presume that that factor always has been there, though perhaps not conceded or even admitted. It is a fact of life, however, and a part of the real world of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the *Equal Protection Clause* perpetuate racial supremacy.

So the ultimate question, as it was at the beginning of this litigation, is: Among the qualified, how does one choose?

[**2808] A long time ago, as time is measured for this Nation, a Chief Justice, both wise and farsighted, said:

"In considering this question, then, we must never forget, that it is *a constitution* we are expounding." *McCulloch v. Maryland*, 4 *Wheat.* 316, 407 (1819) (emphasis in original).

In the same opinion, the Great Chief Justice further observed:

[***845] "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." *Id.*, at 421.

More recently, one destined to become a Justice of this Court observed:

"The great generalities of the constitution have a content and a significance that vary from age to age." B. Cardozo, *The Nature of the Judicial Process* 17 [*408]

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(1921).

And an educator who became a President of the United States said:

"But the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age." W. Wilson, *Constitutional Government in the United States* 69 (1911).

These precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law. Today, again, we are expounding a *Constitution*. The same principles that governed McCulloch's case in 1819 govern Bakke's case in 1978. There can be no other answer.

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in the judgment in part and dissenting in part.

It is always important at the outset to focus precisely on the controversy before the Court.¹ It is particularly important to do so in this case because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

1 Four Members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. See opinion of JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, *ante*, at 324-325. It is hardly necessary to state that only a majority can speak for the Court or determine what is the "central meaning" of any judgment of the Court.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* The California Supreme Court upheld his challenge and ordered him admitted. If the [*409] state court was correct in its view that the University's

special program was illegal, and that Bakke was therefore unlawfully excluded from the Medical School because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court.

The judgment as originally entered by the trial court contained four separate paragraphs, two of [***846] which are of critical importance.² Paragraph 3 declared that the University's [**2809] special admissions program violated the *Fourteenth Amendment*, the State Constitution, and Title VI. The trial court did not order the University to admit Bakke because it concluded that Bakke had not shown that he would have been admitted if there had been no special program. Instead, in paragraph 2 of its judgment it ordered the University to consider Bakke's application for admission without regard to his race or the race of any other applicant. The order did not include any broad [*410] prohibition against any use of race in the admissions process; its terms were clearly limited to the University's consideration of *Bakke's* application.³ Because the University has since been ordered to admit Bakke, paragraph 2 of the trial court's order no longer has any significance.

2 The judgment first entered by the trial court read, in its entirety, as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

"1. Defendant, the Regents of the University of California, have judgment against plaintiff, Allan Bakke, denying the mandatory injunction requested by plaintiff ordering his admission to the University of California at Davis Medical School;

"2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission;

"3. Cross-defendant Allan Bakke have judgment against cross-complainant, the Regents of the University of California, declaring that the special admissions program at the University of California at Davis Medical School violates the

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Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U. S. C. § 2000d];

"4. That plaintiff have and recover his court costs incurred herein in the sum of \$ 217.35." App. to Pet. for Cert. 120a.

3 In paragraph 2 the trial court ordered that "plaintiff [Bakke] is entitled to have *his* application for admission to the medical school considered without regard to *his* race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering *plaintiff's* race or the race of any other applicant in passing upon *his* application for admission." See n. 2, *supra* (emphasis added). The only way in which this order can be broadly read as prohibiting any use of race in the admissions process, apart from Bakke's application, is if the final "his" refers to "any other applicant." But the consistent use of the pronoun throughout the paragraph to refer to Bakke makes such a reading entirely unpersuasive, as does the failure of the trial court to suggest that it was issuing relief to applicants who were not parties to the suit.

The California Supreme Court, in a holding that is not challenged, ruled that the trial court incorrectly placed the burden on Bakke of showing that he would have been admitted in the absence of discrimination. The University then conceded "that it [could] not meet the burden of proving that the special admissions program did not result in Mr. Bakke's failure to be admitted." 4 Accordingly, the California Supreme Court directed the trial court to enter judgment ordering Bakke's admission. 5 Since that order superseded [***847] paragraph [*411] 2 of the trial court's judgment, there is no outstanding injunction forbidding any consideration of racial criteria in processing applications.

4 Appendix B to Application for Stay A19-A20.

5 18 Cal. 3d 34, 64, 553 P. 2d 1152, 1172 (1976). The judgment of the Supreme Court of the State of California affirms only paragraph 3 of the trial court's judgment. The Supreme Court's judgment reads as follows:

"IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court[,] County of Yolo[,] in the

above-entitled cause, is hereby affirmed insofar as it determines that the special admission program is invalid; the judgment is reversed insofar as it denies Bakke and injunction ordering that he be admitted to the University, and the trial court is directed to enter judgment ordering Bakke to be admitted. "Bakke shall recover his costs on these appeals."

It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate. 6

6 "This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297.

II

Both petitioner and respondent have asked us to determine the legality of the University's special admissions program by reference to the Constitution. Our settled practice, however, is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, [**2810] it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105. 7 The more important the issue, the more force [*412] there is to this doctrine. 8 In this case, we are presented with a constitutional question of undoubted and unusual importance. Since, however, a dispositive statutory claim was raised at the very inception of this case, and squarely decided in the portion of the trial court judgment affirmed by the California Supreme Court, it is our plain duty to confront it. Only if petitioner should prevail on the statutory issue would it be necessary to decide whether the University's admissions program violated the *Equal Protection Clause of the Fourteenth Amendment*.

7 "From *Hayburn's Case*, 2 Dall. 409, to *Alma Motor Co. v. Timken-Detroit Axle Co.* [, 329 U.S. 129,] and the Hatch Act case [*United Public Workers v. Mitchell*, 330 U.S. 75] decided this term, this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's

438 U.S. 265, *412; 98 S. Ct. 2733, **2810;
57 L. Ed. 2d 750, ***847; 1978 U.S. LEXIS 5

refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U.S. Const., Art. III. . . .

"The policy, however, has not been limited to jurisdictional determinations. For, in addition, 'the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided." *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569 (footnotes omitted). See also *Ashwander v. TVA*, 297 U.S. 288, 346-348 (Brandeis, J., concurring).

8 The doctrine reflects both our respect for the Constitution as an enduring set of principles and the deference we owe to the Legislative and Executive Branches of Government in developing solutions to complex social problems. See A. Bickel, *The Least Dangerous Branch* 131 (1962).

III

[***848] Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[**LEdHR1D] [1D]The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it

was, and still is, receiving federal financial assistance.⁹ The plain language of the statute therefore requires affirmance of the judgment below. A different result [*413] cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted.

9 Record 29.

Title VI is an integral part of the far-reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action" programs. Its attention was focused on the problem at hand, the "glaring . . . discrimination against Negroes which exists throughout our Nation,"¹⁰ and, with respect to Title [**2811] VI, the federal funding of segregated facilities.¹¹ The genesis of the legislation, however, did not limit the breadth of the solution adopted. Just as Congress responded to the problem of employment discrimination by enacting a provision that protects all races, see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279¹², so, too, its answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of *any* individual from a federally funded program "on the ground of race." In the words of the House Report, Title VI stands for "the general principle that *no person* . . . be excluded from participation . . . on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance." H. R. Rep. No. 914, 88th [*414] Cong., 1st Sess., pt. 1, p. 25 (1963) (emphasis added). This same broad view of Title VI and § 601 was echoed throughout the congressional debate and was stressed by every one of the major spokesmen for the Act.¹³

10 H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963).

11 It is apparent from the legislative history that the immediate object of Title VI was to prevent federal funding of segregated facilities. See, e. g., 110 Cong. Rec. 1521 (1964) (remarks of Rep. Celler); *id.*, at 6544 (remarks of Sen. Humphrey).

12 In *McDonald v. Santa Fe Trail Transp. Co.*, the Court held that "Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standards as would be applicable were they Negroes . . ." 427 U.S., at 280.

438 U.S. 265, *414; 98 S. Ct. 2733, **2811;
57 L. Ed. 2d 750, ***LEdHR1D; 1978 U.S. LEXIS 5

Quoting from our earlier decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, the Court reaffirmed the principle that the statute "[prohibits] '[discriminatory] preference for any [racial] group, minority or majority.'" 427 U.S., at 279 (emphasis in original).

13 See, e. g., 110 Cong. Rec. 1520 (1964) (remarks of Rep. Celler); *id.*, at 5864 (remarks of Sen. Humphrey); *id.*, at 6561 (remarks of Sen. Kuchel); *id.*, at 7055 (remarks of Sen. Pastore). (Representative Celler and Senators Humphrey and Kuchel were the House and Senate floor managers for the entire Civil Rights Act, and Senator Pastore was the majority Senate floor manager for Title VI.)

Petitioner contends, however, that [***849] exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of "exclusion" is justified by the statute or its history. The language of the entire section is perfectly clear; the words that follow "excluded from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds.

The legislative history reinforces this reading. The only suggestion that § 601 would allow exclusion of nonminority applicants came from opponents of the legislation and then only by way of a discussion of the meaning of the word "discrimination."¹⁴ The opponents feared that the term "discrimination" [*415] would be read as mandating racial quotas and "racially balanced" colleges and universities, and they pressed for a specific definition of the term in order to avoid this possibility.¹⁵ In response, the proponents of the legislation gave repeated assurances that the Act [**2812] would be "colorblind" in its application.¹⁶ Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:

"[The] word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin.
. . .

"The answer to this question [what was meant by 'discrimination'] is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored

people do not have to pay taxes, or that they can pay their taxes 6 months later than everyone else." 110 Cong. Rec. 5864 (1964).

"[If] we started to treat Americans as Americans, not as fat ones, [***850] thin ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that we would not need to worry about discrimination." *Id.*, at 5866.

14 Representative Abernethy's comments were typical:

"Title VI has been aptly described as the most harsh and unprecedented proposal contained in the bill

"It is aimed toward eliminating discrimination in federally assisted programs. It contains no guideposts and no yardsticks as to what might constitute discrimination in carrying out federally aided programs and projects. . . .

. . . .

"Presumably the college would have to have a 'racially balanced' staff from the dean's office to the cafeteria. . . .

"The effect of this title, if enacted into law, will interject race as a factor in every decision involving the selection of an individual The concept of 'racial imbalance' would hover like a black cloud over every transaction" *Id.*, at 1619. See also, e. g., *id.*, at 5611-5613 (remarks of Sen. Ervin); *id.*, at 9083 (remarks of Sen. Gore).

15 E. g., *id.*, at 5863, 5874 (remarks of Sen. Eastland).

16 See, e. g., *id.*, at 8346 (remarks of Sen. Proxmire) ("Taxes are collected from whites and Negroes, and they should be expended without discrimination"); *id.*, at 7055 (remarks of Sen. Pastore) ("[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed by Federal and State administrators who are equally colorblind"); and *id.*, at 6543 (remarks of Sen. Humphrey) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or

438 U.S. 265, *415; 98 S. Ct. 2733, **2812;
57 L. Ed. 2d 750, ***850; 1978 U.S. LEXIS 5

results in racial discrimination") (quoting from President Kennedy's Message to Congress, June 19, 1963).

[*416] In giving answers such as these, it seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government,¹⁷ but that does not mean that the legislation only codifies an existing constitutional prohibition. The statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of what the *Fifth* or *Fourteenth Amendment* would require. The Act's proponents plainly considered Title VI consistent with their view of the Constitution and they sought to provide an effective weapon to implement that view.¹⁸ As a distillation of what the supporters of the Act believed the Constitution demanded of State and Federal Governments, § 601 has independent force, with language and emphasis in addition to that found in the Constitution.¹⁹

¹⁷ See, e. g., 110 Cong. Rec. 5253 (1964) (remarks of Sen. Humphrey); and *id.*, at 7102 (remarks of Sen. Javits). The parallel between the prohibitions of Title VI and those of the Constitution was clearest with respect to the immediate goal of the Act -- an end to federal funding of "separate but equal" facilities.

¹⁸ "As in *Monroe* [v. *Pape*, 365 U.S. 167], we have no occasion here to 'reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.' 365 U.S., at 191. For in interpreting the statute it is not our task to consider whether Congress was mistaken in 1871 in its view of the limits of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did in fact act, see *Ries v. Lynskey*, 452 F.2d 172, at 175." *Moor v. County of Alameda*, 411 U.S. 693, 709.

¹⁹ Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose. See *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 709

("[The] basic policy of the statute [Title VII] requires that we focus on fairness to individuals rather than fairness to classes"). This same principle of *individual* fairness is embodied in Title VI.

"The basic fairness of title VI is so clear that I find it difficult to understand why it should create any opposition. . . .

. . . .

"Private prejudices, to be sure, cannot be eliminated overnight. However, there is one area where no room at all exists for private prejudices. That is the area of governmental conduct. As the first Mr. Justice Harlan said in his prophetic dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537, 559:

"Our Constitution is color-blind."

"So -- I say to Senators -- must be our Government. . . .

"Title VI closes the gap between our purposes as a democracy and our prejudices as individuals. The cuts of prejudice need healing. The costs of prejudice need understanding. We cannot have hostility between two great parts of our people without tragic loss in our human values. . . .

"Title VI offers a place for the meeting of our minds as to Federal money." 110 Cong. Rec. 7063-7064 (1964) (remarks of Sen. Pastore).

Of course, one of the reasons marshaled in support of the conclusion that Title VI was "noncontroversial" was that its prohibition was already reflected in the law. See *ibid.* (remarks of Sen. Pell and Sen. Pastore).

[*417] [**2813] As with other provisions of the Civil Rights Act, Congress' expression of its policy to end racial discrimination may independently proscribe conduct that the Constitution does not.²⁰ However, we need not decide the congruence -- or lack of [***851] congruence -- of the controlling statute and the Constitution [*418] since the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally

funded program.

20 For example, private employers now under duties imposed by Title VII were wholly free from the restraints imposed by the *Fifth* and *Fourteenth Amendments* which are directed only to governmental action.

In *Lau v. Nichols*, 414 U.S. 563, the Government's brief stressed that "the applicability of Title VI . . . does not depend upon the outcome of the equal protection analysis. . . . [The] statute independently proscribes the conduct challenged by petitioners and provides a discrete basis for injunctive relief." Brief for United States as *Amicus Curiae*, O. T. 1973, No. 72-6520, p. 15. The Court, in turn, rested its decision on Title VI. MR. JUSTICE POWELL takes pains to distinguish *Lau* from the case at hand because the *Lau* decision "rested solely on the statute." *Ante*, at 304. See also *Washington v. Davis*, 426 U.S. 229, 238-239; *Allen v. State Board of Elections*, 393 U.S. 544, 588 (Harlan, J., concurring and dissenting).

In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. We are dealing with a distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage.²¹ In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race.²² As succinctly phrased during the Senate debate, under Title VI it is not "permissible to say 'yes' to one person; but to say 'no' to another person, only because of the color of his skin."²³

21 As explained by Senator Humphrey, § 601 expresses a principle imbedded in the constitutional *and* moral understanding of the times.

"The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. *In many instances* the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. . . . *In all cases*, such discrimination is contrary to national policy, and to the moral sense of the

Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong. Rec. 6544 (1964) (emphasis added).

22 Petitioner's attempt to rely on regulations issued by HEW for a contrary reading of the statute is unpersuasive. Where no discriminatory policy was in effect, HEW's example of permissible "affirmative action" refers to "special recruitment policies." 45 CFR § 80.5 (j) (1977). This regulation, which was adopted in 1973, sheds no light on the legality of the admissions program that excluded Bakke in this case.

23 110 Cong. Rec. 6047 (1964) (remarks of Sen. Pastore).

Belatedly, however, petitioner argues that Title VI cannot be enforced by a private litigant. The claim is unpersuasive in the context of this case. Bakke requested injunctive and declaratory relief under Title VI; petitioner itself then joined [*419] issue on the question of the legality of its program under Title VI by asking for a declaratory judgment that it was in compliance with the statute.²⁴ Its view during state-court litigation was that a private cause of action does exist under Title VI. Because petitioner [**2814] questions the availability of a private cause of action for the first time in this Court, the question is not properly before us. See *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434. Even if it were, petitioner's [***852] original assumption is in accord with the federal courts' consistent interpretation of the Act. To date, the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI.²⁵ The United States has taken the same position; in its *amicus curiae* brief directed to this specific issue, it concluded that such a remedy is clearly available,²⁶ [*420] and Congress has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private action.²⁷ The conclusion that an individual may maintain a private cause of action is amply supported in the legislative history of Title VI itself.²⁸ In [**2815] short, a [***853] fair consideration of [*421] petitioner's tardy attack on the propriety of Bakke's suit under Title VI requires that it be rejected.

24 Record 30-31.

25 See, e. g., *Lau v. Nichols*, *supra*; *Bossier Parish School Board v. Lemon*, 370 F.2d 847

438 U.S. 265, *421; 98 S. Ct. 2733, **2815;
57 L. Ed. 2d 750, ***853; 1978 U.S. LEXIS 5

(CA5 1967), cert. denied, 388 U.S. 911; *Uzzell v. Friday*, 547 F.2d 801 (CA4 1977), opinion on rehearing en banc, 558 F.2d 727, cert. pending, No. 77-635; *Serna v. Portales*, 499 F.2d 1147 (CA10 1974); cf. *Chambers v. Omaha Public School District*, 536 F.2d 222, 225 n. 2 (CA8 1976) (indicating doubt over whether a *money judgment* can be obtained under Title VI). Indeed, the Government's brief in *Lau v. Nichols*, *supra*, succinctly expressed this common assumption: "It is settled that petitioners . . . have standing to enforce Section 601" Brief for United States as *Amicus Curiae* in *Lau v. Nichols*, O. T. 1973, No. 72-6520, p. 13 n. 5.

26 Supplemental Brief for United States as *Amicus Curiae* 24-34. The Government's supplemental brief also suggests that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds. *Id.*, at 28-30. Section 601 is specifically addressed to personal rights, while § 602 -- the fund cutoff provision -- establishes "an elaborate mechanism for *governmental* enforcement by federal agencies." Supplemental Brief, *supra*, at 28 (emphasis added). Arguably, private enforcement of this "elaborate mechanism" would not fit within the congressional scheme, see separate opinion of MR. JUSTICE WHITE, *ante*, at 380-383. But Bakke did not seek to cut off the University's federal funding; he sought admission to medical school. The difference between these two courses of action is clear and significant. As the Government itself states:

"[The] grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602 A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602." Supplemental Brief, *supra*, at 30 n. 25.

The notion that a private action seeking injunctive or declaratory judgment relief is

inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See *Rosado v. Wyman*, 397 U.S. 397, 420.

27 See 29 U. S. C. § 794 (1976 ed.) (the Rehabilitation Act of 1973) (in particular, the legislative history discussed in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1285-1286 (CA7 1977)); 20 U. S. C. § 1617 (1976 ed.) (attorney fees under the Emergency School Aid Act); and 31 U. S. C. § 1244 (1976 ed.) (private action under the Financial Assistance Act). Of course, none of these subsequent legislative enactments is necessarily reliable evidence of Congress' intent in 1964 in enacting Title VI, and the legislation was not intended to change the existing status of Title VI.

28 Framing the analysis in terms of the four-part *Cort v. Ash* test, see 422 U.S. 66, 78, it is clear that all four parts of the test are satisfied. (1) Bakke's status as a potential beneficiary of a federally funded program definitely brings him within the "class for whose *especial* benefit the statute was enacted," *ibid.* (emphasis in original). (2) A cause of action based on race discrimination has not been "traditionally relegated to state law." *Ibid.* (3) While a few excerpts from the voluminous legislative history suggest that Congress did not intend to create a private cause of action, see opinion of MR. JUSTICE POWELL, *ante*, at 283 n. 18, an examination of the entire legislative history makes it clear that Congress had no intention to foreclose a private right of action. (4) There is ample evidence that Congress considered private causes of action to be consistent with, if not essential to, the legislative scheme. See, e. g., remarks of Senator Ribicoff:

"We come then to the crux of the dispute -- how this right [to participate in federally funded programs without discrimination] should be protected. And even this issue becomes clear upon the most elementary analysis. If Federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies must fall into one of two categories: First, action to end discrimination; or second, action to end the payment of funds. Obviously action to end discrimination is preferable since that reaches the objective of extending the funds on a

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nondiscriminatory basis. But if the discrimination persists and cannot be effectively terminated, how else can the principle of nondiscrimination be vindicated except by nonpayment of funds?" 110 Cong. Rec. 7065 (1964). See also *id.*, at 5090, 6543, 6544 (remarks of Sen. Humphrey); *id.*, at 7103, 12719 (remarks of Sen. Javits); *id.*, at 7062, 7063 (remarks of Sen. Pastore).

The congressional debates thus show a clear understanding that the principle embodied in § 601 involves *personal* federal rights that administrative procedures would not, for the most part, be able to protect. The analogy to the Voting Rights Act of 1965, 42 U. S. C. § 1973 *et seq.* (1970 *ed. and Supp. V*), is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 556. In *Allen*, of course, this Court found a private right of action under the Voting Rights Act.

[***LEdHR1E] [1E]The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the Medical School because of his race. It is therefore our duty to affirm the judgment ordering Bakke admitted to the University.

Accordingly, I concur in the Court's judgment insofar as it affirms the judgment of the Supreme Court of California. To the extent that it purports to do anything else, I respectfully dissent.

REFERENCES

15 *Am Jur 2d, Civil Rights* 80, 81, 96; 15A *Am Jur 2d, Colleges and Universities* 17

5 Federal Procedural Forms L Ed, Civil Rights 10:141 *et seq.*

5 *Am Jur Pl & Pr Forms (Rev)*, Civil Rights, Forms 42, 45, 46

42 *USCS 2000d et seq.; Constitution, 14th Amendment*

US L Ed Digest, Civil Rights 6

ALR Digests, Civil Rights 3

L Ed Index to Annos, Civil Rights; Colleges and Universities

ALR Quick Index, Colleges and Universities; Discrimination

Federal Quick Index, Civil Rights; Colleges and Universities

Annotation References:

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act (28 *USCS* 2201). 40 *L Ed 2d* 783.

Racial discrimination in education. 24 *L Ed 2d* 765.

What constitutes reverse or majority discrimination on basis of sex or race violative of Federal Constitution or statutes. 26 *ALR Fed* 13.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 *ALR3d* 504.

APPENDIX 39



**JANET RENO, ATTORNEY GENERAL, ET AL., PETITIONERS v. JENNY
LISETTE FLORES ET AL.**

No. 91-905

SUPREME COURT OF THE UNITED STATES

*507 U.S. 292; 113 S. Ct. 1439; 123 L. Ed. 2d 1; 1993 U.S. LEXIS 2399; 61 U.S.L.W.
4237; 93 Cal. Daily Op. Service 2028; 93 Daily Journal DAR 3628; 7 Fla. L. Weekly
Fed. S 73*

**October 13, 1992, Argued
March 23, 1993, Decided**

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *942 F.2d 1352*, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners requested a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit that affirmed the lower court's decision granting respondents partial summary judgment on their equal protection claim that the Immigration and Naturalization Service had no rational basis for treating alien minors in deportation proceedings differently from alien minors in exclusion proceedings.

OVERVIEW: Respondents were a class of alien juveniles who were arrested and held in Immigration and

Naturalization Service's custody pending their deportation hearings. Respondents contended that the constitution and immigration laws required them to be released to the custody of responsible adults. The trial court granted partial summary judgment in favor of petitioners on the statutory and international law challenges to the release policy, but granted partial summary judgment in favor of respondents on their equal protection claim that petitioners had no rational basis for treating alien minors in deportation proceedings differently from alien minors in exclusion proceedings. The appellate court affirmed the trial court's decision and the Supreme Court granted a writ of certiorari to review the issue. The court examined the language in the uniform deportation-exclusion rule, 8 C.F.R. § 242.24 (1992), in order to determine whether the alien juveniles should be released to responsible adults was correct. The court concluded that it was not and held that the regulation accorded with both the constitution and the relevant statute, *8 U.S.C.S. § 1252*.

507 U.S. 292, *; 113 S. Ct. 1439, **;
123 L. Ed. 2d 1, ***; 1993 U.S. LEXIS 2399

OUTCOME: The Supreme Court reversed the decision and remanded the case for further proceedings.

LexisNexis(R) Headnotes

*Criminal Law & Procedure > Bail > General Overview
Governments > Federal Government > Domestic Security*

Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond

[HN1] An alien generally should not be detained or required to post bond except on a finding that he is a threat to the national security or that he is a poor bail risk.

Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

[HN2] See 8 U.S.C.S. § 1252(a)(1).

Immigration Law > Admission > Selection System > General Overview

[HN3] See 8 C.F.R. § 242.24 (1992).

Governments > Legislation > Interpretation

[HN4] To prevail in a facial challenge of a regulation, a respondent must establish that no set of circumstances exists under which the regulation would be valid. That is true as to both the constitutional challenges and the statutory challenge.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Constitutional Law > Substantive Due Process > Scope of Protection*

[HN5] The *Fifth* and *Fourteenth Amendments'* guarantee of "due process of law" includes a substantive component, which forbids the government to infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. "Substantive due process" analysis must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond

[HN6] Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in preserving and promoting the welfare of the child and is not punitive since it is not excessive in relation to that valid purpose.

Family Law > Guardians > General Overview

Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond

[HN7] The best interests of the child is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion -- much less the sole constitutional criterion -- for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately. Similarly, the best interests of the child is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.

Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond

[HN8] There is no constitutional need for a hearing to determine whether private placement would be better, so long as institutional custody is good enough.

*Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Immigration Law > Constitutional Foundations > General Overview*

[HN9] The *Fifth Amendment* entitles aliens to due process of law in deportation proceedings.

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Immigration Law > Deportation & Removal > Administrative Appeals > General Overview
Immigration Law > Duties & Rights of Aliens > Legal Representation

[HN10] The alien may request a judicial redetermination at any time later in the deportation process.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > Statements

Criminal Law & Procedure > Interrogation > Miranda Rights > Self-Incrimination Privilege

[HN11] Juveniles are capable of "knowingly and intelligently" waiving their right against self-incrimination in criminal cases.

Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond
Immigration Law > Judicial Review > Costs & Attorney Fees

[HN12] A detention program justified by the need to protect the welfare of juveniles is not constitutionally required to give custody to strangers if that entails the expenditure of administrative effort and resources that the Immigration and Naturalization Service is unwilling to commit.

Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond

[HN13] The Attorney General's exercise of discretion under 8 U.S.C.S. § 1252(a)(1) requires some level of individualized determination.

Immigration Law > Deportation & Removal > Administrative Proceedings > Custody & Bond

Immigration Law > Judicial Review > Habeas Corpus > Detentions

Immigration Law > Judicial Review > Standards of Review > Abuse of Discretion

[HN14] The period of custody is inherently limited by the pending deportation hearing, which must be concluded with "reasonable dispatch" to avoid habeas corpus. 8 U.S.C.S. § 1252(a)(1). It is expected that alien juveniles will remain in Immigration and Naturalization Service custody an average of only 30 days. There is no evidence that alien juveniles are being held for undue periods pursuant to 8 C.F.R. § 242.24, or that habeas corpus is insufficient to remedy particular abuses.

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

Immigration Law > Constitutional Foundations > General Overview

[HN15] On its face, 8 C.F.R. § 242.24 (1992) accords with both the U.S. Constitution and 8 U.S.C.S. § 1252.

DECISION:

Regulation generally allowing release of alien juveniles, detained pending deportation hearings, to only parents, other close relatives, or guardians held not facially violative of *Fifth Amendment* or 8 USCS 1252(a)(1).

SUMMARY:

Under 8 USCS 1252(a)(1), an alien detained pending a deportation hearing generally may, in the discretion of the United States Attorney General, be (1) continued in custody; (2) released under a bond containing such conditions as the Attorney General may prescribe; or (3) released on conditional parole. The Western Region of the Immigration and Naturalization Service (INS)—which operated under the Attorney General—announced a policy allowing the release of alien minors to only a parent or lawful guardian, except in "unusual and extraordinary" cases. In 1985, several plaintiffs filed, in the United States District Court for the Central District of California, a suit which was eventually certified as a class action for a class of alien juveniles. The complaint raised claims challenging (1) the region's juvenile-release policy on constitutional, statutory, and international law grounds; and (2) the conditions of juveniles' detention. The District Court (1) granted the INS partial summary judgment on the statutory and international law release grounds; (2) approved a consent decree that settled all claims regarding detention conditions; and (3) granted the class partial summary judgment on an equal protection claim as to release. In 1988, the INS promulgated a regulation, codified as to deportation at 8 CFR 242.24, which (1) generally authorized the release of a detained alien juvenile, in order of preference, to a parent, a legal guardian, or specified close adult relatives of the juvenile, unless the INS determined that detention was required to secure an appearance or to insure the safety of the juvenile or others; (2) in limited circumstances, authorized discretionary consideration of the release of a juvenile to another person who executed an agreement to care for the juvenile and to insure the juvenile's

attendance at future immigration proceedings; and (3) for unreleased juveniles, generally required a suitable placement at a facility which, in accordance with the consent decree, had to meet specified care standards. A week after the regulation took effect, however, the District Court, invalidating the regulatory scheme on due process grounds, (1) ordered the INS to release any otherwise eligible juvenile to a parent, guardian, custodian, conservator, or "other responsible adult party"; (2) dispensed with the INS condition that an unrelated custodian agree to care for such a juvenile, as well as to insure the juvenile's attendance at future proceedings; and (3) revised the INS' review procedures by decreeing that an immigration judge hearing on probable cause and on release restrictions was to be provided "forthwith" after arrest, regardless of whether a juvenile requested it. On appeal, a panel of the United States Court of Appeals for the Ninth Circuit, in reversing, expressed the view that (1) the INS did not exceed its statutory authority in promulgating 242.24; (2) 242.24 did not violate substantive due process, under the *Federal Constitution's Fifth Amendment*; and (3) a remand was necessary with respect to a procedural due process claim (934 F2d 991). An 11-judge en banc court, designated pursuant to a Court of Appeals rule, then (1) cited federal constitutional grounds including due process; (2) vacated the panel opinion; and (3) affirmed the District Court's order in all respects (942 F2d 1352).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and White, O'Connor, Kennedy, Souter, and Thomas, JJ., it was held that 242.24, on its face, (1) did not violate substantive due process, under the *Fifth Amendment*, through asserted infringement of an allegedly "fundamental" liberty interest, that is, an alleged right of a child who had no available parent, close relative, or legal guardian, and for whom the government was responsible, to be placed in the custody of a willing and able private custodian rather than the custody of a government-operated or government-selected child care institution, because (a) if there existed such a fundamental right, then it would presumably apply to state custody over orphaned and abandoned children as well, (b) such an alleged right was novel, (c) under the circumstances, such continued government custody was rationally connected to a government interest in promoting juveniles' welfare and was not punitive, (d) there was no constitutional need to

meet even a more limited demand for an individualized hearing as to whether private placement would be in a juvenile's "best interests," so long as institutional custody was good enough, and (e) any doubts as to the constitutionality of retaining such custody were eliminated as to alien juveniles; (2) did not violate any "equal protection guarantee" in the *Fifth Amendment*, through (a) releasing alien juveniles with close relatives or legal guardians, while detaining those without, or (b) releasing juveniles to unrelated adults pending federal delinquency proceedings, but detaining unaccompanied alien juveniles pending deportation hearings; (3) did not violate procedural due process, under the *Fifth Amendment*, through (a) failing to require the INS to determine in the case of each alien juvenile that detention in INS custody would better serve the juvenile's interests than release to some other "responsible adult," (b) not providing for automatic review by an immigration judge of initial INS deportability and custody determinations, or (c) failing to set a time period within which an immigration judge hearing, if requested, had to be held; and (4) did not go beyond the scope of the Attorney General's discretion under 1252(a)(1) to continue custody over arrested aliens, because 242.24 rationally pursued the lawful purpose of protecting the welfare of such juveniles.

O'Connor, J., joined by Souter, J., concurring, expressed the view that (1) the detained children in question had a constitutionally protected interest in freedom from institutional confinement, which interest lay within the core of the due process clause; and (2) the Supreme Court did not hold otherwise, but reversed the Court of Appeals' decision because the INS program in question complied, on the program's face, with the requirements of due process.

Stevens, J., joined by Blackmun, J., dissenting, expressed the view that (1) the litigation history of the case at hand (a) cast doubt on the good faith of the government's asserted interest in the welfare of such detained alien juveniles as a justification for 242.24, and (b) demonstrated the complete lack of support, in either evidence or experience, for the government's contention that detaining such juveniles, when there were "other responsible parties" willing to assume care, somehow protected the interests of those juveniles; (2) an agency's interest in minimizing administrative costs was a patently inadequate justification for the detention of harmless children, even when the conditions of detention were

"good enough"; and (3) 242.24, in providing for the wholesale detention of such juveniles for an indeterminate period without individual hearings, (a) was not authorized by 1252(a)(1), and (b) did not satisfy the federal constitutional demands of due process.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §528.5

substantive due process -- liberty -- release of alien juvenile pending deportation hearing --

Headnote:[1A][1B][1C][1D][1E][1F][1G][1H]

An Immigration and Naturalization Service (INS) regulation, 8 CFR 242.24--which, with limited exceptions, generally authorizes the release of an alien juvenile, detained pending a deportation hearing, to only a parent, a legal guardian, or specified close relatives of the juvenile, and which regulation, for unreleased juveniles, generally requires a suitable placement at a facility which, in accordance with a consent decree, must meet specified care standards--does not facially violate substantive due process, under the *Federal Constitution's Fifth Amendment*, through asserted infringement of an allegedly "fundamental" liberty interest, that is, an alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing and able private custodian rather than the custody of a government-operated or government-selected child care institution, because (1) if there exists such a fundamental right, then it would presumably apply to state custody over orphaned and abandoned children as well, giving federal law and federal courts a major new role in the management of state orphanages and other child care institutions; (2) such an alleged right is so novel that it cannot be considered so rooted in the traditions and conscience of the American people as to be ranked as fundamental; (3) where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody is rationally connected to a government interest in promoting the welfare of the child and is not punitive, since such custody is not excessive in relation to that valid purpose; (4) there is no constitutional need to meet even a more limited demand

for an individualized hearing as to whether private placement would be in a juvenile's "best interests," so long as institutional custody is--as it must be found to be, assuming compliance with the consent decree--good enough, for (a) the "best interests of the child" is not an absolute and exclusive constitutional criterion for the government's exercise of such custodial responsibility, (b) while minimum standards must be met, and while a juvenile's fundamental rights must not be impaired, the decision to go beyond these requirements, and to give additional interests of the juvenile priority over other concerns that compete for public funds and administrative attention, is a policy judgment, and (c) the reasonable-fit standard for a less than fundamental interest leaves ample room for the INS to decide that administrative factors such as lack of child-placement expertise favor one means; and (5) any doubts as to the constitutionality of retaining such custody are eliminated as to alien juveniles, given that (a) there is no dispute as to Congress' detention authority, (b) Congress, in enacting a predecessor of 8 USCS 1252(a)(1), eliminated any presumption of release and committed that determination to the discretion of the United States Attorney General, and (c) for the same reasons that 242.24 does not facially violate 1252(a)(1), 242.24 meets the standard of rationally advancing the legitimate purpose of furthering such juveniles' welfare. (Stevens and Blackmun, JJ., dissented from this holding.)

[***LEdHN2]

CONSTITUTIONAL LAW §822

EVIDENCE §248

release of alien juvenile pending deportation hearing -- procedural due process -- assumptions --

Headnote:[2A][2B][2C][2D][2E]

An Immigration and Naturalization Service (INS) regulation, 8 CFR 242.24--which, with limited exceptions, generally authorizes the release of an alien juvenile, detained pending a deportation hearing, to only a parent, a legal guardian, or specified close relatives of the juvenile, and which regulation, for unreleased juveniles, generally requires a suitable placement at a facility which, in accordance with a consent decree, must meet specified care standards--does not facially violate procedural due process, under the *Federal Constitution's Fifth Amendment*, through (1) failing to require the INS

507 U.S. 292, *; 113 S. Ct. 1439, **;
123 L. Ed. 2d 1, ***LEdHN2; 1993 U.S. LEXIS 2399

to determine in the case of each alien juvenile that detention in INS custody would better serve the juvenile's interests than release to some other "responsible adult," because (a) this is just a substantive due process claim recast in procedural due process terms, and (b) the procedural claim will be rejected for the same reasons that the substantive claim is rejected; (2) not providing for automatic review by an immigration judge of initial INS deportability and custody determinations, because, for purposes of such a facial challenge, due process is satisfied by the existing INS procedures of giving alien juveniles the right to a hearing before an immigration judge, as it has not been shown that all of the juveniles are too young or too ignorant to exercise that right when the juveniles, pursuant to the INS procedures, are presented forms in English and Spanish, asking the juveniles to waive or to assert that right, where (a) most such juveniles are 16 or 17 years old and will have been in telephone contact with a responsible adult outside the INS, sometimes a legal services attorney, (b) the waiver is revocable, and (c) the hearing right is no more significant than the right against self-incrimination, which the United States Supreme Court has held that juveniles are capable of knowingly and intelligently waiving in criminal cases; or (3) failing to set a time period within which an immigration judge hearing, if requested, must be held, because the Supreme Court will not assume, for purposes of such a facial challenge, that an excessive delay will invariably ensue, particularly since there is no evidence of such delay, even in isolated instances. (Stevens and Blackmun, JJ., dissented in part from this holding.)

[***LEdHN3]

ALIENS §33

release of alien juvenile pending deportation hearing
-- matters considered -- compliance of regulation with
statute --

Headnote:[3A][3B][3C][3D][3E][3F][3G]

An Immigration and Naturalization Service (INS) regulation, 8 CFR 242.24--which (1) generally authorizes the release of an alien juvenile pending a deportation hearing, in order of preference, to only a parent, a legal guardian, or specified close adult relatives of the juvenile, (2) in limited circumstances, authorizes discretionary consideration of the release of a juvenile to another person who executes an agreement to care for the

juvenile and to insure the juvenile's attendance at future immigration proceedings, and (3) for unreleased juveniles, generally requires a suitable placement at a facility which, in accordance with a consent decree, must meet specified care standards--does not, on the face of 242.24, go beyond the scope of the United States Attorney General's discretion under 8 USCS 1252(a)(1) to continue custody over arrested aliens, because 242.24 has a reasonable foundation, that is, 242.24 rationally pursues the lawful purpose of protecting the welfare of such alien juveniles, where (1) the INS' list of presumptively appropriate custodians (a) begins with parents, whom society and the United States Supreme Court's jurisprudence have always presumed to be the preferred and primary custodians of their minor children, (b) extends to other close blood relatives, whose protective relationship with children has also traditionally been respected, and (c) includes persons given legal guardianship by the states, which the Supreme Court has said possess special proficiency in the field of domestic relations, including child custody; (2) there is no basis for calling the INS' declared purpose of protecting the welfare of the juvenile false; (3) because 242.24 involves no deprivation of a fundamental right, (a) the INS is not compelled to ignore the costs and difficulties of alternative means of advancing the declared goal, and (b) it is impossible to contradict the INS' assessment that the INS lacks the expertise, and is not qualified, to do individualized child-placement studies; (4) sufficient particularization and individuation are presented by the INS' determinations, in the case of each such juvenile, that are specific to the individual and necessary for the accurate application of 242.24, that is, whether (a) there is reason to believe the alien deportable, (b) the alien is under 18 years of age, and (c) the alien's case is so exceptional as to require consideration of release to someone else; and (5) it has not been shown that 242.24 permits the INS, once having determined that an alien juvenile lacks an available relative or legal guardian, to hold the juvenile in detention indefinitely, where (a) the period of detention is inherently limited by the pending deportation hearing, which, under 1252(a)(1), must be conducted with reasonable dispatch to avoid habeas corpus, (b) under the consent decree, it is expected that such juveniles will remain in custody an average of only 30 days, (c) there is no evidence that such juveniles are being held for undue periods pursuant to 242.24 or that habeas corpus is insufficient to remedy particular abuses, and (d) the reasonableness of the INS' negative assessment of putative custodians who fail to obtain legal

guardianship would seem to increase as time goes by. (Stevens and Blackmun, JJ., dissented from this holding.)

[***LEdHN4]

APPEAL §1262.5

COURTS §95.3

certiorari -- review of claim not reached in favorable decision -- failure to cross-petition --

Headnote:[4A][4B]

The United States Supreme Court, in reviewing on certiorari a challenge to a Federal Court of Appeals' en banc decision in favor of representatives of a class of alien juveniles--which representatives claim that 8 CFR 242.24, an Immigration and Naturalization Service (INS) regulation concerning the release from custody of alien juveniles pending deportation hearings, violates the Federal Constitution and 8 USCS 1252(a)(1)--will consider the statutory issue, even though the en banc court did not address the issue and proceeded immediately to find the regulation unconstitutional, and even though the representatives did not cross-petition for certiorari on the statutory issue, for (1) before the en banc decision, both the Federal District Court below and a panel of the Court of Appeals had ruled in favor of the INS on the statutory issue; (2) the representatives may legitimately defend their judgment on any ground properly raised below; (3) the INS does not object to the Supreme Court's consideration of the statutory issue; and (4) the Supreme Court does so in order to avoid deciding constitutional questions unnecessarily.

[***LEdHN5]

ALIENS §33

facial challenge to regulation --

Headnote:[5A][5B]

In order to prevail in a facial challenge to a federal regulation concerning the release from custody of alien juveniles pending deportation hearings, which regulation allegedly violates the Federal Constitution and a federal statute, the party opposing the regulation must establish that no set of circumstances exists under which the regulation would be valid. (Stevens and Blackmun, JJ., dissented in part from this holding.)

[***LEdHN6]

CONSTITUTIONAL LAW §525

substantive due process -- liberty interest --

Headnote:[6]

Under the line of United States Supreme Court cases which has interpreted the guarantees of due process of law in the *Federal Constitution's Fifth and Fourteenth Amendments* to include a substantive component--which forbids the government to infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is tailored to serve a compelling state interest--such substantive due process analysis must begin with a careful analysis of the asserted right, for the doctrine of judicial self-restraint requires the Supreme Court to exercise the utmost care whenever the court is asked to break new ground.

[***LEdHN7]

DIVORCE AND SEPARATION §9.5

custody of child --

Headnote:[7]

In divorce proceedings, the "best interests" of a child is a proper and feasible criterion for making a decision as to which of the two parents will be accorded custody of the child.

[***LEdHN8]

PARENT AND CHILD §5

adoption --

Headnote:[8]

Even if it is shown that a particular couple desirous of adopting of a child would best provide for the child's welfare, the child will nonetheless not be removed from the custody of the child's parents so long as they are providing for the child adequately.

[***LEdHN9]

GUARDIAN AND WARD §1

PARENT AND CHILD §1

exercise of custody --

Headnote:[9]

The "best interests" of a child is not the legal standard that governs parents' or guardians' exercise of their custody; so long as certain minimum standards of child care are met, the interests of the child may be subordinated to the interests of (1) other children, or (2) the parents or guardians themselves.

[***LEdHN10]

CONSTITUTIONAL LAW §526

due process -- liberty -- children -- health care -- schooling -- custody --

Headnote:[10]

For purposes of substantive due process analysis concerning an asserted infringement of a liberty interest under the *Federal Constitution's Fourteenth Amendment*, child care institutions operated by a state in the exercise of its *parens patriae* responsibility are not constitutionally required to be funded at such a level as to provide the best schooling or the best health care available, nor does the Constitution require the states to substitute, whenever possible, private nonadoptive custody for institutional care. (Stevens and Blackmun, JJ., dissented in part from this holding.)

[***LEdHN11]

CONSTITUTIONAL LAW §525

due process -- liberty --

Headnote:[11]

For purposes of substantive due process analysis, under the *Federal Constitution's Fifth and Fourteenth Amendments*, concerning the validity of an alleged impairment of a liberty interest, narrow tailoring is required only where fundamental rights are involved; the impairment of a lesser interest demands no more than a reasonable fit between the governmental purpose and the means chosen to advance that purpose.

[***LEdHN12]

ALIENS §23

immigration -- naturalization -- power of Congress --

Headnote:[12]

Over no conceivable subject is the legislative power of Congress more complete than the subject of regulating the relationship between the United States and its alien visitors; Congress, in the exercise of its broad power over immigration and naturalization, regularly makes rules that would be unacceptable if applied to citizens.

[***LEdHN13]

CONSTITUTIONAL LAW §364

equal protection -- due process -- release of alien juveniles pending deportation hearings --

Headnote:[13]

An Immigration and Naturalization Service regulation, 8 CFR 242.24--which, with limited exceptions, generally authorizes the release of an alien juvenile, detained pending a deportation hearing, to only a parent, a legal guardian, or specified close relatives of the juvenile--does not facially violate any "equal protection guarantee" in the due process clause of the *Federal Constitution's Fifth Amendment* through (1) releasing alien juveniles with close relatives or legal guardians, while detaining those without, because the tradition of reposing custody in close relatives and legal guardians is sufficient to support this distinction; or (2) releasing juveniles to unrelated adults pending federal delinquency proceedings, but detaining unaccompanied alien juveniles pending deportation hearings, because the difference between aliens and citizens is sufficient to support such a distinction. (Stevens and Blackmun, JJ., dissented in part from this holding.)

[***LEdHN14]

CONSTITUTIONAL LAW §758

due process --

Headnote:[14]

The *Federal Constitution's Fifth Amendment* entitles aliens to due process of law in deportation proceedings.

[***LEdHN15]

BAIL AND RECOGNIZANCE §6.5

507 U.S. 292, *; 113 S. Ct. 1439, **;
123 L. Ed. 2d 1, ***LEdHN15; 1993 U.S. LEXIS 2399

right to judicial review -- detention pending
deportation hearing --

Headnote:[15]

With respect to an alien who has been notified of an Immigration and Naturalization Service (INS) decision whether, pending a deportation hearing, the alien will be detained in the custody of the INS, released on recognizance, or released under bond, if the alien requests a custody redetermination hearing before an immigration judge, and if the alien is dissatisfied with the outcome of the custody redetermination hearing and the review of that outcome by the Board of Immigration Appeals, then the alien may obtain further review by the federal courts.

[***LEdHN16]

COURTS §153

deportation of aliens -- role of Congress --

Headnote:[16]

It is for Congress, not the United States Supreme Court, to reorder the priorities of the Immigration and Naturalization Service (INS) so as to impose on the INS, which is essentially a law enforcement agency, the obligation to expend the INS' limited resources to develop the requisite expertise and qualification to do individualized child-placement studies with respect to the release of alien juveniles detained pending deportation hearings. (Stevens and Blackmun, JJ., dissented in part from this holding.)

[***LEdHN17]

STATUTES §107

avoiding constitutional doubts --

Headnote:[17A][17B]

A statute should be interpreted to eliminate serious constitutional doubts, not to eliminate all possible contentions that the statute might be unconstitutional.

[***LEdHN18]

COURTS §92.7

distinction from legislature --

Headnote:[18]

The United States Supreme Court is not a legislature charged with formulating public policy.

SYLLABUS

Respondents are a class of alien juveniles arrested by the Immigration and Naturalization Service (INS) on suspicion of being deportable, and then detained pending deportation hearings pursuant to a regulation, promulgated in 1988 and codified at 8 CFR § 242.24, which provides for the release of detained minors only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances. An immigration judge will review the initial deportability and custody determinations upon request by the juvenile. § 242.2(d). Pursuant to a consent decree entered earlier in the litigation, juveniles who are not released must be placed in juvenile care facilities that meet or exceed state licensing requirements for the provision of services to dependent children. Respondents contend that they have a right under the Constitution and immigration laws to be routinely released into the custody of other "responsible adults." The District Court invalidated the regulatory scheme on unspecified due process grounds, ordering that "responsible adult part[ies]" be added to the list of persons to whom a juvenile must be released and requiring that a hearing before an immigration judge be held automatically, whether or not the juvenile requests it. The Court of Appeals, en banc, affirmed.

Held:

1. Because this is a facial challenge to the regulation, respondents must establish that no set of circumstances exists under which the regulation would be valid. *United States v. Salerno*, 481 U.S. 739, 745. Pp. 300-301, 95 L. Ed. 2d 697, 107 S. Ct. 2095.

2. Regulation 242.24, on its face, does not violate the Due Process Clause. Pp. 301-309.

(a) The regulation does not deprive respondents of "substantive due process." The substantive right asserted by respondents is properly described as the right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a private custodian rather than of a government-operated or government-selected child-care institution. That novel claim cannot be

considered "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *United States v. Salerno*, *supra*, at 751. It is therefore sufficient that the regulation is rationally connected to the government's interest in preserving and promoting the welfare of detained juveniles, and is not punitive since it is not excessive in relation to that valid purpose. Nor does each unaccompanied juvenile have a substantive right to an individualized hearing on whether private placement would be in his "best interests." Governmental custody must meet minimum standards, as the consent decree indicates it does here, but the decision to exceed those standards is a policy judgment, not a constitutional imperative. Any remaining constitutional doubts are eliminated by the fact that almost all respondents are aliens suspected of being deportable, a class that can be detained, and over which Congress has granted the Attorney General broad discretion regarding detention. 8 U.S.C. § 1252 (a)(1). Pp. 301-306.

(b) Existing INS procedures provide alien juveniles with "procedural due process." Respondents' demand for an individualized custody hearing for each detained alien juvenile is merely the "substantive due process" argument recast in procedural terms. Nor are the procedures faulty because they do not require automatic review by an immigration judge of initial deportability and custody determinations. In the context of this facial challenge, providing the *right* to review suffices. It has not been shown that all of the juveniles detained are too young or ignorant to exercise that right; any waiver of a hearing is revocable; and there is no evidence of excessive delay in holding hearings when requested. Pp. 306-309.

3. The regulation does not exceed the scope of the Attorney General's discretion to continue custody over arrested aliens under 8 U.S.C. § 1252(a)(1). It rationally pursues a purpose that is lawful for the INS to seek, striking a balance between the INS's concern that the juveniles' welfare will not permit their release to just any adult and the INS's assessment that it has neither the expertise nor the resources to conduct home studies for individualized placements. The list of approved custodians reflects the traditional view that parents and close relatives are competent custodians, and otherwise defers to the States' proficiency in the field of child custody. The regulation is not motivated by administrative convenience; its use of presumptions and generic rules is reasonable; and the period of detention that may result is limited by the pending deportation

hearing, which must be concluded with reasonable dispatch to avoid habeas corpus. Pp. 309-315.

COUNSEL: Deputy Solicitor General Mahoney argued the cause for petitioners. With her on the briefs were Solicitor General Starr, Assistant Attorney General Gerson, Ronald J. Mann, Michael Jay Singer, and John C. Hoyle.

Carlos Holguin argued the cause for respondents. With him on the brief were Peter A. Schey, Paul Hoffman, Mark Rosenbaum, James Morales, Alice Bussiere, Lucas Guttentag, and John A. Powell. *

* Briefs of amici curiae urging affirmance were filed for the American Bar Association by Talbot D'Alemberte, Andrew S. Krulwich, and Christopher D. Cerf; for Amnesty International U.S.A. by Clara A. Pope; for the Child Welfare League of America et al. by J. Michael Klise, Clifton S. Elgarten, and John R. Heisse II; for the Southwest Refugee Rights Project et al. by Antonia Hernandez, Richard Larson, Susan M. Lydon, and Bill Ong Hing; and for the United States Catholic Conference et al. by William F. Abrams.

JUDGES: SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which SOUTER, J., joined, post, p. 315. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, post, p. 320.

OPINION BY: SCALIA

OPINION

[*294] [**1443] [***12] JUSTICE SCALIA delivered the opinion of the Court.

Over the past decade, the Immigration and Naturalization Service (INS or Service) has arrested increasing numbers of alien juveniles who are not accompanied by their parents or other related adults. Respondents, a class of alien juveniles so arrested and held in INS custody pending their deportation hearings, contend that the Constitution and immigration laws

require them to be released into the custody of "responsible adults."

I

Congress has given the Attorney General broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending [*295] the deportation hearing.¹ The Board of Immigration Appeals has stated that [HN1] "an alien generally . . . should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk." *Matter of Patel*, 15 I. & N. Dec. 666 (1976); cf. *INS v. National Center for Immigrants' Rights, Inc. (NCIR)*, 502 U.S. 183, 116 L. Ed. 2d 546, 112 S. Ct. 551 (1991) (upholding INS regulation imposing conditions upon release). In the case of arrested alien juveniles, however, the INS cannot simply send them off into the night on bond or recognizance. The parties to the present suit agree that the Service must assure itself that someone will care for those minors pending resolution of their deportation proceedings. That is easily done when the juvenile's parents have also been detained and the family can be released together; it becomes complicated when the juvenile is arrested alone, *i.e.*, unaccompanied by a parent, guardian, or other related adult. This problem is a serious one, since the INS arrests thousands of alien juveniles each year (more than 8,500 in 1990 alone) -- as many as 70% of them unaccompanied. Brief for Petitioners 8. Most of these minors are boys in their midteens, but perhaps 15% are girls and the same percentage 14 years of age or younger. See *id.*, at 9, n. 12; App. to Pet. for Cert. 177a.

¹ Title [HN2] 8 U.S.C. § 1252(a)(1), 66 Stat. 208, as amended, provides: "Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole . . . may be revoked at any time by the Attorney General, in his discretion . . ."

The Attorney General's discretion to release aliens convicted of aggravated felonies is narrower. See 8 U.S.C. § 1252(a)(2) (1988 *ed.*, *Supp. III*).

[**1444] For a number of years the problem was apparently dealt with on a regional and ad hoc basis, with some INS offices releasing unaccompanied alien juveniles not only to their parents but also to a range of other adults and organizations. [*296] In 1984, responding to the increased flow of unaccompanied juvenile aliens into California, the INS Western Regional Office adopted a policy of limiting the release of detained minors to "a parent or lawful guardian," except in "unusual and extraordinary cases," when the juvenile could be released to "a responsible individual who agrees to provide [***13] care and be responsible for the welfare and well being of the child." See *Flores v. Meese*, 934 F.2d 991, 994 (CA9 1990) (quoting policy), vacated, 942 F.2d 1352 (CA9 1991) (*en banc*).

In July of the following year, the four respondents filed an action in the District Court for the Central District of California on behalf of a class, later certified by the court, consisting of all aliens under the age of 18 who are detained by the INS Western Region because "a parent or legal guardian fails to personally appear to take custody of them." App. 29. The complaint raised seven claims, the first two challenging the Western Region release policy (on constitutional, statutory, and international law grounds), and the final five challenging the conditions of the juveniles' detention.

The District Court granted the INS partial summary judgment on the statutory and international law challenges to the release policy, and in late 1987 approved a consent decree that settled all claims regarding the detention conditions. The court then turned to the constitutional challenges to the release policy, and granted respondents partial summary judgment on their equal protection claim that the INS had no rational basis for treating alien minors in deportation proceedings differently from alien minors in exclusion proceedings² (whom INS regulations permitted to be paroled, in some circumstances, to persons other than parents and legal guardians, including other relatives and "friends," see 8 CFR § 212.5(a)(2)(ii) (1987)). This prompted the INS to initiate [*297] notice-and-comment rulemaking "to codify Service policy regarding detention and release of juvenile aliens and to provide a single policy for juveniles in both deportation and exclusion proceedings." 52 *Fed. Reg.* 38245 (1987). The District Court agreed to defer consideration of respondents' due process claims until the regulation was promulgated.

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2 Exclusion proceedings, which are not at issue in the present case, involve aliens apprehended before "entering" the United States, as that term is used in the immigration laws. See *Leng May Ma v. Barber*, 357 U.S. 185, 187, 2 L. Ed. 2d 1246, 78 S. Ct. 1072 (1958).

The uniform deportation-exclusion rule finally adopted, published on May 17, 1988, see Detention and Release of Juveniles, 53 Fed. Reg. 17449 (codified as to deportation at [HN3] 8 CFR § 242.24 (1992)), expanded the possibilities for release somewhat beyond the Western Region policy, but not as far as many commenters had suggested. It provides that alien juveniles "shall be released, in order of preference, to: (i) a parent; (ii) a legal guardian; or (iii) an adult relative (brother, sister, aunt, uncle, grandparent) who are [sic] not presently in INS detention," unless the INS determines that "the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others." 8 CFR § 242.24(b)(1) (1992). If the only listed individuals are in INS detention, the Service will consider simultaneous release of the juvenile and custodian "on a discretionary case-by-case basis." § 242.24(b)(2). A parent or legal guardian who is in INS custody or outside the United States may also, by sworn affidavit, designate another person as capable and willing to care for the child, provided that person "execute[s] an agreement to care for [***14] the juvenile and to ensure the juvenile's presence at all future proceedings." § 242.24(b)(3). Finally, in "unusual and compelling circumstances and in the discretion of the [INS] district [**1445] director or chief patrol agent," juveniles may be released to other adults who execute a care and attendance agreement. § 242.24(b)(4).

If the juvenile is *not* released under the foregoing provision, the regulation requires a designated INS official, the "Juvenile Coordinator," to locate "suitable placement . . . in a facility designated for the occupancy of juveniles." [*298] § 242.24(c). The Service may briefly hold the minor in an "INS detention facility having separate accommodations for juveniles," § 242.24(d), but under the terms of the consent decree resolving respondents' conditions-of-detention claims, the INS must within 72 hours of arrest place alien juveniles in a facility that meets or exceeds the standards established by the Alien Minors Care Program of the Community Relations Service (CRS), Department of

Justice, 52 Fed. Reg. 15569 (1987). See Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, *Flores v. Meese*, No. 85-4544-RJK (Px) (CD Cal., Nov. 30, 1987) (incorporating the CRS notice and program description), reprinted in App. to Pet. for Cert. 148a-205a (hereinafter Juvenile Care Agreement).

Juveniles placed in these facilities are deemed to be in INS detention "because of issues of payment and authorization of medical care." 53 Fed. Reg., at 17449. "Legal custody" rather than "detention" more accurately describes the reality of the arrangement, however, since these are not correctional institutions but facilities that meet "state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children," Juvenile Care Agreement 176a, and are operated "in an open type of setting without a need for extraordinary security measures," *id.*, at 173a. The facilities must provide, in accordance with "applicable state child welfare statutes and generally accepted child welfare standards, practices, principles and procedures," *id.*, at 157a, an extensive list of services, including physical care and maintenance, individual and group counseling, education, recreation and leisure-time activities, family reunification services, and access to religious services, visitors, and legal assistance, *id.*, at 159a, 178a-185a.

Although the regulation replaced the Western Region release policy that had been the focus of respondents' constitutional claims, respondents decided to maintain the litigation as a challenge to the new rule. Just a week after the regulation [*299] took effect, in a brief, unpublished order that referred only to unspecified "due process grounds," the District Court granted summary judgment to respondents and invalidated the regulatory scheme in three important respects. *Flores v. Meese*, No. CV 85-4544-RJK (Px) (CD Cal., May 25, 1988), App. to Pet. for Cert. 146a. First, the court ordered the INS to release "any minor otherwise eligible for release . . . to his parents, guardian, custodian, conservator, or other responsible adult party." *Ibid.* (emphasis added). Second, the order dispensed with the regulation's requirement that unrelated custodians formally agree to *care for* the juvenile, 8 CFR §§ 242.24(b)(3) and (4) (1992), in addition to ensuring his [***15] attendance at future proceedings. Finally, the District Court rewrote the related INS regulations that provide for an initial determination of prima facie deportability and release

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conditions before an INS examiner, see § 287.3, with review by an immigration judge upon the alien's request, see § 242.2(d). It decreed instead that an immigration-judge hearing on probable cause and release restrictions should be provided "forthwith" after arrest, whether or not the juvenile requests it. App. to Pet. for Cert. 146a.

A divided panel of the Court of Appeals reversed. *Flores v. Meese*, 934 F.2d 991 (CA9 1990). The Ninth Circuit voted to rehear the case and selected an 11-judge en banc court. See *Ninth Circuit Rule 35-3*. That court vacated the panel opinion and affirmed the District Court order "in all respects." *Flores v. Meese*, 942 F.2d 1352, 1365 (1991). One judge dissented in part, [**1446] see *id.*, at 1372-1377 (opinion of Rymer, J.), and four *in toto*, see *id.*, at 1377-1385 (opinion of Wallace, C.J.). We granted certiorari. 503 U.S. 905 (1992).

II

[**LEdHR1A] [1A] [**LEdHR2A] [2A] [**LEdHR3A] [3A] [**LEdHR4A] [4A] [**LEdHR5A] [5A] Respondents make three principal attacks upon INS regulation 242.24. First, they assert that alien juveniles suspected of being deportable have a "fundamental" right to "freedom from physical restraint," Brief for Respondents 16, [*300] and it is therefore a denial of "substantive due process" to detain them, since the Service cannot prove that it is pursuing an important governmental interest in a manner narrowly tailored to minimize the restraint on liberty. Second, respondents argue that the regulation violates "procedural due process," because it does not require the Service to determine, with regard to *each individual* detained juvenile who lacks an approved custodian, whether his best interests lie in remaining in INS custody or in release to some other "responsible adult." Finally, respondents contend that even if the INS regulation infringes no constitutional rights, it exceeds the Attorney General's authority under 8 U.S.C. § 1252(a)(1). We find it economic to discuss the objections in that order, though we of course reach the constitutional issues only because we conclude that the respondents' statutory argument fails.³

[**LEdHR4B] [4B]

3 The District Court and all three judges on the Court of Appeals panel held in favor of the INS on this statutory claim, see *Flores v. Meese*, 934

F.2d 991, 995, 997-1002 (CA9 1991); id., at 1015 (Fletcher, J., dissenting); the en banc court (curiously) did not address the claim, proceeding immediately to find the rule unconstitutional. Although respondents did not cross-petition for certiorari on the statutory issue, they may legitimately defend their judgment on any ground properly raised below. See *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 476, n. 20, 58 L. Ed. 2d 740, 99 S. Ct. 740 (1979). The INS does not object to our considering the issue, and we do so in order to avoid deciding constitutional questions unnecessarily. See *Jean v. Nelson*, 472 U.S. 846, 854, 86 L. Ed. 2d 664, 105 S. Ct. 2992 (1985).

[**LEdHR5B] [5B] Before proceeding further, however, we make two important observations. First, this is a facial challenge to INS regulation 242.24. Respondents do not challenge its application in a particular instance; it had not yet been applied in a particular instance -- because it was not yet in existence -- when their suit was brought (directed at the 1984 [**16] Western Region release policy), and it had been in effect only a week when the District Court issued the judgment invalidating it. We have before us no findings of fact, indeed no record, concerning the INS's interpretation of the regulation or the [*301] history of its enforcement. We have only the regulation itself and the statement of basis and purpose that accompanied its promulgation. [HN4] To prevail in such a facial challenge, respondents "must establish that no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). That is true as to both the constitutional challenges, see *Schall v. Martin*, 467 U.S. 253, 268, n. 18, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984), and the statutory challenge, see *NCIR*, 502 U.S. at 188.

The second point is related. Respondents spend much time, and their *amici* even more, condemning the conditions under which some alien juveniles are held, alleging that the conditions are so severe as to belie the Service's stated reasons for retaining custody -- leading, presumably, to the conclusion that the retention of custody is an unconstitutional infliction of punishment without trial. See *Salerno*, *supra*, at 746-748; *Wong Wing*

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v. United States, 163 U.S. 228, 237, 41 L. Ed. 140, 16 S. Ct. 977 (1896). But whatever those conditions might have been when this litigation began, they are now (at least in the Western Region, where all members of the respondents' class are held) presumably in compliance with the extensive requirements [**1447] set forth in the Juvenile Care Agreement that settled respondents' claims regarding detention conditions, see *supra*, at 298. The settlement agreement entitles respondents to enforce compliance with those requirements in the District Court, see Juvenile Care Agreement 148a-149a, which they acknowledge they have not done, Tr. of Oral Arg. 43. We will disregard the effort to reopen those settled claims by alleging, for purposes of the challenges to the regulation, that the detention conditions are other than what the consent decree says they must be.

III

[***LEdHR1B] [1B] [***LEdHR6] [6] Respondents' "substantive due process" claim relies upon our line of cases which interprets [HN5] the *Fifth* and *Fourteenth Amendments'* guarantee of "due process of law" to include [*302] a substantive component, which forbids the government to infringe certain "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. See, e.g., *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992); *Salerno, supra*, at 746; *Bowers v. Hardwick*, 478 U.S. 186, 191, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). "Substantive due process" analysis must begin with a careful description of the asserted right, for "the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins, supra*, at 125; see *Bowers v. Hardwick, supra*, at 194-195. The "freedom from physical restraint" invoked by respondents is not at issue [***17] in this case. Surely not in the sense of shackles, chains, or barred cells, given the Juvenile Care Agreement. Nor even in the sense of a right to come and go at will, since, as we have said elsewhere, "juveniles, unlike adults, are always in some form of custody," *Schall*, 467 U.S. at 265, and where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so. *Ibid*. Nor is the right asserted the right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives: The challenged regulation requires

such release when it is sought. Rather, the right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.

[***LEdHR1C] [1C] If there exists a fundamental right to be released into what respondents inaccurately call a "non-custodial setting," Brief for Respondents 18, we see no reason why it would apply only in the context of government custody incidentally acquired in the course of law enforcement. It would presumably apply to state custody over orphans and abandoned [*303] children as well, giving federal law and federal courts a major new role in the management of state orphanages and other child-care institutions. Cf. *Ankenbrandt v. Richards*, 504 U.S. 689, 703-704, 119 L. Ed. 2d 468, 112 S. Ct. 2206 (1992). We are unaware, however, that any court -- aside from the courts below -- has ever held that a child has a constitutional right not to be placed in a decent and humane custodial institution if there is available a responsible person unwilling to become the child's legal guardian but willing to undertake temporary legal custody. The mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it; the alleged right certainly cannot be considered "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Salerno, supra*, at 751 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 54 S. Ct. 330 [**1448] (1934)). [HN6] Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in "preserving and promoting the welfare of the child," *Santosky v. Kramer*, 455 U.S. 745, 766, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982), and is not punitive since it is not excessive in relation to that valid purpose. See *Schall, supra*, at 269.

[***LEdHR1D] [1D] [***LEdHR7] [7] [***LEdHR8] [8] [***LEdHR9] [9] Although respondents generally argue for the categorical right of private placement discussed above, at some points they assert a somewhat more limited constitutional right: the right to an individualized hearing on whether private placement

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would be in the child's "best interests" -- followed by private placement if the answer is in the affirmative. It seems to us, however, that if institutional custody (despite [***18] the availability of responsible private custodians) is not unconstitutional in itself, it does not become so simply because it is shown to be less desirable than some other arrangement for the particular child. [HN7] "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a [*304] proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion -- much less the sole *constitutional* criterion -- for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*. See *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978). Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves. See, e.g., *R. C. N. v. State*, 141 Ga. App. 490, 491, 233 S.E.2d 866, 867 (1977).

[***LEdHR1E] [1E] [***LEdHR10] [10]"The best interests of the child" is likewise not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsibilities that it undertakes, which must be reconciled with many other responsibilities. Thus, child-care institutions operated by the State in the exercise of its *parens patriae* authority, see *Schall, supra*, at 265, are not constitutionally required to be funded at such a level as to provide the *best* schooling or the *best* health care available; nor does the Constitution require them to substitute, wherever possible, private nonadoptive custody for institutional care. And the same principle applies, we think, to the governmental responsibility at issue here, that of retaining or transferring custody over a child who has come within the Federal Government's control, when the parents or guardians of that child are nonexistent or

unavailable. Minimum standards must be met, and the child's fundamental rights must not be impaired; but the decision to go beyond [*305] those requirements -- to give one or another of the child's additional interests priority over other concerns that compete for public funds and administrative attention -- is a policy judgment rather than a constitutional imperative.

[***LEdHR1F] [1F] [***LEdHR11] [11]Respondents' "best interests" argument is, in essence, a demand that the INS program be narrowly tailored to minimize the denial of release into private custody. But narrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest (here, the alleged interest in being released into the custody of strangers) demands no more than a [**1449] "reasonable fit" between governmental purpose (here, protecting the welfare of the juveniles who have come into the Government's custody) and the means chosen to advance that purpose. This leaves ample room for an agency to decide, as the INS has, that administrative factors such as [***19] lack of child-placement expertise favor using one means rather than another. [HN8] There is, in short, no constitutional need for a hearing to determine whether private placement would be better, so long as institutional custody is (as we readily find it to be, assuming compliance with the requirements of the consent decree) good enough.

[***LEdHR1G] [1G] [***LEdHR12] [12]If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles (concededly the overwhelming majority of all involved here) who are aliens. "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz*, 426 U.S. 67, 81, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976). "Over no conceivable subject is the legislative power of Congress more complete." *Fiallo v. Bell*, 430 U.S. 787, 792, 52 L. Ed. 2d 50, 97 S. Ct. 1473 (1977) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 53 L. Ed. 1013, 29 S. Ct. 671 (1909)). Thus, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes [*306] rules that would be unacceptable if applied to citizens.'" 430 U.S. at 792 (quoting *Mathews v. Diaz, supra*, at 79-80). Respondents do not dispute that Congress has the authority to detain

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aliens suspected of entering the country illegally pending their deportation hearings, see *Carlson v. Landon*, 342 U.S. 524, 538, 96 L. Ed. 547, 72 S. Ct. 525 (1952); *Wong Wing v. United States*, 163 U.S. at 235. And in enacting the precursor to 8 U.S.C. § 1252(a), Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General. See *Carlson v. Landon*, *supra*, at 538-540. Of course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose -- which it does, as we shall discuss later in connection with the statutory challenge.

[***LEdHR13] [13] Respondents also argue, in a footnote, that the INS release policy violates the "equal protection guarantee" of the *Fifth Amendment* because of the disparate treatment evident in (1) releasing alien juveniles with close relatives or legal guardians but detaining those without, and (2) releasing to unrelated adults juveniles detained pending federal delinquency proceedings, see 18 U.S.C. § 5034, but detaining unaccompanied alien juveniles pending deportation proceedings. The tradition of reposing custody in close relatives and legal guardians is in our view sufficient to support the former distinction; and the difference between citizens and aliens is adequate to support the latter.

IV

[***LEdHR2B] [2B] [***LEdHR14] [14] We turn now from the claim that the INS cannot deprive respondents of their asserted liberty interest *at all*, to the "procedural due process" claim that the Service cannot do so on the basis of the procedures it provides. It is well established that [HN9] the *Fifth Amendment* entitles aliens to due process of law in deportation proceedings. See *The Japanese Immigrant Case*, 189 U.S. 86, 100-101, 47 L. Ed. 721, 23 S. Ct. 611 [***20] (1903). To determine whether these alien juveniles have received it here, we must [*307] first review in some detail the procedures the INS has employed.

[***LEdHR2C] [2C] [***LEdHR15] [15] Though a procedure for obtaining warrants to arrest named individuals is available, see 8 U.S.C. § 1252(a)(1); 8 CFR § 242.2(c)(1) (1992), the deportation process ordinarily begins with a warrantless arrest by an INS officer who has reason to believe [**1450] that the arrestee "is in the

United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained," 8 U.S.C. § 1357(a)(2). Arrested aliens are almost always offered the choice of departing the country voluntarily, 8 U.S.C. § 1252(b) (1988 ed., Supp. III); 8 CFR § 242.5 (1992), and as many as 98% of them take that course. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044, 82 L. Ed. 2d 778, 104 S. Ct. 3479 (1984). Before the Service seeks execution of a voluntary departure form by a *juvenile*, however, the juvenile "must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list." 8 CFR § 242.24(g) (1992).⁴ If the juvenile does not seek voluntary departure, he must be brought before an INS examining officer within 24 hours of his arrest. § 287.3; see 8 U.S.C. § 1357(a)(2). The examining officer is a member of the Service's enforcement staff, but must be someone other than the arresting officer (unless no other qualified examiner is readily available). 8 CFR § 287.3 (1992). If the examiner determines that "there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws," *ibid.*, a formal deportation proceeding is initiated through the issuance of an order to show cause, § 242.1, and within 24 hours the decision is made whether to continue the alien juvenile in custody or release him, § 287.3.

4 Alien juveniles from Canada and Mexico must be offered the opportunity to make a telephone call but need not in fact do so, see 8 CFR § 242.24(g) (1992); the United States has treaty obligations to notify diplomatic or consular officers of those countries whenever their nationals are detained, see § 242.2(g).

[*308] The INS notifies the alien of the commencement of a deportation proceeding and of the decision as to custody by serving him with a Form I-221S (reprinted in App. to Brief for Petitioners 7a-8a) which, pursuant to the Immigration Act of 1990, 8 U.S.C. § 1252b(a)(3)(A) (1988 ed., Supp. III), must be in English and Spanish. The front of this form notifies the alien of the allegations against him and the date of his deportation hearing. The back contains a section entitled "NOTICE OF CUSTODY DETERMINATION," in which the INS officer checks a box indicating whether the alien will be detained in the custody of the Service, released on recognizance, or released under bond. Beneath these boxes, the form states: "You may request the Immigration Judge to redetermine this decision." See 8 CFR §

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242.2(c)(2) (1992). (The immigration judge is a quasi-judicial officer in the Executive Office for Immigration Review, a division separated from the Service's enforcement staff. § 3.10.) The alien must check either a box stating "I do" or a box stating [***21] "[I] do not request a redetermination by an Immigration Judge of the custody decision," and must then sign and date this section of the form. If the alien requests a hearing and is dissatisfied with the outcome, he may obtain further review by the Board of Immigration Appeals, § 242.2(d); § 3.1(b)(7), and by the federal courts, see, e.g., *Carlson v. Landon*, *supra*, at 529, 531.

[***LEdHR2D] [2D] Respondents contend that this procedural system is unconstitutional because it does not require the Service to determine in the case of each individual alien juvenile that detention in INS custody would better serve his interests than release to some other "responsible adult." This is just the "substantive due process" argument recast in "procedural due process" terms, and we reject it for the same reasons.

The District Court and the en banc Court of Appeals concluded that the INS procedures are faulty because they do not provide for *automatic* review by an immigration judge of the initial deportability and custody determinations. See [*309] *942 F.2d at 1364*. We disagree. At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the *right* to a hearing before an immigration [**1451] judge. It has not been shown that all of them are too young or too ignorant to exercise that right when the form asking them to assert or waive it is presented. Most are 16 or 17 years old and will have been in telephone contact with a responsible adult outside the INS -- sometimes a legal services attorney. The waiver, moreover, is revocable: [HN10] The alien may request a judicial redetermination at any time later in the deportation process. See 8 CFR § 242.2(d) (1992); *Matter of Uluocha*, Interim Dec. 3124 (BIA 1989). We have held that [HN11] juveniles are capable of "knowingly and intelligently" waiving their right against self-incrimination in criminal cases. See *Fare v. Michael C.*, 442 U.S. 707, 724-727, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979); see also *United States v. Saucedo-Velasquez*, 843 F.2d 832, 835 (CA5 1988) (applying *Fare* to alien juvenile). The alleged right to redetermination of prehearing custody status in deportation cases is surely no more significant.

Respondents point out that the regulations do not set a time period within which the immigration-judge hearing, if requested, must be held. But we will not assume, on this facial challenge, that an excessive delay will invariably ensue -- particularly since there is no evidence of such delay, even in isolated instances. Cf. *Matter of Chirinos*, 16 I. & N. Dec. 276 (BIA 1977).

V

[***LEdHR3B] [3B] Respondents contend that the regulation goes beyond the scope of the Attorney General's discretion to continue custody over arrested aliens under 8 U.S.C. § 1252(a)(1). That contention must be rejected if the regulation has a "reasonable foundation," *Carlson v. Landon*, 342 U.S. at 541, that is, if it rationally pursues a purpose that is lawful for the INS to seek. See also *NCIR*, 502 U.S. at 194. We think that it does.

[*310] [***LEdHR3C] [3C] The statement of basis and purpose accompanying promulgation [***22] of regulation 242.24, in addressing the question "as to whose custody the juvenile should be released," began with the dual propositions that "concern for the welfare of the juvenile will not permit release to just any adult" and that "the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released." *Detention and Release of Juveniles*, 53 *Fed. Reg. 17449 (1988)*. The INS decided to "strike a balance" by defining a list of presumptively appropriate custodians while maintaining the discretion of local INS directors to release detained minors to other custodians in "unusual and compelling circumstances." *Ibid*. The list begins with parents, whom our society and this Court's jurisprudence have always presumed to be the preferred and primary custodians of their minor children. See *Parham v. J. R.*, 442 U.S. 584, 602-603, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979). The list extends to other close blood relatives, whose protective relationship with children our society has also traditionally respected. See *Moore v. East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977); cf. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974). And finally, the list includes persons given legal guardianship by the States, which we have said possess "special proficiency" in the field of domestic relations, including child custody. *Ankenbrandt v. Richards*, 504

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U.S. at 704. When neither parent, close relative, or state-appointed guardian is immediately available,⁵ the INS will normally keep legal custody of the juvenile, place him in a government-supervised and state-licensed shelter-care [*311] facility, and continue searching [**1452] for a relative or guardian, although release to others is possible in unusual cases.⁶

5 The regulation also provides for release to any person designated by a juvenile's parent or guardian as "capable and willing to care for the juvenile's well-being." 8 CFR § 242.24(b)(3) (1992). "[To] ensure that the INS is actually receiving the wishes of the parent or guardian," 53 *Fed. Reg. 17450 (1988)*, the designation must be in the form of a sworn affidavit executed before an immigration or consular officer.

6 The dissent maintains that, in making custody decisions, the INS cannot rely on "categorical distinctions between cousins and uncles, or between relatives and godparents or other responsible persons," because "due process demands more, far more." *Post*, at 343. Acceptance of such a proposition would revolutionize much of our family law. Categorical distinctions between relatives and nonrelatives, and between relatives of varying degree of affinity, have always played a predominant role in determining child custody and in innumerable other aspects of domestic relations. The dissent asserts, however, that it would prohibit such distinctions only for the purpose of "prefer[ring] detention [by which it means institutional detention] to release," and accuses us of "mischaracterizing the issue" in suggesting otherwise. *Post*, at 343, n. 29. It seems to us that the dissent mischaracterizes the issue. The INS uses the categorical distinction between relatives and nonrelatives not to deny release, but to determine which potential custodians will be accepted without the safeguard of state-decreed guardianship.

[**LEdHR3D] [3D] [**LEdHR16] [16] Respondents object that this scheme is motivated purely by "administrative convenience," a charge echoed by the dissent, see, e.g., *post*, at 320. This fails to grasp the distinction between administrative convenience (or, to

speak less pejoratively, administrative efficiency) as the *purpose* of a policy -- for example, a policy of not considering late-filed objections -- and administrative [***23] efficiency as the reason for selecting one means of achieving a purpose over another. Only the latter is at issue here. The requisite statement of basis and purpose published by the INS upon promulgation of regulation 242.24 declares that the purpose of the rule is to protect "the welfare of the juvenile," 53 *Fed. Reg. 17449 (1988)*, and there is no basis for calling that false. (Respondents' contention that the real purpose was to save money imputes not merely mendacity but irrationality, since respondents point out that detention in shelter-care facilities is more expensive than release.) Because the regulation involves no deprivation of a "fundamental" right, the Service was not compelled to ignore the costs and difficulty of alternative means of advancing its declared goal. Cf. *Stanley v. [**312] Ill. 405 U.S. 645, 656-657, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)*. It is impossible to contradict the Service's assessment that it lacks the "expertise," and is not "qualified," to do individualized child-placement studies, 53 *Fed. Reg. 17449 (1988)*, and the right alleged here provides no basis for this Court to impose upon what is essentially a law enforcement agency the obligation to expend its limited resources in developing such expertise and qualification.⁷ That reordering of priorities is for Congress -- which has shown, we may say, no inclination to shrink from the task. See, e.g., 8 *U.S.C. § 1154(c)* (requiring INS to determine if applicants for immigration are involved in "sham" marriages). We do not hold, as the dissent contends, that "minimizing administrative costs" is adequate justification for the Service's detention of juveniles, *post*, at 320; but we do hold that [HN12] a detention program justified by the need to protect the welfare of juveniles is not constitutionally required to give custody to strangers if that entails the expenditure of administrative effort and resources that the Service is unwilling [**1453] to commit.⁸

7 By referring unrelated persons seeking custody to state guardianship procedures, the INS is essentially drawing upon resources and expertise that are already in place. Respondents' objection to this is puzzling, in light of their assertion that the States generally view unrelated adults as appropriate custodians. See *post*, at 325-326, n. 7 (STEVENS, J., dissenting) (collecting state statutes). If that is so, one wonders why the individuals and organizations respondents allege

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are eager to accept custody do not rush to state court, have themselves appointed legal guardians (temporary or permanent, the States have procedures for both), and then obtain the juveniles' release under the terms of the regulation. Respondents and their *amici* do maintain that becoming a guardian can be difficult, but the problems they identify -- delays in processing, the need to ensure that existing parental rights are not infringed, the "bureaucratic gauntlet" -- would be no less significant were the INS to duplicate existing state procedures.

8 We certainly agree with the dissent that this case must be decided in accordance with "indications of congressional policy," *post*, at 334. The most pertinent indication, however, is not, as the dissent believes, the federal statute governing detention of juveniles pending delinquency proceedings, 18 U.S.C. § 5034, but the statute under which the Attorney General is here acting, 8 U.S.C. § 1252(a)(1). That grants the Attorney General *discretion* to determine when temporary detention pending deportation proceedings is appropriate, and makes his exercise of that discretion "presumptively correct and unassailable except for abuse." *Carlson v. Landon*, 342 U.S. 524, 540, 96 L. Ed. 547, 72 S. Ct. 525 (1952). We assuredly cannot say that the decision to rely on universally accepted presumptions as to the custodial competence of parents and close relatives, and to defer to the expertise of the States regarding the capabilities of other potential custodians, is an abuse of this broad discretion simply because it does not track policies applicable outside the immigration field. See *NCIR*, 502 U.S. 183, 193-194, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991). Moreover, reliance upon the States to determine guardianship is quite in accord with what Congress has directed in other immigration contexts. See 8 U.S.C. § 1154(d) (INS may not approve immigration petition for an alien juvenile orphan being adopted unless "a valid home-study has been favorably recommended by an agency of the State of the child's proposed residence, or by an agency authorized by that State to conduct such a study"); § 1522(d)(2)(B)(ii) (for refugee children unaccompanied by parents or close relatives, INS shall "attempt to arrange . . . placement under the laws of the States"); see also 45 CFR § 400.113

(1992) (providing support payments under § 1522 until the refugee juvenile is placed with a parent or with another adult "to whom legal custody and/or guardianship is granted under State law").

[*313] [***24] [***LEdHR3E] [3E] [***LEdHR17A] [17A] Respondents also contend that the INS regulation violates the statute because it relies upon a "blanket" presumption of the unsuitability of custodians other than parents, close relatives, and guardians. We have stated that, at least in certain [HN13] contexts, the Attorney General's exercise of discretion under § 1252(a)(1) requires "some level of individualized determination." *NCIR*, 502 U.S. at 194; see also *Carlson v. Landon*, 342 U.S. at 538. But as *NCIR* itself demonstrates, this does not mean that the Service must forswear use of reasonable presumptions and generic rules. See 502 U.S. at 196, *n.* 11; cf. *Heckler v. Campbell*, 461 U.S. 458, 467, 76 L. Ed. 2d 66, 103 S. Ct. 1952 (1983). In the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation: Is there reason to believe the alien deportable? Is the alien under 18 years of age? Does the alien have an available [*314] adult relative or legal guardian? Is the alien's case so exceptional as to require consideration of release to someone else? The particularization and individuation need go no further than this.⁹

[***LEdHR17B] [17B]

9 The dissent would mandate fully individualized custody determinations for two reasons. First, because it reads *Carlson v. Landon*, *supra*, as holding that the Attorney General may not employ "mere presumptions" in exercising his discretion. *Post*, at 337. But it was only the *dissenters* in *Carlson* who took such a restrictive view. See 342 U.S. at 558-559, 563-564, 568 (Frankfurter, J., dissenting). Second, because it believes that § 1252(a) must be interpreted to require individualized hearings in order to avoid "constitutional doubts." *Post*, at 334 (quoting *United States v. Witkovich*, 353 U.S. 194, 199, 1 L. Ed. 2d 765, 77 S. Ct. 779 (1957)); see *post*, at 339-340. The "constitutional doubts" argument has been the last refuge of many an interpretive lost cause. Statutes should be interpreted to avoid

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serious constitutional doubts, *Witkovich, supra, at 202*, not to eliminate all possible contentions that the statute *might* be unconstitutional. We entertain no serious doubt that the Constitution does not require any more individuation than the regulation provides, see *supra, at 303-305, 309*, and thus find no need to supplement the text of § 1252(a).

[***LEdHR3F] [3F] Finally, respondents claim that the regulation is an abuse of discretion because it permits the INS, once having determined that an alien juvenile lacks an available relative or legal guardian, to hold the juvenile in detention indefinitely. That is not so. [HN14] The period of custody is inherently limited by the pending deportation hearing, which must be concluded with "reasonable dispatch" to avoid habeas corpus. 8 U.S.C. § 1252(a)(1); cf. *United States v. Salerno, 481 U.S. at 747* (noting time limits [***25] placed on pretrial detention by the Speedy Trial Act). It is expected that alien juveniles will remain in INS custody an average of only 30 days. See Juvenile Care Agreement 178a. There is no evidence that alien juveniles are being held for undue periods pursuant to regulation 242.24, or that habeas corpus is insufficient to remedy particular abuses. 10 And the reasonableness of the [*315] Service's negative assessment of putative custodians who fail to obtain legal guardianship would seem, if anything, to increase as time goes by.

10 The dissent's citation of a single deposition from 1986, *post, at 323*, and n. 6, is hardly proof that "excessive delay" will result in the "typical" case, *post, at 324*, under regulation 242.24, which was not promulgated until mid-1988.

* * *

[***LEdHR1H] [1H] [***LEdHR2E] [2E] [***LEdHR3G] [3G] [***LEdHR18] [18] We think the INS policy now in place is a reasonable response to the difficult problems presented when the Service arrests unaccompanied alien juveniles. It may well be that other policies would be even better, but "we are [not] a legislature charged with formulating public policy." *Schall v. Martin, 467 U.S. at 281*. [HN15] On its face, INS regulation 242.24 accords with both the Constitution and the relevant statute.

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

It is so ordered.

CONCUR BY: O'CONNOR

CONCUR

JUSTICE O'CONNOR, with whom JUSTICE SOUTER joins, concurring.

I join the Court's opinion and write separately simply to clarify that in my view these children have a constitutionally protected interest in freedom from institutional confinement. That interest lies within the core of the Due Process Clause, and the Court today does not hold otherwise. Rather, we reverse the decision of the Court of Appeals because the INS program challenged here, on its face, complies with the requirements of due process.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana, 504 U.S. 71, 80, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992)*. "Freedom from bodily restraint" means more than freedom from handcuffs, straitjackets, or detention cells. A person's core liberty interest is also implicated when she is confined in a prison, a mental hospital, or some other form of custodial institution, even if the conditions of confinement are liberal. This is clear beyond cavil, at least [*316] where adults are concerned. "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the 'deprivation of liberty' triggering the protections of the Due Process Clause" *DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 200, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989)*. The institutionalization of an adult [***26] by the government triggers heightened, substantive due process scrutiny. There must be a "sufficiently compelling" governmental interest to justify such action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the [**1454] community. *United States v. Salerno, 481 U.S. 739, 748, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)*; see *Foucha, supra, at 80-81*.

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Children, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional "freedom from bodily restraint" is no narrower than an adult's. Beginning with *In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967), we consistently have rejected the [**1455] assertion that "a child, unlike an adult, has a right 'not to liberty but to custody.'" *Id.*, at 17. *Gault* held that a child in delinquency proceedings must be provided various procedural due process protections (notice of charges, right to counsel, right of confrontation and cross-examination, privilege against self-incrimination) when those proceedings may result in the child's institutional confinement. As we explained:

"Ultimately, however, we confront the reality of . . . the Juvenile Court process . . . A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence -- and of limited practical meaning -- that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' [*317] or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a building with whitewashed walls, regimented routine and institutional hours. Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, [and] state employees" *Id.*, at 27 (footnote and internal quotation marks omitted).

See also *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) (proof-beyond-reasonable-doubt standard applies to delinquency proceedings); *Breed v. Jones*, 421 U.S. 519, 44 L. Ed. 2d 346, 95 S. Ct. 1779 (1975) (double jeopardy protection applies to delinquency proceedings); *Parham v. J. R.*, 442 U.S. 584, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979) (proceedings to commit child to mental hospital must satisfy procedural due process).

Our decision in *Schall v. Martin*, 467 U.S. 253, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984), makes clear that

children have a protected liberty interest in "freedom from institutional restraints," *id.*, at 265, even absent the stigma of being labeled "delinquent," see *Breed*, *supra*, at 529, or "mentally ill," see *Parham*, *supra*, at 600-601. In *Schall*, we upheld a New York statute authorizing pretrial detention of dangerous juveniles, but only after analyzing the statute at length to ensure that it complied with substantive and procedural due process. We recognized that children "are assumed to be subject to the control [***27] of their parents, and if parental control falters, the State must play its part as *parens patriae*." 467 U.S. at 265. But this *parens patriae* purpose was seen simply as a plausible *justification* for state action implicating the child's protected liberty interest, not as a limitation on the scope of due process protection. See *ibid.* Significantly, *Schall* was essentially a facial challenge, as is this case, and New York's policy was to detain some juveniles in "open facilit[ies] in the community . . . without locks, bars, or security officers where the child receives schooling and counseling and has access to recreational facilities." *Id.*, at 271. A [*318] child's placement in this kind of governmental institution is hardly the same as handcuffing her, or confining her to a cell, yet it must still satisfy heightened constitutional scrutiny.

It may seem odd that institutional placement as such, even where conditions are decent and humane and where the child has no less authority to make personal choices than she would have in a family setting, nonetheless implicates the Due Process Clause. The answer, I think, is this. Institutionalization is a decisive and unusual event. "The consequences of an erroneous commitment decision are more tragic where children are involved. Childhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives." *Parham*, *supra*, at 627-628 (footnotes [**1456] omitted) (opinion of Brennan, J.). Just as it is true that "in our society liberty [for adults] is the norm, and detention prior to trial or without trial is the carefully limited exception," *Salerno*, *supra*, at 755, so too, in our society, children normally grow up in families, not in governmental institutions. To be sure, government's failure to take custody of a child whose family is unable to care for her may also effect harm. But the purpose of heightened scrutiny is not to prevent government from placing children in an institutional setting, where necessary. Rather, judicial review ensures that government acts in this sensitive area with the requisite care.

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In sum, this case does not concern the scope of the Due Process Clause. We are not deciding whether the constitutional concept of "liberty" extends to some hitherto unprotected aspect of personal well-being, see, e.g., *Collins v. Harker Heights*, 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992); *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989); *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986), but rather whether a governmental decision implicating a squarely protected liberty interest comports with substantive and procedural due process. See *ante*, at 301-306 [*319] (substantive due process scrutiny); *ante*, at 306-309 (procedural due process scrutiny). Specifically, the absence of available parents, close relatives, or legal guardians to care for respondents does not vitiate their constitutional interest in freedom from institutional confinement. It does not place that interest outside the core of the Due Process Clause. Rather, combined with the Juvenile Care Agreement, the fact that the normal forms of custody have faltered [***28] explains why the INS program facially challenged here survives heightened, substantive due process scrutiny. "Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in 'preserving and promoting the welfare of the child,' *Santosky v. Kramer*, 455 U.S. 745, 766, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982), and is not punitive since it is not excessive in relation to that valid purpose." *Ante*, at 303. Because this is a facial challenge, the Court rightly focuses on the Juvenile Care Agreement. It is proper to presume that the conditions of confinement are no longer "most disturbing," *Flores v. Meese*, 942 F.2d 1352, 1358 (CA9 1991) (en banc) (quoting *Flores v. Meese*, 934 F.2d 991, 1014 (CA9 1990) (Fletcher, J., dissenting)), and that the purposes of confinement are no longer the troublesome ones of lack of resources and expertise published in the Federal Register, see 53 *Fed. Reg.* 17449 (1988), but rather the plainly legitimate purposes associated with the Government's concern for the welfare of the minors. With those presumptions in place, "the terms and conditions of confinement . . . are in fact compatible with [legitimate] purposes," *Schall, supra*, at 269, and the Court finds that the INS program conforms with the Due Process Clause. On this understanding, I join the opinion of the Court.

DISSENT BY: STEVENS

DISSENT

[*320] JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The Court devotes considerable attention to debunking the notion that "the best interests of the child" is an "absolute and exclusive" criterion for the Government's exercise of the custodial responsibilities that it undertakes. *Ante*, at 304. The Court reasons that as long as the conditions of detention are "good enough," *ante*, at 305, the Immigration and Naturalization Service (INS or Agency) is perfectly justified in declining to expend administrative effort and resources to minimize such detention. *Ante*, at 305, 311-312.

As I will explain, I disagree with that proposition, for in my view, an agency's interest [**1457] in minimizing administrative costs is a patently inadequate justification for the detention of harmless children, even when the conditions of detention are "good enough." ¹ What is most curious about the Court's analysis, however, is that the INS *itself* vigorously denies that its policy is motivated even in part by a desire to avoid the administrative burden of placing these children in the care of "other responsible adults." Reply Brief for Petitioners 4. That is, while the Court goes out of its way to attack "the best interest of the child" as a [***29] criterion for judging the INS detention policy, it is precisely that interest that the INS invokes as the sole basis for its refusal to release these children to "other responsible adults":

"The articulated basis for the detention is that it furthers the government's interest in ensuring the welfare of the juveniles in its custody. . . .

"[Respondents] argue that INS's interest in furthering juvenile welfare does not in fact support the policy [*321] because INS has a 'blanket' policy that requires detention without any factual showing that detention is necessary to ensure respondents' welfare. . . . That argument, however, represents nothing more than a policy disagreement, because it criticizes INS for failing to pursue a view of juvenile welfare that INS has not

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adopted, namely the view held by respondent: that it is better for alien juveniles to be released to unrelated adults than to be cared for in suitable, government-monitored juvenilecare facilities, except in those cases where the government has knowledge that the particular adult seeking custody is unfit. The policy adopted by INS, reflecting the traditional view of our polity that parents and guardians are the most reliable custodians for juveniles, is that it is inappropriate to release alien juveniles -- whose troubled background and lack of familiarity with our society and culture, give them particularized needs not commonly shared by domestic juveniles -- to adults who are not their parents or guardians." *Id.*, at 4-5 (internal citations, emphasis, and quotation marks omitted).

1 Though the concurring JUSTICES join the Court's opinion, they too seem to reject the notion that the fact that "other concerns . . . compete for public funds and administrative attention," *ante*, at 305, is a sufficient justification for the INS' policy of refusing to make individualized determinations as to whether these juveniles should be detained. *Ante*, at 319 (concurring opinion).

Possibly because of the implausibility of the INS' claim that it has made a reasonable judgment that detention in government-controlled or government-sponsored facilities is "better" or more "appropriate" for these children than release to independent *responsible* adults, the Court reaches out to justify the INS policy on a ground not only not argued, but expressly disavowed by the INS, that is, the tug of "other concerns that compete for public funds and administrative attention," *ante*, at 305. I cannot share my colleagues' eagerness for that aggressive tack in a case involving a substantial deprivation of liberty. Instead, I will begin where the INS asks us to begin, with its assertion that its policy is justified by its interest in protecting the welfare of these children. As I will explain, the INS' decision to detain these juveniles despite the existence of responsible [*322] adults willing and able

to assume custody of them is contrary to federal policy, is belied by years of experience with both citizen and alien juveniles, and finds no support whatsoever in the administrative proceedings that led to the promulgation of the Agency's regulation. I will then turn to the Court's statutory and constitutional analysis and explain why this ill-conceived and ill-considered regulation is neither authorized by § 242(a) of the Immigration and Nationality Act nor consistent with fundamental notions of due process of law.

At the outset, it is important to emphasize two critical points. First, this case involves the institutional detention of juveniles who pose [**1458] no risk of flight and no threat of harm to themselves or to others. They are children who have responsible third [***30] parties available to receive and care for them; many, perhaps most, of them will never be deported.² It makes little difference that juveniles, unlike adults, are always in some form of custody, for detention in an institution pursuant to the regulation is vastly different from release to a responsible person -- whether a cousin,³ a godparent, a friend, or a charitable organization -- willing to assume responsibility for the juvenile for the time the child would otherwise be detained.⁴ In many ways the difference is [*323] comparable to the difference between imprisonment and probation or parole. Both conditions can be described as "legal custody," but the constitutional dimensions of individual "liberty" identify the great divide that separates the two. See *Morrissey v. Brewer*, 408 U.S. 471, 482, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). The same is true regarding the allegedly improved conditions of confinement -- a proposition, incidentally, that is disputed by several *amici curiae*.⁵ The fact that the present conditions may satisfy standards appropriate for incarcerated juvenile offenders does not detract in the slightest from the basic proposition that this is a case about the wholesale detention of children who do not pose a risk of flight, and who are not a threat to either themselves or the community.

2 See Tr. of Oral Arg. 55 (statement by counsel for petitioners).

3 The Court assumes that the rule allows release to any "close relative," *ante*, at 302. The assumption is incorrect for two reasons: The close character of a family relationship is determined by much more than the degree of affinity; moreover, contrary to the traditional view expressed in *Moore v. East Cleveland*, 431 U.S. 494, 504, 52

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L. Ed. 2d 531, 97 S. Ct. 1932 (1977), the INS rule excludes cousins.

4 The difference is readily apparent even from the face of the allegedly benign Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, reprinted in App. to Pet. for Cert. 148a-205a (Juvenile Care Agreement), upon which the Court so heavily relies to sustain this regulation. To say that a juvenile care facility under the agreement is to be operated "in an open type of setting without a need for *extraordinary* security measures," *ante*, at 298 (quoting Juvenile Care Agreement 173a) (emphasis added), suggests that the facility has some *standard* level of security designed to ensure that children do not leave. That notion is reinforced by the very next sentence in the agreement: "However, recipients are required to design programs and strategies to discourage runaways and prevent the unauthorized absence of minors in care." *Ibid*.

Indeed, the very definition of the word "detention" in the American Bar Association's Juvenile Justice Standards reflects the fact that it still constitutes detention even if a juvenile is placed in a facility that is "decent and humane," *ante*, at 303:

"The definition of detention in this standard includes every facility used by the state to house juveniles during the interim period. Whether it gives the appearance of the worst sort of jail, or a comfortable and pleasant home, the facility is classified as 'detention' if it is not the juvenile's usual place of abode." Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards: Standards Relating to Interim Status 45 (1980) (citing Wald, "Pretrial Detention for Juveniles," in *Pursuing Justice for the Child* 119, 120 (Rosenheim ed. 1976)).

The point cannot be overemphasized. The legal formalism that children are always in someone else's custody should not obscure the fact that "institutionalization," as JUSTICE O'CONNOR explains, "is a decisive and unusual event." *Ante*, at 318 (concurring opinion).

5 See Brief for Southwest Refugee Rights Project et al. as *Amici Curiae* 20-33.

Second, the period of detention is indefinite, and

has, on occasion, approached one year.⁶ In its statement [***31] of policy [*324] governing proposed contracts with private institutions that may assume physical (though not legal) custody of these minors, the INS stated that the duration of the confinement "is anticipated to be approximately thirty (30) days; however, due to the variables and uncertainties inherent in each case, recipients must design programs which are able to provide a combination of short term and long term care." Juvenile Care Agreement 178a. The INS rule itself imposes no time limit on the period of detention. The only limit is the statutory right to seek a writ [**1459] of habeas corpus on the basis of a "conclusive showing" that the Attorney General is not processing the deportation proceeding "with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case . . ." 8 U.S.C. § 1252(a)(1). Because examples of protracted deportation proceedings are so common, the potential for a lengthy period of confinement is always present. The fact that an excessive delay may not "invariably ensue," *ante*, at 309, provides small comfort to the typical detainee.

6 See Deposition of Kim Carter Hedrick, INS Detention Center Director-Manager (CD Cal., June 27, 1986), p. 68.

I

The Court glosses over the history of this litigation, but that history speaks mountains about the bona fides of the Government's asserted justification for its regulation, and demonstrates the complete lack of support, in either evidence or experience, for the Government's contention that detaining alien juveniles when there are "other responsible parties" willing to assume care somehow protects the interests of these children.

The case was filed as a class action in response to a policy change adopted in 1984 by the Western Regional Office of the INS. Prior to that change, the relevant policy in the Western Region had conformed to the practice followed by the INS in the rest of the country, and also followed by federal magistrates throughout the country in the administration of § 504 of the Juvenile Justice and Delinquency Prevention [*325] Act of 1974. Consistently with the consensus expressed in a number of recommended standards for the treatment of juveniles,⁷ that [**1460] statute authorizes the release of a juvenile [*326] charged with an offense "to his parents, [***32] guardian, custodian, or *other responsible party*

(including, but not limited to, the director of a shelter-care facility) upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others." 18 U.S.C. § 5034 (emphasis added).⁸ There is no evidence in the record of this litigation that any release by the INS, or by a federal magistrate, to an "other responsible party" ever resulted in any harm to a juvenile. Thus, nationwide experience prior to 1984 discloses no evidence of any demonstrated need for a change in INS policy.

7 See, e.g., U.S. Dept. of Health, Education, and Welfare, Model Acts for Family Courts and State-Local Children's Programs 24 (1975) ("With all possible speed" the child should be released to "parents, guardian, custodian, or other suitable person able and willing to provide supervision and care"); U.S. Dept. of Justice, National Advisory Committee for Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice 299 (1980) (a juvenile subject to the jurisdiction of the family court "should be placed in a foster home or shelter facility only when . . . there is no person willing and able to provide supervision and care"); National Advisory Commission on Criminal Justice Standards and Goals, Corrections 267 (1973) ("Detention should be used only where the juvenile has no parent, guardian, custodian, or other person able to provide supervision and care"); Institute of Judicial Administration, American Bar Association, Standards Relating to Noncriminal Misbehavior 41, 42 (1982) ("If the juvenile consents," he should be released "to the parent, custodian, relative, or other responsible person as soon as practicable").

State law from across the country regarding the disposition of juveniles who come into state custody is consistent with these standards. See, e.g., Ala. Code § 12-15-62 (1986) (allowing release to custody of "a parent, guardian, custodian or any other person who the court deems proper"); Conn. Gen. Stat. § 46b-133 (1986) (allowing release to "parent or parents, guardian or some other suitable person or

agency"); D.C. Code Ann. § 16-2310 (1989) (allowing release to "parent, guardian, custodian, or other person or agency able to provide supervision and care for him"); Idaho Code § 16-1811.1(c) (Supp. 1992) (allowing release to custody of "parent or other responsible adult"); Iowa Code § 232.19(2) (1987) (release to "parent, guardian, custodian, responsible adult relative, or other adult approved by the court"); Ky. Rev. Stat. Ann. § 610.200 (Michie 1990) (release to custody of "relative, guardian, person exercising custodial control or supervision or other responsible person"); Me. Rev. Stat. Ann., Tit. 15, § 3203-A (Supp. 1992) (release to "legal custodian or other suitable person"); Md. Cts. & Jud. Proc. Code Ann. § 3-814(b)(1) (1989) (release to "parents, guardian, or custodian or to any other person designated by the court"); Mass. Gen. Laws § 119:67 (1969) (release to "parent, guardian or any other reputable person"); Minn. Stat. § 260.171 (1992) (release to "parent, guardian, custodian, or other suitable person"); Miss. Code Ann. § 43-21-301(4) (Supp. 1992) (release to "any person or agency"); Neb. Rev. Stat. § 43-253 (1988) (release to "parent, guardian, relative, or other responsible person"); Nev. Rev. Stat. § 62.170 (1991) (release to "parent or other responsible adult"); N. H. Rev. Stat. Ann. § 169-B:14 (1990) (release to relative, friend, foster home, group home, crisis home, or shelter-care facility); S. C. Code Ann. § 20-7-600 (Supp. 1992) (release to "parent, a responsible adult, a responsible agent of a court-approved foster home, group home, facility, or program"); S. D. Codified Laws § 26-7A-89 (1992) (release to probation officer or any other suitable person appointed by the court); Tex. Fam. Code Ann. § 52.02 (Supp. 1993) (release to "parent, guardian, custodian of the child, or other responsible adult"); Utah Code Ann. § 78-3a-29(3)(a) (1992) (release to "parent or other responsible adult").

8 As enacted in 1938, the Federal Juvenile Delinquency Act authorized a committing magistrate to release a juvenile "upon his own recognizance or that of some responsible person. . . . Such juvenile shall not be committed to a jail or other similar institution, unless in the opinion of the marshal it appears that such commitment is necessary to secure the custody of the juvenile or to insure his safety or that of others." § 5, 52 Stat.

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765. The "responsible person" alternative has been a part of our law ever since.

Nevertheless, in 1984 the Western Region of the INS adopted a separate policy for minors in deportation proceedings, but not for exclusion proceedings. The policy provided that minors would be released only to a parent or lawful guardian, except "in unusual and extraordinary cases, at the [*327] discretion of a District Director or Chief Patrol Agent." *Flores v. Meese*, 942 F.2d 1352, 1355 (CA9 1991). The regional Commissioner explained that the policy was "necessary to assure that the minor's welfare and safety is [sic] maintained and that the agency is protected against possible legal liability." *Flores v. Meese*, 934 F.2d 991, 994 (CA9 1990), vacated, 942 F.2d 1352 (CA9 1991) (en banc). As the Court of Appeals noted, the Commissioner "did not cite any instances of harm which had befallen children released to unrelated adults, nor did he make any reference to suits that [***33] had been filed against the INS arising out of allegedly improper releases." 942 F.2d at 1355.⁹

9 The court added: "It has remained undisputed throughout this proceeding that the blanket detention policy is not necessary to ensure the attendance of children at deportation hearings." 942 F.2d at 1355. Although the Commissioner's expressed concern about possible legal liability may well have been genuine, in view of the fact that the policy change occurred prior to our decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989), the Court of Appeals was surely correct in observing that "governmental agencies face far greater exposure to liability by maintaining a special custodial relationship than by releasing children from the constraints of governmental custody." 942 F.2d at 1363. Even if that were not true, the Agency's selfish interest in avoiding potential liability would be manifestly insufficient to justify its wholesale deprivation of a core liberty interest. In this Court, petitioners have prudently avoided any reliance on what may have been the true explanation for the genesis of this litigation.

The complete absence of evidence of any need for the policy change is not the only reason for questioning the bona fides of the Commissioner's expressed interest

in the welfare of alien minors as an explanation for his new policy. It is equally significant that at the time the new policy was adopted the conditions of confinement were admittedly "deplorable."¹⁰ How a responsible administrator could possibly [*328] conclude that the practice of commingling harmless children [**1461] with adults of the opposite sex¹¹ in detention centers protected by barbed-wire fences,¹² without providing them with education, recreation, or visitation,¹³ while subjecting them to arbitrary strip searches,¹⁴ would be in their best interests is most difficult to comprehend.

10 In response to respondents' argument in their brief in opposition to the petition for certiorari that the unsatisfactory character of the INS detention facilities justified the injunction entered by the District Court, the INS asserted that "these deplorable conditions were addressed and remedied during earlier proceedings in this case . . ." Reply to Brief in Opposition 3. If the deplorable conditions prevailed when the litigation began, we must assume that the Western Regional Commissioner was familiar with them when he adopted his allegedly benevolent policy.

11 See Deposition of Kim Carter Hedrick, *supra* n. 6, at 13.

12 See Declaration of Paul DeMuro, Consultant, U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention (CD Cal., Apr. 11, 1987), p. 7. After inspecting a number of detention facilities, Mr. DeMuro declared:

"It is clear as one approaches each facility that each facility is a locked, secure, detention facility. The Inglewood facility actually has two concentric perimeter fences in the part of the facility where children enter.

"The El Centro facility is a converted migrant farm workers' barracks which has been secured through the use of fences and barbed wire. The San Diego facility is the most jail-like. At this facility each barracks is secured through the use of fences, barbed wire, automatic locks, observation areas, etc. In addition the entire residential complex is secured through the use of a high security fence (16-18'), barbed wire, and supervised by uniformed guards." *Ibid*.

13 See *id.*, at 8.

14 See Defendants' Response to Requests for

507 U.S. 292, *328; 113 S. Ct. 1439, **1461;
123 L. Ed. 2d 1, ***33; 1993 U.S. LEXIS 2399

Admissions (CD Cal., Nov. 22, 1985), pp. 3-4.

The evidence relating to the period after 1984 only increases the doubt concerning the true motive for the policy adopted in the Western Region. First, as had been true before 1984, the absence of any indication of a need for such a policy in any other part of the country persisted. Moreover, there is evidence in the record that in the Western Region when undocumented parents came to claim their children, they were immediately arrested and deportation [***34] proceedings were instituted against them. *934 F.2d at 1023* (Fletcher, J., dissenting). Even if the detention of children might [*329] serve a rational enforcement purpose that played a part in the original decisional process, that possibility can only add to the Government's burden of trying to establish its legitimacy.

After this litigation was commenced, the District Court enjoined the enforcement of the new policy because there was no rational basis for the disparate treatment of juveniles in deportation and exclusion proceedings. That injunction prompted the INS to promulgate the nationwide rule that is now at issue.¹⁵ Significantly, however, in neither the rulemaking proceedings nor this litigation did the INS offer any evidence that compliance with that injunction caused any harm to juveniles or imposed any administrative burdens on the Agency.

¹⁵ The rule differs from the regional policy in three respects: (1) it applies to the entire country, rather than just the Western Region; (2) it applies to exclusion as well as deportation proceedings; and (3) it authorizes release to adult brothers, sisters, aunts, uncles, and grandparents as well as parents and legal guardians.

The Agency's explanation for its new rule relied on four factual assertions. First, the rule "provides a single policy for juveniles in both deportation and exclusion proceedings." *53 Fed. Reg. 17449 (1988)*. It thus removed the basis for the outstanding injunction. Second, the INS had "witnessed a dramatic increase in the number of juvenile aliens it encounters," most of whom were "not accompanied by a parent, legal guardian, or other adult relative." *Ibid.* There is no mention, however, of either the actual or the approximate number of juveniles encountered, or the much smaller number that do not elect voluntary departure.¹⁶ Third, the [*330] Agency stated that "concern for the welfare of the juvenile

[**1462] will not permit release to *just any adult*." *Ibid.* (emphasis added).¹⁷ There is no mention, however, of the obvious distinction between "just any adult" and the broad spectrum of responsible parties that can assume care of these children, such as extended family members, godparents, friends, and private charitable organizations. Fourth, "the Service has neither the expertise nor the [***35] resources to conduct home studies for placement of each juvenile released." *Ibid.* Again, however, there is no explanation of why any more elaborate or expensive "home study" would be necessary to evaluate the qualifications of apparently responsible persons than had been conducted in the past. There is a strange irony in both the fact that the INS suddenly decided that temporary releases that had been made routinely to responsible persons in the past now must be preceded by a "home study," and the fact that the scarcity of its "resources" provides the explanation for spending far more money on detention than would be necessary to perform its newly discovered home study obligation.¹⁸

¹⁶ In its brief in this Court petitioners' attempt to describe the magnitude of the problem addressed by the rule is based on material that is not in the record -- an independent study of a sample of juveniles detained in Texas in 1989, see Brief for Petitioners 8, n. 12, and the Court in turn relies on the assertions made in the brief for petitioners about the problem in 1990. See *ante*, at 295. Since all of those figures relate to a period well after the rule was proposed in 1987 and promulgated in 1988, they obviously tell us nothing about the "dramatic increase" mentioned by the INS. *53 Fed. Reg. 17449 (1988)*. Indeed, the study cited by the Government also has nothing to say about any *increase* in the number of encounters with juvenile aliens. In all events, the fact that both the Government and this Court deem it appropriate to rely on a *post hoc*, nonrecord exposition of the dimensions of the problem that supposedly led to a dramatic change in INS policy merely highlights the casual character of the Agency's deliberative process. One can only speculate about whether the "dramatic increase in the number of juvenile aliens it encounters," *ibid.*, or the District Court's injunction was the more important cause of the new rule.

¹⁷ This statement may be the source of the Court's similar comment that "the INS cannot simply send them off into the night on bond or

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recognizance." *Ante*, at 295. There is, of course, no evidence that the INS had ever followed such an irresponsible practice, or that there was any danger that it would do so in the future.

18 The record indicates that the cost of detention may amount to as much as \$ 100 per day per juvenile. Deposition of Robert J. Schmidt, Immigration and Naturalization Service (July 31, 1986), p. 76. Even the sort of elaborate home study that might be appropriate as a predicate to the adoption of a newborn baby should not cost as much as a few days of detention. Moreover, it is perfectly obvious that the qualifications of most responsible persons can readily be determined by a hearing officer, and that in any doubtful case release should be denied. The respondents have never argued that there is a duty to release juveniles to "just any adult." 53 *Fed. Reg.* 17449 (1988).

[*331] What the Agency failed to explain may be even more significant than what it did say. It made no comment at all on the uniform body of professional opinion that recognizes the harmful consequences of the detention of juveniles.¹⁹ It made no comment on the period of detention that would be required for the completion of deportation proceedings, or the reasons why the rule places no limit on the duration of the detention. Moreover, there is no explanation for the absence of any specified procedure for either the consideration or the review of a request for release to an apparently responsible person.²⁰ [***36] It is difficult to understand why an [*332] [**1463] agency purportedly motivated by the best interests of detained juveniles would have so little to say about obvious objections to its rule.

19 Consistent with the standards developed by the American Bar Association and other organizations and agencies, see n. 7, *supra*, the United States Department of Justice's own Standards for the Administration of Juvenile Justice describe "the harsh impact that even brief detention may have on a juvenile, especially when he/she is placed in a secure facility, and the corresponding need to assure as quickly as possible that such detention is necessary." U.S. Dept. of Justice, Standards for the Administration of Juvenile Justice, *supra* n. 7, at 304.

20 As Judge Rymer pointed out in her separate

opinion in the Court of Appeals: "Unlike the statutes at issue in *Schall v. Martin*, 467 U.S. 253, 81 L. Ed. 2d 207, 104 S. Ct. 2403 . . . (1984), and [*United States v.*] *Salerno*, [481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987),] which survived due process challenges, the INS regulations provide no opportunity for the reasoned consideration of an alien juvenile's release to the custody of a non-relative by a neutral hearing officer. Nor is there any provision for a prompt hearing on a § 242.24(b)(4) release. No findings or reasons are required. Nothing in the regulations provides the unaccompanied detainee any help, whether from counsel, a parent or guardian, or anyone else. Similarly, the regulation makes no provision for appointing a guardian if no family member or legal guardian comes forward. There is no analogue to a pretrial services report, however cursory. While the INS argues that it lacks resources to conduct home studies, there is no substantial indication that some investigation or opportunity for independent, albeit informal consideration of the juvenile's circumstances in relation to the adult's agreement to care for her is impractical or financially or administratively infeasible. Although not entirely clear where the burden of proof resides, it has not clearly been imposed on the government. And there is no limit on when the deportation hearing must be held, or put another way, how long the minor may be detained. In short, there is no ordered structure for resolving custodial status when no relative steps up to the plate but an unrelated adult is able and willing to do so." *Flores v. Meese*, 942 F.2d 1352, 1374-1375 (CA9 1991) (opinion concurring in judgment in part and dissenting in part) (footnotes omitted).

The promulgation of the nationwide rule did not, of course, put an end to the pending litigation. The District Court again enjoined its enforcement, this time on the ground that it deprived the members of the respondent class of their liberty without the due process of law required by the *Fifth Amendment*. For the period of over four years subsequent to the entry of that injunction, the INS presumably has continued to release juveniles to responsible persons in the Western Region without either performing any home studies or causing any harm to alien juveniles. If any evidence confirming the supposed

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need for the rule had developed in recent years, it is certain that petitioners would have called it to our attention, since the INS did not hesitate to provide us with off-the-record factual material on a less significant point. See n. 16, *supra*.

The fact that the rule appears to be an ill-considered response to an adverse court ruling, rather than the product of the kind of careful deliberation that should precede a policy change that has an undeniably important impact on individual liberty, is not, I suppose, a sufficient reason for concluding that it is invalid.²¹ It does, however, shed light [*333] on the question whether the INS has legitimately exercised the discretion that the relevant statute has granted to the Attorney General. In order to avoid the constitutional question, I believe we should first address that statutory issue. In the alternative, as I shall explain, I would hold that a rule providing for the wholesale detention of juveniles for an indeterminate period without individual hearings is unconstitutional.

21 That fact may, however, support a claim that the INS' issuance of the regulation was arbitrary and capricious within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 706. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) ("An agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). Respondents brought such a claim in the District Court, but do not renew that line of argument in this Court. In any event, even if the INS has managed to stay within the bounds of the APA, there is nonetheless a disturbing parallel between the Court's ready conclusion that no individualized hearing need precede the deprivation of liberty of an undocumented alien so long as the conditions of institutional custody are "good enough," *ante*, at 305, and similar *post hoc* justifications for discrimination that is more probably explained as nothing more than "the accidental byproduct of a traditional way of thinking about" the disfavored class, see *Califano*

v. Goldfarb, 430 U.S. 199, 223, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977) (STEVENS, J., concurring in judgment).

II

Section 242(a) of the Immigration and Nationality Act provides that any "alien taken into custody may, in the discretion of the Attorney General and pending [a] final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions [***37] as the Attorney General may prescribe; or (C) be released on conditional parole." 8 U.S.C. § 1252(a)(1). Despite the exceedingly broad language of § 242(a), the Court has recognized that "once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative." *United [**1464] States v. Witkovich*, 353 U.S. 194, 199, 1 L. Ed. 2d 765, 77 S. Ct. 779 [*334] (1957). See also *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 116 L. Ed. 2d 546, 112 S. Ct. 551 (1991) (*NCIR*).

Our cases interpreting § 242(a) suggest that two such "considerations" are paramount: indications of congressional policy, and the principle that "a restrictive meaning must be given if a broader meaning would generate constitutional doubts." *Witkovich*, 353 U.S. at 199. Thus, in *Carlson v. Landon*, 342 U.S. 524, 96 L. Ed. 547, 72 S. Ct. 525 (1952), we upheld the Attorney General's detention of deportable members of the Communist Party, relying heavily on the fact that Congress had enacted legislation, the Internal Security Act of 1950, based on its judgment that Communist subversion threatened the Nation. *Id.*, at 538. The Attorney General's discretionary decision to detain certain alien Communists was thus "wholly consistent with Congress' intent," *NCIR*, 502 U.S. at 194 (summarizing Court's analysis in *Carlson*). Just last Term, we faced the question whether the Attorney General acted within his authority in requiring that release bonds issued pursuant to § 242(a) contain a condition forbidding unauthorized employment pending determination of deportability. See *NCIR, supra*. Relying on related statutes and the "often recognized" principle that "a primary purpose in restricting immigration is to preserve jobs for American workers," *id.*, at 194, and n. 8 (internal quotation marks omitted), we held that the regulation was "wholly consistent with this established concern of immigration law and thus squarely within the

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scope of the Attorney General's statutory authority." *Ibid.* Finally, in *Witkovich*, the Court construed a provision of the Immigration and Nationality Act which made it a criminal offense for an alien subject to deportation to willfully fail to provide to the Attorney General "information . . . as to his nationality, circumstances, habits, associations, and activities, and such other information . . . as the Attorney General may deem fit and proper." 353 U.S. at 195. Noting that "issues touching liberties that the Constitution safeguards, even for an alien 'person,' would fairly be [*335] raised on the Government's [broad] view of the statute," we held that the statute merely authorized inquiries calculated to determine the continued availability for departure of aliens whose deportation was overdue. *Id.*, at 201-202.

The majority holds that it was within the Attorney General's authority to determine that parents, guardians, and certain relatives are "presumptively appropriate custodians" for the juveniles that come into the INS' custody, *ante*, at 310, and therefore to detain indefinitely those juveniles who are without one of the "approved" [***38] custodians.²² In my view, however, the guiding principles articulated [**1465] in *Carlson*, *NCIR*, and *Witkovich* compel the opposite conclusion.

22 While the regulation provides that release can be granted to a broader class of custodians in "unusual and compelling circumstances," the practice in the Western Region after the 1984 order, but before the issuance of the injunction, was to exercise that discretion only in the event of medical emergency. See Federal Defendants' Responses to Plaintiffs' Second Set of Interrogatories (CD Cal., Jan. 30, 1986), pp. 11-12. At oral argument, counsel for petitioners suggested that "extraordinary and compelling circumstances" might include the situation where a godfather has lived and cared for the child, has a kind of family relationship with the child, and is in the process of navigating the state bureaucracy in order to be appointed a guardian under state law. Tr. of Oral Arg. 54. Regardless of the precise contours of the exception to the INS' sweeping ban on discretion, it seems fair to conclude that it is meant to be extremely narrow.

There is nothing at all "puzzling," *ante*, at 312, n. 7, in respondents' objection to the INS' requirement that would-be custodians apply for

and become guardians in order to assume temporary care of the juveniles in INS custody. Formal state guardianship proceedings, regardless of how appropriate they may be for determinations relating to *permanent* custody, would unnecessarily prolong the detention of these children. What *is* puzzling is that the Court acknowledges, see *ibid.*, but then ignores the fact that were these children in *state* custody, they would be released to "other responsible adults" as a matter of course. See n. 7, *supra*.

Congress has spoken quite clearly on the question of the plight of juveniles that come into federal custody. As explained above, § 504 of the Juvenile Justice and Delinquency Prevention Act of 1974 demonstrates Congress' clear preference for release, as opposed to detention. See S. Rep. No. [*336] 93-1011, p. 56 (1974) ("[Section 504] establishes a presumption for release of the juvenile").²³ And, most significantly for this case, it demonstrates that Congress has rejected the very presumption that the INS has made in this case; for under the Act juveniles are not to be detained when there is a "responsible party," 18 U.S.C. § 5034, willing and able to assume care for the child.²⁴ It is no retort [***39] that § 504 is directed at citizens, whereas the INS' regulation is directed at aliens, *ante*, at 305-306, 312-313, n. 8; Reply Brief for Petitioners [*337] 5, n. 4. As explained above, the INS justifies its policy as serving the best interests of the juveniles that come into its custody. In seeking to dismiss the force of the Juvenile Justice and Delinquency Act as a source of congressional policy, the INS is reduced to the absurdity of contending that Congress has authorized the Attorney General to treat allegedly illegal aliens *better* than American citizens. In my view, Congress has spoken on the detention of juveniles, and has rejected the very presumption upon which the INS relies.

There is a deeper problem with the regulation, however, one that goes beyond the use of the *particular* presumption at issue in this case. Section 242(a) grants to the Attorney General the *discretion* to detain individuals pending deportation. As we explained in *Carlson*, a "purpose to injure [the United States] could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail . . ." 342 U.S. at 538. In my view, Congress has not authorized the INS to rely on mere presumptions as a substitute for the exercise

of that discretion.

23 As I have already noted, the 1938 Federal Juvenile Delinquency Act authorized the magistrate to release an arrested juvenile "upon his own recognizance or that of *some responsible person*," § 5, 52 Stat. 765 (emphasis added). This language was retained in the 1948 Act, see 62 Stat. 858, and amended to its present form in 1974. The Senate Report on the 1974 bill stated that it "also amends the Federal Juvenile Delinquency Act, virtually unchanged for the past thirty-five years, to provide basic procedural rights for juveniles who come under Federal jurisdiction and to bring Federal procedures up to the standards set by various model acts, many state codes and court decisions." S. Rep. No. 93-1011, p. 19 (1974). Juveniles arrested by the INS are, of course, within the category of "juveniles who come under Federal jurisdiction."

24 I find this evidence of congressional intent and congressional policy far more significant than the fact that Congress has made the unexceptional determination that state human service agencies should play a role in the permanent resettlement of refugee children, *ante*, at 313, n. 8 (citing 8 U.S.C. § 1522(d)(2)(B)), and orphans adopted abroad by United States citizens, *ante*, at 313, n. 8 (citing 8 U.S.C. § 1154(d)). This case is not about the *permanent* settlement of alien children, or the establishment or *permanent* legal custody over alien children. It is about the *temporary detention* of children that come into federal custody, which is precisely the focus of § 504 of the Juvenile Justice and Delinquency Prevention Act of 1974.

Furthermore, the Court is simply wrong in asserting that the INS' policy is rooted in the "universally accepted presumption as to the custodial competence of parents and close relatives," *ante*, at 313, n. 8. The flaw in the INS' policy is not that it prefers parents and close relatives over unrelated adults, but that it prefers government detention over release to responsible adults. It is that presumption -- that detention is better or more appropriate for these children than release to unrelated responsible adults -- that is contrary to congressional policy.

The Court's analysis in *Carlson* makes that point

clear. If ever there were a factual predicate for a "reasonable presumption," *ante*, at 313, it was in that case, because Congress had expressly found that communism posed a "clear and present danger to [**1466] the security of the United States," and that mere membership in the Communist Party was a sufficient basis for deportation.²⁵ Yet, in affirming the Attorney [**338] General's detention of four alien Communists, the Court was careful to note that the Attorney General had not merely relied on a presumption that alien Communists posed a risk to the United States, and that therefore they should be detained, but that the detention order was grounded in "evidence of membership *plus* personal activity in supporting and extending the Party's philosophy concerning violence," 342 U.S. at 541 (emphasis added). In fact, the Court expressly noted that "there is no evidence or contention that all persons arrested as deportable under the . . . Internal Security Act for Communist membership are denied bail," and that bail is allowed "in the large majority of cases." *Id.*, at 541-542.

25 The Internal Security Act of 1950 was based on explicit findings regarding the nature of the supposed threat posed by the worldwide Communist conspiracy. The Communist Party in the United States, Congress found, "is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined . . . awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement" 342 U.S. at 535, n. 21 (quoting § 2(15) of the Internal Security Act of 1950).

By the same reasoning, the Attorney General is not authorized, in my [***40] view, to rely on a presumption regarding the suitability of potential custodians as a substitute for determining whether there is, in fact, any reason that a *particular* juvenile should be detained. Just as a "purpose to injure could not be imputed generally to all aliens," *id.*, at 538, the unsuitability of certain unrelated adults cannot be imputed generally to all adults so as to lengthen the detention to which these children are subjected. The particular circumstances facing these juveniles are too diverse, and the right to be free from government

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detention too precious, to permit the INS to base the crucial determinations regarding detention upon a mere presumption regarding "appropriate custodians," *ante*, at 310. I do not believe that Congress intended to authorize such a policy.²⁶

²⁶ Neither *NCIR*, 502 U.S. 183, 112 S. Ct. 551, 116 L. Ed. 2d 546 (1991), nor *Heckler v. Campbell*, 461 U.S. 458, 467, 76 L. Ed. 2d 66, 103 S. Ct. 1952 (1983), upon which the majority relies for the proposition that the INS can rely on "reasonable presumptions" and "generic rules," *ante*, at 313, are to the contrary. The Court mentioned the word "presumption" in a footnote in the *NCIR* case, 502 U.S. at 196, n. 11, merely in noting that the regulation at issue -- a broad rule requiring that all release bonds contain a condition forbidding unauthorized employment -- seemed to presume that undocumented aliens taken into INS custody were not, in fact, authorized to work. We said that such a *de facto* presumption was reasonable because the vast majority of aliens that come into INS custody do not have such authorization, and because the presumption was easily rebutted. *Ibid.* To the extent that case has any bearing on the INS' use of presumptions, it merely says that the INS may use some easily rebuttable presumptions in identifying the class of individuals subject to its regulations -- in that case, aliens lacking authorization to work. Once that class is properly identified, however, the issue becomes whether the INS can use mere presumptions as a basis for making fundamental decisions about detention and freedom. On *that* question, *NCIR* is silent; for the regulation at issue there was not based on a presumption at all. It simply provided that an alien who violates American law by engaging in unauthorized employment also violates the terms of his release from INS custody. *Id.*, at 185.

Heckler v. Campbell, 461 U.S. 458, 76 L. Ed. 2d 66, 103 S. Ct. 1952 (1983), presents a closer analog to what the INS has done in this case, but only as a matter of logic, for the factual differences between the governmental action approved in *Heckler* and the INS' policy in this case renders the former a woefully inadequate precedent to support the latter. In *Heckler*, the Court approved the use of pre-established

medical-vocational guidelines for determining Social Security disability benefits, stating:

"The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking." *Id.*, at 467 (citations omitted).

Suffice it to say that the determination as to the suitability of a temporary guardian for a juvenile, unlike the determination as to the nature and type of jobs available for an injured worker, *is* an inquiry that requires case-by-case consideration, and *is not* one that may be established fairly and efficiently in a single rulemaking. More importantly, the determination as to whether a child should be released to the custody of a friend, godparent, or cousin, as opposed to being detained in a government institution, implicates far more fundamental concerns than whether an individual will receive a particular government benefit. In my view, the Court's reliance on *Heckler v. Campbell* cuts that case from its administrative law moorings. I simply do not believe that Congress authorized the INS to determine, by rulemaking, that children are better off in government detention facilities than in the care of responsible friends, cousins, godparents, or other responsible parties.

[*339] And finally, even if it were not clear to me that the Attorney General [***41] has exceeded [**1467] her authority under § 242(a), I would still hold that § 242(a) requires an individualized determination [*340] as to whether detention is necessary when a juvenile does not have an INS-preferred custodian available to assume temporary custody. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Witkovich*, 353 U.S. at 201-202 (quoting *Crowell v. Benson*, 285 U.S. 22, 62, 76 L. Ed. 598, 52 S. Ct. 285 (1932)). The detention of juveniles on the basis of a general presumption as to the

507 U.S. 292, *340; 113 S. Ct. 1439, **1467;
123 L. Ed. 2d 1, ***41; 1993 U.S. LEXIS 2399

suitability of particular custodians without an individualized determination as to whether that presumption bears any relationship at all to the facts of a particular case implicates an interest at the very core of the Due Process Clause, the constitutionally protected interest in freedom from bodily restraint. As such, it raises even more serious constitutional concerns than the INS policy invalidated in *Witkovich*. Legislative grants of discretionary authority should be construed to avoid constitutional issues and harsh consequences that were almost certainly not contemplated or intended by Congress. Unlike my colleagues, I would hold that the Attorney General's actions in this case are not authorized by § 242(a).

III

I agree with JUSTICE O'CONNOR that respondents "have a constitutionally protected interest in freedom from institutional confinement . . . [that] lies within the core of the Due Process Clause." *Ante*, at 315 (concurring opinion). Indeed, we said as much just last Term. See *Foucha v. Louisiana*, 504 U.S. 71, 80, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992) ("Freedom from bodily restraint has always been at the core of liberty protected by the Due Process Clause from arbitrary governmental action"). *Ibid.* [*341] ("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty") (quoting *United States v. Salerno*, 481 U.S. 739, 750, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987)).

I am not as convinced as she, however, that "the Court today does not hold otherwise." *Ante*, at 315 (concurring opinion). For the children at issue in this case *are* being confined in government-operated or government-selected institutions, their liberty *has been* curtailed, and yet the Court defines the right at issue as merely the "alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Ante*, at 302. Finding such a claimed constitutional right to be "nove[l]," *ante*, at 303, and certainly not "fundamental," *ante*, at 305, 311, the Court concludes that these juveniles' alleged "right" to be released to "other responsible adults" is easily trumped by the government's interest [**1468] in protecting the welfare of these children and, most significantly, by

[***42] the INS' interest in avoiding the administrative inconvenience and expense of releasing them to a broader class of custodians. *Ante*, at 305, 311-312.

In my view, the only "novelty" in this case is the Court's analysis. The right at stake in this case is not the right of detained juveniles to be *released* to one particular custodian rather than another, but the right not to be *detained* in the first place. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. It is the government's burden to prove that detention is necessary, not the individual's burden to prove that release is justified. And, as JUSTICE O'CONNOR explains, that burden is not easily met, for when government action infringes on this most fundamental of rights, we have scrutinized such conduct to ensure that the detention serves both "legitimate and compelling" [*342] interests, *id.*, at 749, and, in addition, is implemented in a manner that is "carefully limited" and "narrowly focused." *Foucha*, 504 U.S. at 81.²⁷

27 A comparison of the detention regimes upheld in *Salerno* and struck down in *Foucha* is illustrative. In *Salerno*, we upheld against due process attack provisions of the Bail Reform Act of 1984 which allow a federal court to detain an arrestee before trial if the Government can demonstrate that no release conditions will "reasonably assure . . . the safety of any other person and the community." *Salerno*, 481 U.S. at 741. As we explained in *Foucha*:

"The statute carefully limited the circumstances under which detention could be sought to those involving the most serious of crimes . . . , and was narrowly focused on a particularly acute problem in which the government interests are overwhelming. In addition to first demonstrating probable cause, the Government was required, in a full-blown adversary hearing, to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person Furthermore, the duration of confinement under the Act was strictly limited. The arrestee was entitled to a prompt detention hearing and the maximum length of pretrial detention was limited by the stringent limitations of the Speedy Trial

507 U.S. 292, *342; 113 S. Ct. 1439, **1468;
123 L. Ed. 2d 1, ***42; 1993 U.S. LEXIS 2399

Act." 504 U.S. at 81 (citations and internal quotation marks omitted).

By contrast, the detention statute we struck down in *Foucha* was anything but narrowly focused or carefully limited. Under Louisiana law, criminal defendants acquitted by reason of insanity were automatically committed to state psychiatric institutions, regardless of whether they were then insane, and held until they could prove that they were no longer dangerous. *Id.*, at 73. We struck down the law as a violation of the substantive component of the *Due Process Clause of the Fourteenth Amendment*:

"Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited. Under the state statute, *Foucha* is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous

. . . .

"It was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration. Here, in contrast, the State asserts that . . . [*Foucha*] may be held indefinitely." *Id.*, at 81-82.

As explained in the text, the INS' regulation at issue in this case falls well on the *Foucha* side of the *Salerno/Foucha* divide.

[*343] On its face, the INS' regulation at issue in this case cannot withstand such scrutiny.²⁸ The United States [*343] no doubt has a substantial and legitimate interest in protecting the welfare of juveniles that come into its custody. [*1469] *Schall v. Martin*, 467 U.S. 253, 266, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984). However, a blanket rule that simply *presumes* that detention is more appropriate than release to responsible adults is not narrowly focused on serving that interest. Categorical distinctions between cousins and uncles, or between relatives and godparents or other responsible persons, are much too blunt instruments to justify wholesale deprivations of liberty. Due process demands

more, far more.²⁹ If the Government is going to detain juveniles in order to protect their welfare, due process requires that it demonstrate, *on an individual basis*, that detention in fact serves that interest. That is the clear command of our cases. See, e.g., *Foucha*, 504 U.S. at 81 (finding due process violation when individual who is detained on grounds [*344] of "dangerousness" is denied right to adversary hearing in "which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community"); *Salerno*, 481 U.S. at 742 (finding no due process violation when detention follows hearing to determine whether detention is necessary to prevent flight or danger to community); *Schall v. Martin*, 467 U.S. at 263 (same; hearing to determine whether there is "serious risk" that if released juvenile will commit a crime); *Gerstein v. Pugh*, 420 U.S. 103, 126, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975) (holding that *Fourth Amendment* requires judicial determination of probable cause as prerequisite to detention); *Greenwood v. United States*, 350 U.S. 366, 367, 100 L. Ed. 412, 76 S. Ct. 410 (1956) (upholding statute in which individuals charged with or convicted of federal crimes may be committed to the custody of the Attorney General after judicial determination of incompetency); *Carlson v. Landon*, 342 U.S. at 541 (approving Attorney General's discretionary decision to detain four alien Communists based on their membership and activity in Communist Party); *Ludecke v. Watkins*, 335 U.S. 160, 163, n. 5, 92 L. Ed. 1881, 68 S. Ct. 1429 (1948) (upholding Attorney General's detention and deportation of alien under the Alien Enemy Act; finding of "dangerousness" based on evidence adduced at administrative hearings). See also *Stanley v. Illinois*, 405 U.S. 645, 657-658, 31 L. Ed. 2d 551, 92 S. Ct. 1208 [*344] (1972) (State cannot rely on presumption of unsuitability of unwed fathers; State must make individualized determinations of parental fitness); *Carrington v. Rash*, 380 U.S. 89, 95-96, 13 L. Ed. 2d 675, 85 S. Ct. 775 (1965) (striking down blanket exclusion depriving all servicemen stationed in State of right to vote when interest in limiting franchise to bona fide residents could have been achieved by assessing a serviceman's claim to residency on an individual basis).

30

28 Because this is a facial challenge, the Court asserts that respondents cannot prevail unless there is "no set of circumstances . . . under which the [regulation] would be valid." *Ante*, at 301. This is a rather puzzling pronouncement. Would a facial challenge to a statute providing for

507 U.S. 292, *344; 113 S. Ct. 1439, **1469;
123 L. Ed. 2d 1, ***44; 1993 U.S. LEXIS 2399

imprisonment of all alien children without a hearing fail simply because there is a set of circumstances in which at least one such alien should be detained? Is the Court saying that this challenge fails because the categorical deprivation of liberty to the members of the respondent class may turn out to be beneficial to some? Whatever the Court's rhetoric may signify, it seems clear to me, as I explain in the text, that detention for an insufficient reason without adequate procedural safeguards is a deprivation of liberty without due process of law.

29 In objecting to this statement, see *ante*, at 311, n. 6, the majority once again mischaracterizes the issue presented in this case. As explained above, see n. 24, *supra*, the INS can of course favor release of a juvenile to a parent or close relative over release to an unrelated adult. What the INS cannot do, in my view, is prefer *detention* over *release* to a responsible adult, a proposition that hardly "revolutionize[s]" our family law.

30 There is, of course, one notable exception to this long line of cases: *Korematsu v. United States*, 323 U.S. 214, 89 L. Ed. 194, 65 S. Ct. 193 (1944), in which the Court upheld the exclusion from particular "military areas" of all persons of Japanese ancestry without a determination as to whether any particular individual actually posed a threat of sabotage or espionage. *Id.*, at 215-216. The Court today does not cite that case, but the Court's holding in *Korematsu* obviously supports the majority's analysis, for the Court approved a serious infringement of individual liberty without requiring a case-by-case determination as to whether such an infringement was in fact necessary to effect the Government's compelling interest in national security. I understand the majority's reluctance to rely on *Korematsu*. The exigencies of war that were thought to justify that categorical deprivation of liberty are not, of course, implicated in this case. More importantly, the recent congressional decision to pay reparations to the Japanese-Americans who were detained during that period, see Restitution for World War II Internment of Japanese Americans and Aleuts, 102 Stat. 903, suggests that the Court should proceed with extreme caution when asked to permit the detention of juveniles when the Government has failed to inquire whether, in any

given case, detention actually serves the Government's interest in protecting the interests of the children in its custody.

[*345] [**1470] If, in fact, the Due Process Clause establishes a powerful presumption against unnecessary official detention that is not based on an individualized evaluation of its justification, why has the INS refused to make such determinations? As emphasized above, the argument that detention is more appropriate for these children than release to responsible adults is utterly lacking in support, in either the history of this litigation, or expert opinion. Presumably because of the improbability of the INS' asserted justification for its policy, the Court does not rely on it as the basis for upholding the regulation. Instead, the Court holds that even if detention is not really *better* for these juveniles than release to responsible adults, so long as it is "good enough," *ante*, at 305, the INS need not spend the time and money that would be necessary to actually serve the "best interests" of these children. *Ante*, at 304-305. In other words, so long as its cages are gilded, the INS need not expend its administrative resources on a program that would better serve its asserted interests and that would not need to employ cages at all.

The linchpin in the Court's analysis, of course, is its narrow reading of the right at stake in this case. By characterizing it as some insubstantial and nonfundamental right to be released [*346] to an unrelated adult, the Court is able to escape the clear holding of our cases that "administrative convenience" is a thoroughly inadequate basis for the deprivation of core constitutional rights. *Ante*, at 311 (citing, for comparison, *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)). As explained above, [***45] however, the right at issue in this case is not the right to be released to an unrelated adult; it is the right to be free from Government confinement that is the very essence of the liberty protected by the Due Process Clause. It is a right that cannot be defeated by a claim of a lack of expertise or a lack of resources. In my view, then, *Stanley v. Illinois* is not a case to look to for comparison, but one from which to derive controlling law. For in *Stanley*, we flatly rejected the premise underlying the Court's holding today.

In that case, we entertained a due process challenge to a statute under which children of unwed parents, upon the death of the mother, were declared wards of the State

without any hearing as to the father's fitness for custody. In striking down the statute, we rejected the argument that a State's interest in conserving administrative resources was a sufficient basis for refusing to hold a hearing as to a father's fitness to care for his children:

"Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

"*Bell v. Burson* [402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971),] held that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault. Absent fault, the State's declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be considered. [*347] That drivers involved in accidents, as a statistical matter, might be very likely to have been wholly or partially at fault did not foreclose hearing and proof on specific cases before licenses were suspended.

"We think the Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit [**1471] father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.*, at 656-658.

Just as the State of Illinois could not rely on the

administrative convenience derived from denying fathers a hearing, the INS may not rely on the fact that "other concerns . . . compete for public funds and administrative attention," *ante*, at 305, as an excuse to keep from doing what due process commands: determining, on an individual basis, whether the detention of a child in a government-operated or government-sponsored institution actually serves the INS' asserted interest [***46] in protecting the welfare of that child.³¹

31 Of course, even as a factual matter the INS' reliance on its asserted inability to conduct home studies because of a lack of resources or expertise as a justification for its wholesale detention policy is unpersuasive. It is perfectly clear that the costs of detention far exceed the cost of the kinds of inquiry that are necessary or appropriate for temporary release determinations. See n. 18, *supra*. Moreover, it is nothing less than perverse that the Attorney General releases juvenile *citizens* to the custody of "other responsible adults" without the elaborate "home studies" allegedly necessary to safeguard the juvenile's interests but deems such studies necessary before releasing *noncitizens* to the custody of "other responsible adults."

Ultimately, the Court is simply wrong when it asserts that "freedom from physical restraint" is not at issue in this case. That is precisely what is at issue. The Court's assumption that the detention facilities used by the INS conform to the [*348] standards set forth in the partial settlement in this case has nothing to do with the fact that the juveniles who are not released to relatives or responsible adults are held in detention facilities. They do not have the "freedom from physical restraint" that those who are released do have. That is what this case is all about. That is why the respondent class continues to litigate. These juveniles do not want to be committed to institutions that the INS and the Court believe are "good enough" for aliens simply because they conform to standards that are adequate for the incarceration of juvenile delinquents. They want the same kind of liberty that the Constitution guarantees similarly situated citizens. And as I read our precedents, the omission of any provision for individualized consideration of the best interests of the juvenile in a rule authorizing an indefinite period of detention of presumptively innocent and harmless children denies them precisely that liberty.

507 U.S. 292, *348; 113 S. Ct. 1439, **1471;
123 L. Ed. 2d 1, ***46; 1993 U.S. LEXIS 2399

I respectfully dissent.

REFERENCES

3A Am Jur 2d, Aliens and Citizens 1101, 1107-1110, 1276, 1958, 1959

18A Federal Procedure, L Ed, Immigration, Naturalization, and Nationality 45:889, 45:895-45:898, 45:1061, 45:1062

10A Federal Procedural Forms, L Ed, Immigration, Naturalization, and Nationality 40:282, 40:286, 40:287, 40:318-40:321

26 Am Jur Trials 327, Representation of an Alien in Exclusion, Rescission and Deportation Proceedings

USCS, *Constitution, Amendment 5*; 8 USCS 1252(a)(1)

Immigration Law Service 17:104, 17:111, 23:5, 23:6

L Ed Digest, Aliens 33, 34; Constitutional Law 528.5, 758, 822

L Ed Index, Children and Minors; Deportation or Exclusion of Aliens

ALR Index, Children; Deportation; Detention of Person

Annotation References :

Constitutional principles applicable to award or modification of custody of child-- Supreme Court cases. *80 L Ed 2d 886.*

Procedural due process requirements in proceedings to exclude or deport aliens-- Supreme Court cases. *74 L Ed 2d 1066.*

Effect of party's failure to cross-appeal on scope of appellate review as to contentions of party relating to judgment below-- Supreme Court cases. *63 L Ed 2d 911.*

Supreme Court's views as to concept of "liberty" under *due process clauses of Fifth and Fourteenth Amendments.* *47 L Ed 2d 975.*

Procedural requirements under Federal Constitution in juvenile delinquency proceedings--federal cases. *25 L Ed 2d 950.*

APPENDIX 40



ROSANE v. SENGER ET AL.

No. 15,215.

Supreme Court of Colorado

112 Colo. 363; 149 P.2d 372; 1944 Colo. LEXIS 185

May 1, 1944, Decided

SUBSEQUENT HISTORY: [***1] Rehearing denied June 5, 1944.

PRIOR HISTORY: An action for damages arising from alleged negligence in the performance of a surgical operation. Judgment of dismissal.

Affirmed in Part.

Reversed in Part.

Error to the District Court of Pueblo County, Hon. Harry Leddy, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff patient sought review of the decision of the District Court of Pueblo County (Colorado), which dismissed the patient's cause of action for negligence in the performance of a surgical procedure against defendants, doctors, nurse, and hospital.

OVERVIEW: The patient was injured when the doctors

left a gauze pad inside the incision. Eleven years later, after significant pain and suffering, the patient underwent exploratory surgery, during which the gauze pad was discovered as the cause of her pain. The patient's complaint against the nurse, hospital, and doctors was dismissed for failure to state a cause of action against the hospital and as being time-barred as to all defendants. The court reversed in part. The court held that the complaint was properly dismissed as to the hospital and the nurse for failure to state a cause of action, but that it was improperly dismissed as to the doctors. The court held that the statute of limitations did not begin to run against the patient because the doctors' conduct amounted to a concealment of the negligence. The doctors could not be permitted to benefit from their own wrong in the fraudulent concealment of their negligence.

OUTCOME: The court affirmed the dismissal of the complaint as to the hospital and the nurse, but reversed the dismissal as to the doctors and remanded the case for further proceedings.

LexisNexis(R) Headnotes

112 Colo. 363, *; 149 P.2d 372, **;
1944 Colo. LEXIS 185, ***1

*Civil Procedure > Pleading & Practice > Defenses,
Demurrers & Objections > Affirmative Defenses >
Statutes of Limitations > Statutory Construction
Governments > Legislation > Statutes of Limitations >
General Overview*

*Torts > Procedure > Statutes of Limitations > General
Overview*

[HN1] That there are certain recognized exceptions to the strict and literal construction of statutes of limitation as to medical malpractice causes of action, necessarily construed into them by the demands of simple justice and the necessity for evading constitutional conflicts, is well known to the profession.

*Civil Procedure > Pleading & Practice > Defenses,
Demurrers & Objections > Affirmative Defenses >
Tolling > Fraud*

*Torts > Procedure > Statutes of Limitations > General
Overview*

[HN2] One may not take advantage of his own wrong.

*Torts > Procedure > Statutes of Limitations > General
Overview*

[HN3] Fraudulent concealment stops the running of the statute. It is said this is necessary that one be not permitted to take advantage of his own wrong.

*Civil Procedure > Equity > Maxims > Own Wrongs
Principle*

*Civil Procedure > Pleading & Practice > Defenses,
Demurrers & Objections > Affirmative Defenses >
Tolling > Discovery Rule*

*Governments > Legislation > Statutes of Limitations >
General Overview*

[HN4] While generally plaintiff's ignorance of the wrong committed can not be considered in determining when the statute of limitations begins to run, an exception to this rule is made in cases of the concealment of the cause of action. There the bar of the statute does not operate until discovery, and this proposition is so fundamental that no authorities need be cited.

*Civil Procedure > Equity > Maxims > Own Wrongs
Principle*

Torts > Procedure > Statutes of Limitations > General

Overview

[HN5] A legal right to damage for an injury is property and one can not be deprived of his property without due process. There can be no due process unless the party deprived has his day in court and if without his fault his debtor conceals from him his right until a statute deprives him of his remedy he is deprived of due process. It is also an ancient maxim of the common law that "where there is a right there is a remedy."

COUNSEL: Mr. ALBERT B. LOGAN, for plaintiff in error.

Mr. PAUL M. CLARK, Mr. FRED FARRAR, Mr. ELMER P. COGBURN, for defendants in error.

JUDGES: Before MR. JUSTICE BURKE. MR. JUSTICE GOUDY dissents as to the reversal.

OPINION BY: BURKE

OPINION

En Banc

[*364] [**373] MR. JUSTICE BURKE delivered the opinion of the court.

THESE parties occupy the same relative position in this [*365] court as below. Plaintiff in error is hereinafter referred to as plaintiff and defendants in error as defendants, or Senger and Ireland as the doctors, the Colorado Fuel and Iron Company as the hospital, and Stratton as the nurse.

Plaintiff brought this action against defendants for \$37,152 actual and \$5,000 exemplary damages, arising from alleged negligence in the performance of an abdominal operation. Motions to dismiss (demurrers) were sustained and she elected to stand. To review the judgment entered accordingly she prosecutes [***2] this writ. The question raised by the specifications is, Did this complaint state a good cause of action against defendants or any of them?

It is alleged that the Colorado Fuel and Iron Company owned and conducted the hospital and had in its employ the doctors and the nurse; that the operation in question was advised, supervised and performed by the doctors; and that the nurse was "in charge of the operating room * * * and was then and there engaged in

assisting said surgeons in the performance of said operation." Hence we have here three distinct and separate relationships to the plaintiff, that of the nurse, that of the hospital, and that of the doctors. 1. The nurse moved to dismiss: (a) For failure to state a cause of action; and (b) for the bar of the six-year statute of limitations. 2. The hospital moved to dismiss for the same reasons. 3. The doctors moved to dismiss because of the bar of the two-year statute of limitations.

1. The motion of the nurse was overruled as to the first ground and sustained as to the second. We disregard the second and hold it should have been sustained as to the first. We think this is self evident. It is not alleged that she was derelict [***3] as to any special duty with which she was charged, or that she was [**374] charged with any. She was simply "assisting said surgeons," whatever that may mean, and the presumption is that she was directed by them. It is not alleged that [*366] she was engaged because of any special skill possessed by her, or that she possessed any. Her negligence, if any, was that of the doctors of the hospital. In fact the language charging her might, with almost equal propriety, have been applied to a janitor. No cause of action is stated against her.

2. The motion of the hospital was sustained as to both grounds. A hospital, a corporation as here, can not be licensed to, and can not, practice medicine and surgery. The relation between doctor and patient is personal. That a hospital employs doctors on its staff does not make it liable for the discharge of their professional duty since it is powerless, under the law, to command or forbid any act by them in the practice of their profession. Unless it employs those whose want of skill is known, or should be known, to it, or by some special conduct or neglect makes itself responsible for their malpractice (and no such allegation here [***4] appears) it cannot be held liable therefor. Hence the motion of the hospital was properly sustained as to the first ground thereof. The second becomes immaterial. *Stacy v. Williams*, 253 Ky. 353, 69 S.W. (2d) 697; *Schloendorff v. Society of N.Y. Hospital*, 211 N.Y. 125, 105 N.E. 92; *Black v. Fischer*, 30 Ga. App. 109, 117 S.E. 103; *People v. Painless Parker*, 85 Colo. 304, 275 Pac. 928.

3. The motion of the doctors was sustained. The operation in question was performed July 28, 1930. The negligence charged is, "They inserted a large gauze pad

in the incision * * * and closed the incision * * * leaving said gauze pad inside of the incision and body of the plaintiff." This action was started December 26, 1941. It is alleged that in the interim plaintiff, in order to ascertain the cause of her constant pain and suffering, consulted and was "treated by various surgeons and physicians, and when her condition became extremely grave in Norfolk, Nebraska, in October, A.D. 1940, X-ray and fluoroscope examinations were made under the direction of Dr. A. E. Coletti, but same failed [*367] to disclose the presence of said gauze pad and an exploratory operation was indicated; [***5] that on October 25, 1940, a laparotomy was performed by Drs. A. J. Schwedhelm and A. E. Coletti, and the said gauze pad was discovered and removed, this being the first notice to plaintiff of the negligence, carelessness and recklessness of the defendants."

The statute upon which the doctors rely, so far as here applicable, reads: "No person shall be permitted to maintain an action * * * to recover damages from any person licensed to practice medicine * * * on account of the alleged negligence of such person in the practice of the profession * * * unless such action be instituted within two years after such cause of action accrued." '35 C.S.A., c. 102, § 7, The briefs, on both sides, present much argument and many authorities on the question of whether it is the negligent act or the resulting damage which fixes the date when the statute begins to run. We ignore these because that is not the point. The question here is, Does justifiable delay, due to plaintiff's ignorance of the cause of a known injury, stop the running of the statute when plaintiff has used every reasonable effort to ascertain that cause and been frustrated solely by defendants' concealment? In other words under [***6] such circumstances, when did the cause of action accrue?

[HN1] That there are certain recognized exceptions to the strict and literal construction of such statutes as that here in question, necessarily construed into them by the demands of simple justice and the necessity for evading constitutional conflicts, is well known to the profession. For instance, it would be outrageous to deprive one of his right to sue when a superior law forbade suit, or require him to sue when good faith to his debtor forbade action. *Brooks v. Bates*, 7 Colo. 576, 4 Pac. 1069; *County Com'rs v. Flanagan*, 21 Colo. App. 467, 122 Pac. 801. Do the facts before us constitute such an exception?

[*368] Cases involving the applicability of statutes

112 Colo. 363, *368; 149 P.2d 372, **374;
1944 Colo. LEXIS 185, ***6

similar to that here in question are numerous and not a few of them were actions against physicians for leaving foreign substance in closed incisions. Their perusal would almost lead to the conclusion that certain surgeons use such incisions as waste baskets. In most of these cases the exceptions are repudiated and the statute strictly construed. A shocking result of this doctrine is well illustrated by a New York case. There [**375] the surgeon performed [***7] an operation for appendicitis and left his arterial forceps in the wound when it was closed. Despite allegations that he knew of his negligence, but failed to disclose it, and that plaintiff did everything within reason to discover the trouble and succeeded only when an X-ray revealed it and a hasty operation was performed to save life, a two year statute had run and its bar was sustained. We cite the case principally, however, to say that we agree with Justice O'Malley who dissented. *Conklin v. Draper*, 229 N.Y. App. Div. 227, 254 N.Y. 620, 173 N.E. 892.

A notable "gauze pad case" comes from Alabama. It was contended there that the statute was tolled since the cause of action was concealed by the negligence hence the malfeasance should be treated as a fraudulent concealment. The strict construction rule was applied but the opinion does recognize the rule that [HN2] one may not take advantage of his own wrong. A careful reading of the case discloses that the real basis of the decision was the absence of allegations of diligence on the part of the plaintiff. *Hudson v. Moore*, 239 Ala. 130, 194 So. 147.

It is generally held that [HN3] *fraudulent concealment* stops the running [***8] of the statute. 74 A.L.R., p. 1320. It is said this is necessary that one be not permitted to take advantage of his own wrong. *Reynolds v. Hennessy*, 17 R.I. 169, 23 Atl. 639. But in such case the defendant has committed two wrongs, the original negligence and the fraudulent concealment. Why permit him [*369] to take advantage of the first and apply the rule only to the second? We are not impressed with the reasoning which supports the materiality of fraud. The statute is enacted for the purpose of promoting justice, discouraging unnecessary delay and forestalling the prosecution of stale claims, not for the benefit of the negligent. It should not be construed to defeat justice. The negligence is equally damaging and the victim equally helpless regardless of the motive for concealment.

This statute has exactly the same effect as would a contract of employment which provided that no action could be maintained against the doctors unless brought within two years from the date of the performance of the operation; that is on a par with a contract of insurance providing no recovery can be had unless notice be given within a specified time. Any excuse which would defeat [***9] such express contracts is equally effective to toll the statute and it is well settled in this jurisdiction that impossibility to give notice is such. *London Guarantee & Accident Co. v. Officer*, 78 Colo. 441, 242 Pac. 989; *United States Cas. Co. v. Hanson*, 20 Colo. App. 393, 79 Pac. 176.

Counsel for the doctors say we have held in a workmen's compensation case that ignorance of death did not toll the statute and that ruling should be regarded as controlling here. There no facts appeared upon which any recognized exception could be based and we merely announced and followed the general rule. The case is not in point. *Miller v. Industrial Com.*, 106 Colo. 364, 105 P. (2d) 404.

The Court of Appeals of Maryland, after reviewing with apparent acquiescence various authorities which deny the exception, or limit it to other grounds, appears finally unable to escape the logic and justice of the rule that plaintiff's lack of knowledge, due to no lack of diligence on his part, but solely to defendant's concealment, tolls the statute, and holds flatly that "the statute began to run from the time of the discovery of the alleged [*370] injury." *Hahn v. Claybrook*, 130 [***10] Md. 179, 100 Atl. 83.

[HN4] It has been held that while generally, plaintiff's ignorance of the wrong committed can not be considered in determining when the statute begins to run, an exception to this rule is made in cases of the concealment of the cause of action. There the bar of the statute does not operate until discovery, and it is said, "This proposition is so fundamental that no authorities need be cited." *Johnson v. Chicago, M. & St. P. Ry. Co.*, 224 Fed. 196, 201. With this statement we agree. Certainly one should not be permitted to take advantage of his own wrong. Under the facts pleaded it was impossible for plaintiff to sue within the limitation and it is a recognized maxim that the law requires not impossibilities. [HN5] A legal right to damage for an injury is property and one can not be deprived of his property without due process. There can be no due

112 Colo. 363, *370; 149 P.2d 372, **375;
1944 Colo. LEXIS 185, ***10

process unless the party deprived has his day in court and if without his fault his debtor conceals from him his right until a statute deprives him of his remedy he is deprived of due process. It is also an ancient maxim of the common law that "Where there is a right there is a remedy." What a mockery to say to one, grievously [***11] [**376] wronged, "Certainly you *had* a remedy, but while your debtor concealed from you the fact that you had a right the law stripped you of your remedy."

Regardless of the number of authorities supporting the rule of strict construction we disagree with them on reason and hold that this alleged cause of action against the doctors was not barred by the statute relied upon. As to them the judgment is reversed and the cause remanded for further proceedings in harmony herewith.

MR. JUSTICE GOUDY dissents as to the reversal.

APPENDIX 41



**SAN ANTONIO INDEPENDENT SCHOOL DISTRICT ET AL. v. RODRIGUEZ
ET AL.**

No. 71-1332

SUPREME COURT OF THE UNITED STATES

411 U.S. 1; 93 S. Ct. 1278; 36 L. Ed. 2d 16; 1973 U.S. LEXIS 91

**Argued October 12, 1972
March 21, 1973**

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

DISPOSITION: The Court reversed the decision of the lower court, which held that the Texas school finance system was unconstitutional under the *Equal Protection Clause of the Fourteenth Amendment*.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant State of Texas appealed a decision from the United States District Court for the Western District of Texas, which held the Texas school finance system unconstitutional under the *Equal Protection Clause of the Fourteenth Amendment*, in plaintiff parents' class action on behalf of school children throughout Texas who were members of minority groups, or who were poor and resided in school districts having a low property tax base.

OVERVIEW: In a suit by plaintiff parents on behalf of school children throughout Texas who were members of

minority groups, or who were poor and resided in school districts having a low property tax base, the lower court held that the Texas school finance system was unconstitutional under the *Equal Protection Clause of the Fourteenth Amendment*. The lower court based its decision on the substantial inter-district disparities in school expenditures largely attributable to differences in the amounts of money collected through local property taxation. On appeal, the Supreme Court held that where wealth was involved, the *Equal Protection Clause* did not require absolute equality or precisely equal advantages. The Court found that the Texas system did not operate to the peculiar disadvantage of any suspect class. The Court rejected the lower court's finding that education was a fundamental right or liberty. The strict scrutiny test was inappropriate and applied a standard of review that required only that the State's system be shown to bear some rational relationship to legitimate State purposes. The Texas plan satisfied the standard, and thus, the Court reversed.

OUTCOME: The Court reversed the decision of the lower court, which held that the Texas school finance

411 U.S. 1, *; 93 S. Ct. 1278, **;
36 L. Ed. 2d 16, ***; 1973 U.S. LEXIS 91

system was unconstitutional under the *Equal Protection Clause of the Fourteenth Amendment*.

LexisNexis(R) Headnotes

Education Law > Departments of Education > State Departments of Education > Authority

[HN1] See *Tex. Const. art. X, § 1* (1845).

Education Law > Departments of Education > State Departments of Education > Authority

[HN2] See *Tex. Const. art. X, § 2* (1845).

Civil Rights Law > General Overview

[HN3] The traditional indicia of suspectness include whether a class is saddled with disabilities, or subjected to a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Civil Rights Law > General Overview

[HN4] Wealth discrimination alone does not provide an adequate basis for invoking strict scrutiny.

Education Law > Departments of Education > State Departments of Education > Authority

[HN5] It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Constitutional Law > Equal Protection > Level of Review

Constitutional Law > Equal Protection > Scope of Protection

[HN6] The importance of a service performed by the state does not determine whether it must be regarded as fundamental for purposes of examination under the *Equal Protection Clause of the Fourteenth Amendment*.

Constitutional Law > Equal Protection > Scope of Protection

[HN7] The Supreme Court does not pick out particular human activities, characterize them as "fundamental," and give them added protection. To the contrary, the Court simply recognizes an established constitutional right, and gives to that right no less protection than the Constitution itself demands.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Constitutional Law > Equal Protection > Scope of Protection

Transportation Law > Right to Travel

[HN8] It is not the province of the Supreme Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Constitutional Law > Equal Protection > Scope of Protection

[HN9] Since the members of a legislature necessarily enjoy a familiarity with local conditions which the Supreme Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

Constitutional Law > Equal Protection > Scope of Protection

Education Law > Departments of Education > State Departments of Education > Authority

[HN10] The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation >

General Overview

[HN11] Questions of federalism are always inherent in the process of determining whether a state's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.

Constitutional Law > Equal Protection > Scope of Protection

[HN12] Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.

Constitutional Law > Equal Protection > Scope of Protection**Education Law > Funding > Allocation****Energy & Utilities Law > Financing > General Overview**

[HN13] It has simply never been within the constitutional prerogative of the Supreme Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

Constitutional Law > Equal Protection > Level of Review**Constitutional Law > Equal Protection > Scope of Protection**

[HN14] The constitutional standard under the *Equal Protection Clause of the Fourteenth Amendment* is whether the challenged state action rationally furthers a legitimate state purpose or interest.

SUMMARY:

A class action on behalf of certain Texas school children was instituted against state school authorities in the United States District Court for the Western District of Texas, the plaintiffs challenging the constitutionality, under the *equal protection clause of the Fourteenth Amendment*, of the state's statutory system for financing public education which authorizes an ad valorem tax by each school district on property within the district to supplement educational funds received by each district from the state, and which thus results in substantial interdistrict disparities in per-pupil expenditures attributable chiefly to the differences in amounts received

through local property taxation because of variations in the amount of taxable properties within each district. The three-judge District Court held that the Texas school financing system discriminated on the basis of wealth and was unconstitutional under the *equal protection clause*, ruling that (1) wealth was a suspect classification, and education was a fundamental interest, thus requiring the state to show, under the strict judicial scrutiny test, a compelling state interest for its system, which the state had failed to do, and (2) in any event, the state had failed to establish even a reasonable basis for its system (*337 F Supp 280*).

On direct appeal, the United States Supreme Court reversed. In an opinion by Powell, J., expressing the views of five members of the court, it was held that (1) the strict judicial scrutiny test, which was appropriate when state action impinged on a fundamental right or operated to the disadvantage of a suspect class—under which strict test the Texas financing system would have been unconstitutional—was not applicable on the theory that the system disadvantaged a suspect class by discriminating on the basis of wealth, since there was no showing that any definable category of "poor" persons was discriminated against, that any children were suffering an absolute deprivation of public education, or that there was any comparative discrimination based on relative family income within districts, and since any "district" wealth discrimination against residents of less wealthy districts did not meet the criteria of a suspect class, (2) the financing system did not impinge on any fundamental right so as to call for application of the strict judicial scrutiny test, since education was not a right afforded explicit or implicit protection under the Constitution, and since even assuming that some identifiable quantum of education was a constitutionally protected prerequisite to meaningful exercise of the right of free speech and the right to vote, nevertheless the system did not deny educational opportunities to any child, and there was no showing that the system failed to provide an adequate education for all children, (3) the traditional standard of review under the *equal protection clause*, requiring a showing that the state's action had a rational relationship to legitimate state purposes, was applicable, particularly in view of the court's traditional deference to state legislatures in the areas of fiscal and educational policies and local taxation, and in view of the case's great potential impact as to principles of federalism, and (4) under the traditional equal protection test, the Texas financing system, despite its conceded

411 U.S. 1, *; 93 S. Ct. 1278, **;
36 L. Ed. 2d 16, ***; 1973 U.S. LEXIS 91

imperfections, rationally furthered a legitimate state purpose, and thus did not violate the *equal protection clause*, since the system, by its provision for state contributions to each district, assured a basic education for every child, while permitting and encouraging vital local participation and control of schools through district taxation, and since the system, which was similar to systems employed in virtually every other state, was not the product of purposeful discrimination against any class, but instead was a responsible attempt to arrive at practical and workable solutions to educational problems.

Stewart, J., concurring, stated that (1) the Texas system did not create the kind of objectively identifiable classes that were cognizable under the *equal protection clause*, (2) even assuming the existence of such discernible categories, the classifications were not based upon constitutionally "suspect" criteria, (3) the financing system did not rest on grounds wholly irrelevant to the achievement of the state's objective, and (4) the system impinged on no substantive constitutional rights or liberties.

Brennan, J., dissented, stating that (1) the Texas statutory scheme was devoid of any rational basis, thus being violative of the *equal protection clause*, and (2) since education was inextricably linked to the right to participate in the electoral process and to the rights of free speech and association, any classification affecting education should be subjected to strict judicial scrutiny, under which the Texas system was also unconstitutional.

White, joined by Douglas and Brennan, JJ., dissented on the ground that even though local control of education might be a legitimate goal of a school financing system, nevertheless the means chosen to effectuate such goal must be rationally related to its achievement, and the Texas system unconstitutionally discriminated against parents and children who resided in property-poor districts, which districts had no meaningful chance to supplement minimum state funds to the same extent as more affluent districts.

Marshall, J., joined by Douglas, J., dissenting, expressed the views that (1) the Texas financing scheme discriminated from a constitutional perspective against the identifiable class of school children residing in property-poor districts, (2) strict judicial scrutiny of state classifications under the *equal protection clause* should depend on the constitutional and societal importance of the interest adversely affected and the invidiousness of

the basis upon which the classification was drawn, not merely on whether the fundamental right involved was explicitly or implicitly guaranteed by the Constitution, (3) in view of the close nexus between education and the constitutionally protected rights of free speech and association and the right to vote, the Texas system should be subjected to exacting judicial scrutiny, particularly since the system's discrimination on the basis of district or group wealth created a classification of a suspect character, (4) in all equal protection cases, the court should consider the substantiality of the state interest sought to be served, scrutinizing the reasonableness of the means by which the state sought to advance its interest, (5) although local control of education constituted a substantial state interest, nevertheless such interest did not justify the Texas system's discrimination in educational opportunity, since there was no possible local control over the amount of property located in a district, the means selected thus being wholly inappropriate to secure the state's purported interest in assuring school districts local fiscal control, and (6) the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas system rendered the system violative of the *equal protection clause* in view of the denial to children in property-poor districts of equal educational opportunities.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

COURTS §225.6

three-judge District Court -- constitutionality of state statutes --

Headnote:[1A][1B]

A three-judge Federal District Court is properly convened under 28 USCS 2281 in an action by parents of school children against state officials attacking the constitutionality under the *equal protection clause of the Fourteenth Amendment* of the state's statutory system for financing public education.

[***LEdHN2]

LAW §345

equal protection -- school financing system --

Headnote:[2A][2B][2C]

411 U.S. 1, *; 93 S. Ct. 1278, **;
36 L. Ed. 2d 16, ***LEdHN2; 1973 U.S. LEXIS 91

In determining the validity, under the *equal protection clause of the Fourteenth Amendment*, of a state's statutory system for financing public education which authorizes an ad valorem tax by each school district on property within the district to supplement educational funds received by the district from the state, and which thus results in substantial interdistrict disparities in per-pupil expenditures attributable primarily to the differences in amounts received through local property taxation because of the variations in the amount of taxable properties within each district--such system being challenged as subjecting children in less affluent districts to invidious discrimination--the proper standard of judicial review is the traditional standard requiring that the system be shown to bear some rational relationship to a legitimate state purpose, rather than the strict judicial scrutiny standard requiring the showing of a compelling state interest, under which strict standard the system would be unconstitutional; under the traditional standard of review, the state's financing system, despite its conceded imperfections, rationally furthers a legitimate state purpose or interest, and thus is not violative of the *equal protection clause*, where (1) the system's provisions for state contribution of funds to each district was designed to provide an adequate minimum educational offering in every school, the system thus assuring a basic education for every child while permitting and encouraging a large measure of vital participation in and control of each district's schools at the local level, and (2) the system, which was similar to systems in virtually every other state, was not the product of purposeful discrimination against any group, but instead was rooted in decades of experience, was in the major part the product of responsible studies by qualified persons, and was, at every stage of its development, a rough accommodation of interests in an effort to arrive at a practical and workable solution of a problem for which there was no perfect solution.

[***LEdHN3]

LAW §345

equal protection -- financing public education --

Headnote:[3]

If a state's statutory system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, it is subject to

strict judicial scrutiny in determining whether it violates the *equal protection clause of the Fourteenth Amendment*; if the statutory scheme does not so operate, it must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the *equal protection clause*.

[***LEdHN4]

LAW §345

equal protection -- school financing system --

Headnote:[4A][4B]

With regard to the validity, under the *equal protection clause of the Fourteenth Amendment*, of a state's statutory system for financing public education which authorizes an ad valorem tax by each school district on property within the district to supplement educational funds received by the district from the state, and which thus results in substantial interdistrict disparities in per-pupil expenditures attributable primarily to the differences in amounts received through local property taxation because of the variations in the amount of taxable properties within each district, such system does not operate to the peculiar disadvantage of any suspect class, discriminating on the basis of wealth, so as to require application of the strict judicial scrutiny rule under which the state must establish a compelling state interest for its actions, where (1) there was no showing that the system discriminated against any definable category of "poor" persons, or that children in districts having relatively low assessable property values were suffering an absolute deprivation of public education, (2) even assuming that a class composed of the "comparatively" poor could claim the special protection accorded "suspect" classes, nevertheless the record did not establish any relative or comparative discrimination based on family income through any correlation between the wealth of families within each district and the expenditures therein for education, and (3) any "district" wealth discrimination, that is discrimination against those who, irrespective of personal income, happen to reside in any district except the one with the most assessable property or in districts with assessable property falling below the statewide average, would not meet the criteria of a suspect class, since such a large, diverse, and amorphous class was unified only by the common factor of residence in districts that happened to have less taxable

wealth than other districts.

[***LEdHN5]

LAW §345

equal protection -- school financing system --

Headnote:[5A][5B]

A state's statutory system for financing public education which authorizes an ad valorem tax by each school district on property within the district to supplement educational funds received by the district from the state, and which thus results in substantial interdistrict disparities in per-pupil expenditures attributable primarily to the differences in amounts received through local property taxation because of the variations in the amount of taxable properties within each district, does not impinge upon any fundamental right protected by the Constitution, so as require application of the strict judicial scrutiny test under which a compelling state interest must be shown, since education, notwithstanding its undisputed importance, is not a right afforded explicit or implicit protection by the Constitution; even assuming that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of the right of free speech and the right to vote, nevertheless the strict judicial scrutiny rule is not applicable where the state's financing system does not occasion an absolute denial of educational opportunities to any of its children, and where there is no indication or charge that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

[***LEdHN6]

LAW §75

finer -- judge's discretion --

Headnote:[6]

In imposing criminal fines, sentencing judges may consider the defendant's ability to pay, and in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.

[***LEdHN7]

LAW §348.5

equal protection -- wealth discrimination --

Headnote:[7]

At least where wealth is involved, the *equal protection clause of the Fourteenth Amendment* does not require absolute equality or precisely equal advantages.

[***LEdHN8]

EVIDENCE §961

sufficiency -- discrimination in education financing

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Headnote:[8]

In an action challenging the constitutionality, under the *equal protection clause of the Fourteenth Amendment*, of a state's statutory system for financing public education--such system authorizing an ad valorem tax by each school district on property within the district to supplement educational funds received by the district from the state, and thus resulting in substantial interdistrict disparities in per-pupil expenditures attributable to the differences in amounts received through local property taxation because of the variations in taxable properties within each district--the evidence is insufficient to sustain a finding of relative or comparative discrimination based on family income through correlation between each district's expenditures for education and the wealth of families within the district, where the affidavit on which such finding was made showed only that the wealthiest few districts in a sample of about 10 percent of the state's school districts had the highest median family incomes and spent the most on education, whereas the several poorest districts had the lowest family incomes and devoted the least amount of money to education, but with regard to the remainder of the districts, almost 90 percent of the samples, the affidavit showed that the districts which spent next to the most money on education were populated by families having next to the lowest median family incomes, while the districts spending the least had the highest median family income.

[***LEdHN9]

LAW §327

equal protection -- political subdivisions --

Headnote:[9A][9B]

With regard to the *equal protection clause of the Fourteenth Amendment*, the state has power to draw reasonable distinctions between political subdivisions within its borders.

[***LEdHN10]

LAW §317

equal protection -- "suspect" class --

Headnote:[10]

With regard to the equal protection test of strict judicial scrutiny where state law operates to the disadvantage of some "suspect" class, the traditional indicia of suspectness include a class saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

[***LEdHN11]

SCHOOLS §1

equal opportunities --

Headnote:[11]

Opportunity of education, where the state has undertaken to provide it, must be made available to all on equal terms.

[***LEdHN12]

LAW §313

equal protection -- fundamental service -- judicial review --

Headnote:[12]

The importance of a service performed by the state does not determine whether it must be regarded as fundamental for purposes of strict judicial examination under the *equal protection clause of the Fourteenth Amendment*.

[***LEdHN13]

COURTS §92.3

legislation --

Headnote:[13]

The United States Supreme Court lacks both authority and competence to assume a legislative role.

[***LEdHN14]

LAW §313

equal protection -- fundamental rights -- strict judicial scrutiny --

Headnote:[14]

In determining whether a particular state law impinges on a fundamental right or interest so as to be subject to strict judicial scrutiny under the *equal protection clause*, the United States Supreme Court does not pick out particular human activities, characterize them as "fundamental," and give them added protection but, to the contrary, the court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.

[***LEdHN15]

LAW §317

equal protection -- classification --

Headnote:[15]

Under the *equal protection clause*, any classification which serves to penalize the exercise of a constitutional right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

[***LEdHN16]

LAW §313

equal protection -- judicial review of state laws --

Headnote:[16]

Social importance of the right or interest involved is not the critical determinant for subjecting legislation to

strict judicial scrutiny under the *equal protection clause* of the *Fourteenth Amendment*.

[***LEdHN17]

LAW §101

remedies --

Headnote:[17]

The Federal Constitution does not provide judicial remedies for every social and economic ill.

[***LEdHN18]

TENANT §22

right to occupy property --

Headnote:[18]

There is no federal constitutional guaranty of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent.

[***LEdHN19]

COURTS §92.7

functions --

Headnote:[19]

Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.

[***LEdHN20]

LAW §313

equal protection --

Headnote:[20]

It is not the province of the United States Supreme Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.

[***LEdHN21]

LAW §318

equal protection -- basis for classification --

Headnote:[21A][21B]

If a state statute impinges upon fundamental freedoms protected by the Constitution, the statutory classification must, under the *equal protection clause*, be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest.

[***LEdHN22]

ELECTIONS §3

right to vote --

Headnote:[22A][22B]

Even though the right to vote in state elections is not expressly mentioned in the Federal Constitution, nevertheless a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.

[***LEdHN23]

LAW §348.5

equal protection -- strict judicial review --

Headnote:[23A][23B]

The standard of review calling for strict judicial scrutiny is applicable in determining the constitutionality, under the *equal protection clause*, of an ordinance affecting *First Amendment* interests.

[***LEdHN24]

SCHOOLS §1

education as constitutional right --

Headnote:[24]

Education is not among the rights afforded explicit or implicit protection under the Federal Constitution.

[***LEdHN25]

LAW §345

equal protection -- legislation affecting education --

Headnote:[25]

The undisputed importance of education will not alone cause the United States Supreme Court to depart from the usual standard, under the *equal protection clause of the Fourteenth Amendment*, for reviewing a state's social and economic legislation affecting education.

[***LEdHN26]

ELECTIONS §3

right to vote --

Headnote:[26A][26B]

Although the right to vote in state elections, per se, is not a constitutionally protected right, nevertheless implicit in the constitutional system is the right to participate in state elections on an equal basis with other qualified voters whenever the state has adopted an elective process for determining who will represent any segment of the state's population.

[***LEdHN27]

LAW §925

ELECTIONS §1

state activities -- judicial intrusion --

Headnote:[27]

Although guaranteeing to the citizen the most effective speech or the most informed electoral choice are desirable goals of a system of freedom of expression and of a representative form of government, nevertheless they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

[***LEdHN28]

ELECTIONS §1

state interest --

Headnote:[28A][28B]

The states have a legitimate interest in assuring

intelligent exercise of the voting franchise.

[***LEdHN29]

LAW §345

equal protection -- school financing system --

Headnote:[29]

The strict judicial scrutiny standard for review of state action under the *equal protection clause of the Fourteenth Amendment*, requiring the state to establish a compelling state interest for its action denying or impinging on a fundamental right, is not appropriate in reviewing a state's statutory system for financing public education which involves an ad valorem property tax by each school district to supplement funds received from the state, where such system does not deny education to anyone, but instead was implemented in an effort to extend public education and to improve its quality; since the thrust of the state's system is affirmative and reformatory, such system should be scrutinized under judicial principles sensitive to the nature of the state's efforts and to the rights reserved to the states under the Constitution.

[***LEdHN30]

LAW §321

legislation aimed at particular evils --

Headnote:[30]

A statute is not invalid under the Federal Constitution because it might have gone further than it did, since a legislature need not strike at all evils at the same time, and reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

[***LEdHN31]

LAW §313

equal protection -- standard of review --

Headnote:[31]

The traditional standard of review of state law under the *equal protection clause of the Fourteenth Amendment* requires only that the state's law be shown to bear some

rational relationship to legitimate state purposes.

[***LEdHN32]

LAW §345

COURTS §124

equal protection -- school financing system --

Headnote:[32]

The traditional standard of review of state action under the *equal protection clause of the Fourteenth Amendment*, requiring only that the state's action be shown to bear some rational relationship to legitimate state purposes--rather than the strict judicial scrutiny standard requiring the state to establish a compelling state interest for its action--is appropriate for application by the United States Supreme Court in reviewing a state's statutory system for financing public education which involves an ad valorem property tax by each school district to supplement funds received from the state, and which thus results in substantial interdistrict disparities in per-pupil expenditures attributable primarily to the differences in amounts received through local property taxation, since (1) the court, in view of its lack of expertise and familiarity with local problems, traditionally defers to state legislatures in the area of a state's fiscal policies, including local taxation and disposition of public revenues, (2) persistent and difficult questions are involved as to educational policies, another area in which the court's lack of specialized knowledge and experience counsels against premature interference with informed judgments made at state and local levels, and an area in which the judiciary should refrain from interposing inflexible constitutional restraints on the states that could hinder research and experimentation, and (3) the case affects systems of financing public education in existence in virtually every state, thus presenting great potential impact as to principles of federalism; such considerations are also relevant to the determination whether the state's system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose.

[***LEdHN33]

SCHOOLS §1

validity of state laws --

Headnote:[33A][33B]

The very complexity of the problems of financing and managing a state-wide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect.

[***LEdHN34]

#) EVIDENCE §99(1)

presumption -- validity of state laws --

Headnote:[34]

Under the traditional standard of judicial review of state action under the *equal protection clause of the Fourteenth Amendment*, a state's laws are accorded a presumption of constitutionality.

[***LEdHN35]

LAW §9

interpretation of Constitution --

Headnote:[35]

The maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which the United States Supreme Court examines state action.

[***LEdHN36]

LAW §345

equal protection -- school financing system --

Headnote:[36]

A state's system for financing public education which authorizes an ad valorem tax by each school district on property within the district to supplement educational funds received by the district from the state, and which thus results in substantial interdistrict disparities in per-pupil expenditures attributable primarily to the differences in amounts received through local property taxation because of the variations in the amount of taxable properties within each district, does not violate the *equal protection clause of the Fourteenth Amendment*

merely because the system's reliance on local property taxation for school revenue provides less freedom of choice with respect to expenditures for some districts than for others, since the existence of some inequality in the manner in which the state's rationale of local control of education is achieved is not alone a sufficient basis for striking down the entire system; nor must the system fail because other methods of satisfying the state's interest which occasion less drastic disparities in expenditures might be conceived.

[***LEdHN37]

LAW §313

equal protection --

Headnote:[37]

With regard to the validity of state action under the *equal protection clause of the Fourteenth Amendment*, only where the state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.

[***LEdHN38]

LAW §345

equal protection -- school financing system --

Headnote:[38]

For the purpose of determining whether a state's statutory system for financing public education is supported by a legitimate and reasonable basis as required by the *equal protection clause of the Fourteenth Amendment*, it is irrelevant whether local control of education, sought to be assured by such system, would be preserved and possibly better served under other systems.

[***LEdHN39]

LAW §345

equal protection -- school financing system --

Headnote:[39]

A state's statutory system for financing public education which authorizes an ad valorem tax by each school district on property within the district to supplement educational funds received by the district

from the state, and which thus results in substantial interdistrict disparities in per-pupil expenditures attributable primarily to the differences in amounts received through local property taxation because of the variations in the amount of taxable properties within each district, is not unconstitutionally arbitrary under the *equal protection clause of the Fourteenth Amendment* merely because it allows the availability of local taxable resources to turn on happenstance as to the positioning of boundary lines of political subdivisions and the location of valuable commercial and industrial property, since any scheme of local taxation requires the establishment of jurisdictional boundaries that are inevitably arbitrary, and since it is equally inevitable that some localities will have more taxable assets than others.

[***LEdHN40]

LAW §327

state financing -- unequal burden on political subdivisions --

Headnote:[40]

It is not within the constitutional prerogative of the United States Supreme Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

[***LEdHN41]

#) EVIDENCE §99(2)

presumptions -- validity of statute --

Headnote:[41]

In determining the constitutionality under the *equal protection clause of the Fourteenth Amendment* of a state's statutory system for financing public education, the statutory system is entitled to a presumption of validity.

[***LEdHN42]

COURTS §124

state taxation and education -- legislative matters --

Headnote:[42]

The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various states; the ultimate solutions as to such matters must come from the lawmakers and from the democratic pressures of those who elect them, not from the United States Supreme Court.

SYLLABUS

The financing of public elementary and secondary schools in Texas is a product of state and local participation. Almost half of the revenues are derived from a largely state-funded program designed to provide a basic minimum educational offering in every school. Each district supplements state aid through an ad valorem tax on property within its jurisdiction. Appellees brought this class action on behalf of school children said to be members of poor families who reside in school districts having a low property tax base, making the claim that the Texas system's reliance on local property taxation favors the more affluent and violates equal protection requirements because of substantial interdistrict disparities in per-pupil expenditures resulting primarily from differences in the value of assessable property among the districts. The District Court, finding that wealth is a "suspect" classification and that education is a "fundamental" right, concluded that the system could be upheld only upon a showing, which appellants failed to make, that there was a compelling state interest for the system. The court also concluded that appellants failed even to demonstrate a reasonable or rational basis for the State's system. Held:

1. This is not a proper case in which to examine a State's laws under standards of strict judicial scrutiny, since that test is reserved for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. Pp. 18-44.

(a) The Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of "poor" people or to occasion discriminations depending on the relative wealth of the families in any district. And, insofar as the financing system disadvantages those who, disregarding their individual income characteristics, reside in comparatively poor school districts, the resulting class

cannot be said to be suspect. Pp. 18-28.

(b) Nor does the Texas school-financing system impermissibly interfere with the exercise of a "fundamental" right or liberty. Though education is one of the most important services performed by the State, it is not within the limited category of rights recognized by this Court as guaranteed by the Constitution. Even if some identifiable quantum of education is arguably entitled to constitutional protection to make meaningful the exercise of other constitutional rights, here there is no showing that the Texas system fails to provide the basic minimal skills necessary for that purpose. Pp. 29-39.

(c) Moreover, this is an inappropriate case in which to invoke strict scrutiny since it involves the most delicate and difficult questions of local taxation, fiscal planning, educational policy, and federalism, considerations counseling a more restrained form of review. Pp. 40-44.

2. The Texas system does not violate the *Equal Protection Clause of the Fourteenth Amendment*. Though concededly imperfect, the system bears a rational relationship to a legitimate state purpose. While assuring a basic education for every child in the State, it permits and encourages participation in and significant control of each district's schools at the local level. Pp. 44-53.

337 F. Supp. 280, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, post, p. 59. BRENNAN, J., filed a dissenting opinion, post, p. 62. WHITE, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, post, p. 63. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, J., joined, post, p. 70.

COUNSEL: Charles Alan Wright argued the cause for appellants. With him on the briefs were Crawford C. Martin, Attorney General of Texas, Nola White, First Assistant Attorney General, Alfred Walker, Executive Assistant Attorney General, J. C. Davis and Pat Bailey, Assistant Attorneys General, and Samuel D. McDaniel.

Arthur Gochman argued the cause for appellees. With him on the brief was Mario Obledo

Briefs of amici curiae urging reversal were filed by George F. Kugler, Jr., Attorney General, pro se, and Stephen Skillman, Assistant Attorney General, for the Attorney General of New Jersey; by George W. Liebmann and Shale D. Stiller for Montgomery County, Maryland, joined by Francis B. Burch, Attorney General of Maryland, Henry R. Lord, Deputy Attorney General, E. Stephen Derby, Assistant Attorney General; William J. Baxley, Attorney General of Alabama; Gary K. Nelson, Attorney General of Arizona, James G. Bond, Assistant Attorney General; Evelle J. Younger, Attorney General of California, Elizabeth Palmer, Assistant Attorney General, Edward M. Belasco, Deputy Attorney General; Duke W. Dunbar, Attorney General of Colorado; Robert K. Killian, Attorney General of Connecticut, F. Michael Ahern, Assistant Attorney General; W. Anthony Park, Attorney General of Idaho, James R. Hargis, Deputy Attorney General; Theodore L. Sendak, Attorney General of Indiana; Charles M. Wells, Harry T. Ice, Richard C. Turner, Attorney General of Iowa, George W. Murray, Assistant Attorney General; Vern Miller, Attorney General of Kansas, Matthew J. Dowd and John C. Johnson, Assistant Attorneys General; Ed W. Hancock, Attorney General of Kentucky, Carl T. Miller, Assistant Attorney General; William J. Guste, Jr., Attorney General of Louisiana; James S. Erwin, Attorney General of Maine, George West, Assistant Attorney General; Robert H. Quinn, Attorney General of Massachusetts, Lawrence T. Bench, Assistant Attorney General, Charles F. Clippert, William M. Saxton, Robert B. Webster; A. F. Summer, Attorney General of Mississippi, Martin R. McLendon, Assistant Attorney General; John Danforth, Attorney General of Missouri, D. Brook Bartlett, Assistant Attorney General; Clarence A. H. Meyer, Attorney General of Nebraska, Harold Mosher, Assistant Attorney General; Warren B. Rudman, Attorney General of New Hampshire; Louis J. Lefkowitz, Attorney General of New York; Robert B. Morgan, Attorney General of North Carolina, Burley B. Mitchell, Jr., Assistant Attorney General; Helgi Johannesson, Attorney General of North Dakota, Gerald Vandewalle, Assistant Attorney General; Lee Johnson, Attorney General of Oregon; Daniel R. McLeod, Attorney General of South Carolina, G. Lewis Argoe, Jr., Assistant Attorney General; Gordon Mydland, Attorney General of South Dakota, C. J. Kelly, Assistant Attorney General; David M. Pack, Attorney General of Tennessee, Milton P. Rice, Deputy Attorney General; Vernon B. Romney, Attorney General of Utah, Robert B. Hansen, Deputy Attorney General; James M. Jeffords, Attorney General of Vermont; Chauncey H.

Browning, Jr., Attorney General of West Virginia, Victor A. Barone, Assistant Attorney General; Robert W. Warren, Attorney General of Wisconsin, and Betty R. Brown, Assistant Attorney General; and by John D. Maharg and James W. Briggs for Richard M. Clowes, Superintendent of Schools of the County of Los Angeles, et al.

Briefs of amici curiae urging affirmance were filed by David Bonderman and Peter Van N. Lockwood for Wendell Anderson, Governor of Minnesota, et al.; by Robert R. Coffman for Wilson Riles, Superintendent of Public Instruction of California, et al.; by Roderick M. Hills for Houston I. Flourmoy, Controller of California; by Ramsey Clark, John Silard, David C. Long, George L. Russell, Jr., Harold J. Ruvoldt, Jr., J. Albert Woll, Thomas E. Harris, John Ligtenberg, A. L. Zwerdling, and Stephen I. Schlossberg for the Mayor and City Council of Baltimore et al.; by George H. Spencer for San Antonio Independent School District; by Norman Dorsen, Marvin M. Karpatkin, Melvin L. Wulf, Paul S. Berger, Joseph B. Robison, Arnold Forster, and Stanley P. Hebert for the American Civil Liberties Union et al.; by Jack Greenberg, James M. Nabrit III, Norman J. Chachkin, and Abraham Sofaer for the NAACP Legal Defense and Educational Fund, Inc.; by Stephen J. Pollak, Ralph J. Moore, Jr., Richard M. Sharp, and David Rubin for the National Education Assn. et al.; and by John E. Coons for John Serrano, Jr., et al.

Briefs of amici curiae were filed by Lawrence E. Walsh, Victor W. Bouldin, Richard B. Smith, and Guy M. Struve for the Republic National Bank of Dallas et al., and by Joseph R. Cortese, Joseph Guandolo, Bryce Huguenin, Manly W. Mumford, Joseph H. Johnson, Jr., Joseph Rudd, Fred H. Rosenfeld, Herschel H. Friday, George Herrington, Harry T. Ice, Cornelius W. Grafton, Fred G. Benton, Jr., Eugene E. Huppenbauer, Jr., Harold B. Judell, Robert B. Fizzell, John B. Dawson, George J. Fagin, Howard A. Rankin, Huger Sinkler, Robert W. Spence, Hobby H. McCall, James R. Ellis, and William J. Kiernan, Jr., Bond Counsel.

JUDGES: Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist

OPINION BY: POWELL

OPINION

[*4] [***26] [**1282] MR. JUSTICE POWELL delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A] This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary [*5] schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas. ¹ [***27] They brought a class action on behalf of school children throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants ² were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The complaint [*6] was filed in the summer of 1968 and a three-judge court was impaneled in January 1969. ³ In December 1971 ⁴ the panel rendered its judgment in a per curiam opinion holding the Texas school finance system unconstitutional under the *Equal Protection Clause of the Fourteenth Amendment* ⁵. The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. *406 U.S. 966 (1972)*. For the reasons stated in this opinion, we reverse the decision of the District Court.

1 Not all of the children of these complainants attend public school. One family's children are enrolled in private school "because of the condition of the schools in the Edgewood Independent School District." Third Amended Complaint, App. 14.

2 The San Antonio Independent School District, whose name this case still bears, was one of seven school districts in the San Antonio metropolitan area that were originally named as defendants. After a pretrial conference, the District Court issued an order dismissing the school districts from the case. Subsequently, the San Antonio Independent School District joined in the plaintiffs' challenge to the State's school finance system and filed an amicus curiae brief in support of that position in this Court.

[***LEdHR1B] [1B]

3 A three-judge court was properly convened and there are no questions as to the District Court's jurisdiction or the direct appealability of

its judgment. *28 U.S.C. §§ 1253, 2281*.

4 The trial was delayed for two years to permit extensive pretrial discovery and to allow completion of a pending Texas legislative investigation concerning the need for reform of its public school finance system. *337 F. Supp. 280, 285 n. 11 (WD Tex. 1971)*.

5 *337 F. Supp. 280*. The District Court stayed its mandate for two years to provide Texas an opportunity to remedy the inequities found in its financing program. The court, however, retained jurisdiction to fashion its own remedial order if the State failed to offer an acceptable plan. *Id.*, at 286.

I

The first Texas State Constitution, promulgated upon Texas' entry into the Union in 1845, provided for the establishment of a system of free schools ⁶. Early in its history, Texas adopted a dual approach to the financing of its schools, relying on mutual participation by the local school districts and the State. As early as 1883, the state [*7] constitution was amended to provide for the creation of local school districts empowered to levy ad valorem taxes with the consent of local taxpayers for the "erection . . . of school buildings" and for the "further maintenance of public free schools." ⁷ Such local funds as were raised were supplemented by funds distributed to each district from the State's Permanent and Available School Funds. ⁸ The Permanent [**1283] School Fund, its predecessor established in 1854 with [***28] \$ 2,000,000 realized from an annexation settlement ⁹, was thereafter endowed with millions of acres of public land set aside to assure a continued source of income for school support. ¹⁰ The Available School Fund, which received income from the Permanent School Fund as well as from a state ad valorem property tax and other designated taxes ¹¹, served as the disbursing arm for most state educational funds throughout the late 1800's and first half of this century. Additionally, in 1918 an increase in state property taxes was used to finance a program providing free textbooks throughout the State. ¹²

6 [HN1] *Tex. Const., Art. X, § 1* (1845):

"A general diffusion of knowledge being

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36 L. Ed. 2d 16, ***28; 1973 U.S. LEXIS 91

essential to the preservation of the rights and liberties of the people, it shall be the duty of the Legislature of this State to make suitable provision for the support and maintenance of public schools."

Id., § 2:

[HN2] "The Legislature shall as early as practicable establish free schools throughout the State, and shall furnish means for their support, by taxation on property ..."

7 Tex. Const. of 1876, Art. 7, § 3, as amended, Aug. 14, 1883.

8 Id., Art. 7, §§ 3, 4, 5.

9 3 Gammel's Laws of Texas 1847-1854, p. 1461. See *Tex. Const., Art. 7, §§ 1, 2, 5* (interpretive commentaries); 1 Report of Governor's Committee on Public School Education, *The Challenge and the Chance* 27 (1969) (hereinafter Governor's Committee Report).

10 *Tex. Const., Art. 7, § 5* (see also the interpretive commentary); 5 Governor's Committee Report 11-12.

11 The various sources of revenue for the Available School Fund are cataloged in A Report of the Adequacy of Texas Schools, prepared by Texas State Board of Education, 7-15 (1938) (hereinafter Texas State Bd. of Educ.).

12 *Tex. Const., Art. 7, § 3*, as amended, Nov. 5, 1918 (see interpretive commentary).

Until recent times, Texas was a predominantly rural State and its population and property wealth were spread [*8] relatively evenly across the State. ¹³ Sizable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced. ¹⁴ The location of commercial and industrial property began to play a significant role in determining the amount of tax

resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education ¹⁵.

13 1 Governor's Committee Report 35; Texas State Bd. of Educ., *supra*, n. 11, at 5-7; J. Coons, W. Clune, & S. Sugarman, *Private Wealth and Public Education* 48-49 (1970); E. Cubberley, *School Funds and Their Apportionment* 21-27 (1905).

14 By 1940, one-half of the State's population was clustered in its metropolitan centers. 1 Governor's Committee Report 35.

15 Gilmer-Aikin Committee, *To Have What We Must* 13 (1948).

In due time it became apparent to those concerned with financing public education that contributions from the Available School Fund were not sufficient to ameliorate these disparities ¹⁶. Prior to 1939, the Available School Fund contributed money to every school district at a rate of \$17.50 per school-age child. ¹⁷ Although the amount was increased several times in the early 1940's, ¹⁸ [*9] the Fund was providing only \$46 per student by 1945. ¹⁹

16 R. Still, *The Gilmer-Aikin Bills* 11-13 (1950); Texas State Bd. of Educ., *supra*, n. 11.

17 Still, *supra*, n. 16, at 12. It should be noted that during this period the median per-pupil expenditure for all schools with an enrollment of more than 200 was approximately \$ 50 per year. During this same period, a survey conducted by the State Board of Education concluded that "in Texas the best educational advantages offered by the State at present may be had for the median cost of \$ 52.67 per year per pupil in average daily attendance." Texas State Bd. of Educ., *supra*, n. 11, at 56.

18 General Laws of Texas, 46th Legis., Reg. Sess. 1939, c. 7, pp. 274-275 (\$22.50 per student); General & Spec. Laws of Texas, 48th Legis., Reg. Sess. 1943, c. 161, pp. 262-263 (\$25 per student).

19 General & Spec. Laws of Texas, 49th Legis., Reg. Sess. 1945, c. 52, pp. 74-75; Still, *supra*, n.

16, at 12.

Recognizing the need for increased state funding to help offset [***29] disparities in local spending and to meet Texas' changing educational requirements, the state legislature in the late 1940's undertook a thorough evaluation of public education [**1284] with an eye toward major reform. In 1947, an 18-member committee, composed of educators and legislators, was appointed to explore alternative systems in other States and to propose a funding scheme that would guarantee a minimum or basic educational offering to each child and that would help overcome interdistrict disparities in taxable resources. The Committee's efforts led to the passage of the Gilmer-Aikin bills, named for the Committee's co-chairmen, establishing the Texas Minimum Foundation School Program ²⁰. Today, this Program accounts for approximately half of the total educational expenditures in Texas. ²¹

²⁰ For a complete history of the adoption in Texas of a foundation program, see Still, *supra*, n. 16. See also 5 Governor's Committee Report 14; Texas Research League, *Public School Finance Problems in Texas* 9 (Interim Report 1972).

²¹ For the 1970-1971 school year this state aid program accounted for 48% of all public school funds. Local taxation contributed 41.1% and 10.9% was provided in federal funds. Texas Research League, *supra*, n. 20, at 9.

The Program calls for state and local contributions to a fund earmarked specifically for teacher salaries, operating expenses, and transportation costs. The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible - as a unit - for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts [*10] under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State. ²² Each county's assignment is then divided among its school districts on the basis of each

district's share of assessable property within the county. ²³ The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

²² 5 Governor's Committee Report 44-48.

²³ At present, there are 1,161 school districts in Texas. Texas Research League, *supra*, n. 20, at 12.

The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children ²⁴ but that would not by itself exhaust any district's resources. ²⁵ Today every school district does impose a property tax from which it derives locally [***30] expendable [*11] funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program.

²⁴ In 1948, the Gilmer-Aikin Committee found that some school districts were not levying any local tax to support education. Gilmer-Aikin Committee, *supra*, n. 15, at 16. The Texas State Board of Education Survey found that over 400 common and independent school districts were levying no local property tax in 1935-1936. Texas State Bd. of Educ., *supra* n. 11, at 39-42.

²⁵ Gilmer-Aikin Committee, *supra*, n. 15, at 15.

In the years since this program went into operation in 1949, expenditures for education - from state as well as local sources -- have increased steadily. Between 1949 and 1967, expenditures increased approximately 500%. ²⁶ In the [**1285] last decade alone the total public school budget rose from \$ 750 million to \$ 2.1 billion ²⁷ and these increases have been reflected in consistently rising per-pupil expenditures throughout the State. ²⁸ Teacher salaries, by far the largest item in any school's budget, have increased dramatically - the state-supported minimum salary for teachers possessing college degrees

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has risen from \$ 2,400 to \$ 6,000 over the last 20 years.

29

26 1 Governor's Committee Report 51-53.

27 Texas Research League, *supra*, n. 20, at 2.

28 In the years between 1949 and 1967, the average per-pupil expenditure for all current operating expenses increased from \$206 to \$ 493. In that same period, capital expenditures increased from \$44 to \$ 102 per pupil. 1 Governor's Committee Report 53-54.

29 Acts 1949, 51st Legis., p. 625, c. 334, Art. 4, Tex. Educ. Code Ann. § 16.302 (1972); see generally 3 Governor's Committee Report 113-146; Berke, Carnevale, Morgan & White, *The Texas School Finance Case: A Wrong in Search of a Remedy*, 1 J. of L. & Educ. 659, 681-682 (1972).

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary [*12] and secondary schools. The district is situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is \$ 5,960 - the lowest in the metropolitan area -- and the median family income (\$4,686) is also the lowest.³⁰ At an equalized tax rate of \$ 1.05 per \$ 100 of assessed property -- the highest in the metropolitan area -- the district contributed \$26 to the education of each child for the 1967-1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed \$ 222 per pupil for a state-local total of \$248³¹. Federal funds added another

\$ 108 for a total of \$ 356 per pupil.³²

30 The family income figures are based on 1960 census statistics.

31 The Available School Fund, technically, provides a second source of state money. That Fund has continued as in years past (see text accompanying nn. 16-19, *supra*) to distribute uniform per-pupil grants to every district in the State. In 1968, this Fund allotted \$ 98 per pupil. However, because the Available School Fund contribution is always subtracted from a district's entitlement under the Foundation Program, it plays no significant role in educational finance today.

32 While federal assistance has an ameliorating effect on the difference in school budgets between wealthy and poor districts, the District Court rejected an argument made by the State in that court that it should consider the effect of the federal grant in assessing the discrimination claim. *337 F. Supp.*, at 284. The State has not renewed that contention here.

Alamo [***31] Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly "Anglo," having only 18% Mexican-Americans [*13] and less than 1% Negroes. The assessed property value per pupil exceeds \$ 49,000,³³ and the median [**1286] family income is \$ 8,001. In 1967-1968 the local tax rate of \$.85 per \$ 100 of valuation yielded \$ 333 per pupil over \$ 225 provided from that Program, the district was able to supply \$ 558 per student. Supplemented by a \$ 36 per-pupil grant from federal sources, Alamo Heights spent \$ 594 per pupil.

33 A map of Bexar County included in the record shows that Edgewood and Alamo Heights are among the smallest districts in the county and are of approximately equal size. Yet, as the figures above indicate, Edgewood's student population is more than four times that of Alamo Heights. This factor obviously accounts for a significant percentage of the differences between the two districts in per-pupil property values and expenditures. If Alamo Heights had as many

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students to educate as Edgewood does (22,000) its per pupil assessed property value would be approximately \$ 11,100 rather than \$ 49,000, and its per-pupil expenditures would therefore have been considerably lower.

Although the 1967-1968 school year figures provide the only complete statistical breakdown for each category of aid,³⁴ more recent partial statistics indicate that the previously noted trend of increasing state aid has been significant. For the 1970-1971 school year, the Foundation School Program allotment for Edgewood was \$ 356 per pupil, a 62% increase over the 1967-1968 school year. Indeed, state aid alone in 1970-1971 equaled Edgewood's entire 1967-1968 school budget from local, state, and federal sources. Alamo Heights enjoyed a similar increase under the Foundation Program, netting \$491 per pupil in 1970-1971³⁵. These recent figures [*14] also reveal the extent to which these two districts' allotments were funded from their own required contributions to the Local Fund Assignment. Alamo Heights, because of [***32] its relative wealth, was required to contribute out of its local property tax collections approximately \$100 per pupil, or about 20% of its Foundation grant. Edgewood, on the other hand, paid only \$8.46 per pupil, which is about 2.4% of its grant.³⁶ It appears then that, at least as to these two districts, the Local Fund Assignment does reflect a rough approximation of the relative taxpaying potential of each.

37

34 The figures quoted above vary slightly from those utilized in the District Court opinion. 337 *F. Supp.*, at 282. These trivial differences are apparently a product of that court's reliance on slightly different statistical data than we have relied upon.

35 Although the Foundation Program has made significantly greater contributions to both school districts over the last several years, it is apparent that Alamo Heights has enjoyed a larger gain. The sizable difference between the Alamo Heights and Edgewood grants is due to the emphasis in the State's allocation formula on the guaranteed minimum salaries for teachers. Higher salaries are guaranteed to teachers having more years of experience and possessing more advanced degrees. Therefore, Alamo Heights, which has a greater percentage of experienced

personnel with advanced degrees, receives more State support. In this regard, the Texas Program is not unlike that presently in existence in a number of other States. Coons, Clune & Sugarman, *supra*, n. 13, at 63-125. Because more dollars have been given to districts that already spend more per pupil, such Foundation formulas have been described as "anti-equalizing." *Ibid.* The formula, however, is anti-equalizing only if viewed in absolute terms. The percentage disparity between the two Texas districts is diminished substantially by state aid. Alamo Heights derived in 1967-1968 almost 13 times as much money from local taxes as Edgewood did. The state aid grants to each district in 1970-1971 lowered the ratio to approximately two to one, i.e., Alamo Heights had a little more than twice as much money to spend per pupil from its combined state and local resources.

36 Texas Research League, *supra*, n. 20, at 13.

37 The Economic Index, which determines each county's share of the total Local Fund Assignment, is based on a complex formula conceived in 1949 when the Foundation Program was instituted. See text, *supra*, at 9-10. It has frequently been suggested by Texas researchers that the formula be altered in several respects to provide a more accurate reflection of local taxpaying ability, especially of urban school districts. 5 Governor's Committee Report 48; Texas Research League, *Texas Public School Finance: A Majority of Exceptions* 31-32 (2d Interim Report 1972); Berke, Carnevale, Morgan & White, *supra*, n. 29, at 680-681.

[*15] Despite [**1287] these recent increases, substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State³⁸ still exist. And it was [*16] these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school financing violated the *Equal Protection Clause*. The District Court held that the Texas system discriminates on the basis of wealth in the manner [***33] in which education is provided for its people. 337 *F. Supp.*, at

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282. Finding that wealth is a "suspect" classification and that education is a "fundamental" interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest. *Id.*, at 282-284. On this issue the court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications." *Id.*, at 284.

38 The District Court relied on the findings presented in an affidavit submitted by Professor

Berke of Syracuse. His sampling of 110 Texas school districts demonstrated a direct correlation between the amount of a district's taxable property and its level of per-pupil expenditure. But his study found only a partial correlation between a district's median family income and per-pupil expenditures. The study also shows, in the relatively few districts at the extremes, an inverse correlation between percentage of minorities and expenditures.

Market Value of Taxable Property Per Pupil	Median Family Income From 1960	Per Cent Minority Pupils	State & Local Revenues Per Pupil
Above \$100,000 (10 districts)	\$5,900	8%	\$815
\$100,000-\$50,000 (26 districts)	\$4,425	32%	\$544
\$50,000-\$30,000 (30 districts)	\$4,900	23%	\$483
\$30,000-\$10,000 (40 districts)	\$5,050	31%	\$462
Below \$10,000 (4 districts)	\$3,325	79%	\$305

Although the correlations with respect to family income and race appear only to exist at the extremes, and although the affiant's methodology has been questioned (see Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny*, 120 U. Pa. L. Rev. 504, 523-525, nn. 67, 71 (1972)), insofar as any of these correlations is relevant to the constitutional thesis presented in this case we may accept its basic thrust. But see *infra*, at 25-27. For a defense of the reliability of the affidavit, see Berke, Carnevale, Morgan & White, *supra*, n. 29.

Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights³⁹ or that involve suspect classifications.⁴⁰ If, as [**1288] previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the

complainants must carry a "heavy burden of justification," that the State must [*17] demonstrate that its educational system has been structured with "precision," and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives⁴¹, the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that "[n]o one familiar with the Texas system would contend that it has yet achieved perfection."⁴² Apart from its concession that educational financing in Texas has "defects"⁴³ and "imperfections,"⁴⁴ the State defends the system's rationality with vigor and disputes the District Court's finding that it lacks a "reasonable basis."

39 E.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

40 E.g., *Graham v. Richardson*, 403 U.S. 365 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

41 See *Dunn v. Blumstein*, *supra*, at 343, and

the cases collected therein.

42 Brief for Appellants 11.

43 Ibid.

44 Tr. of Oral Arg. 3; Reply Brief for Appellants 2.

[***LEdHR3] [3]This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the *Equal Protection Clause of the Fourteenth Amendment*.

II

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to [***34] Texas' system of school financing. In concluding that strict judicial scrutiny was required, [*18] that court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes⁴⁵, and on cases disapproving wealth restrictions on the right to vote⁴⁶. Those cases, the District Court concluded, established wealth as a suspect classification. Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as controlling. It then reasoned, based on decisions of this Court affirming the undeniable importance of education⁴⁷, that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand.

45 E.g., *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963).

46 *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969); *Bullock v. Carter*, 405 U.S. 134 (1972); *Goosby v. Osser*, 409 U.S. 512 (1973).

47 See cases cited in text, *infra*, at 29-30.

[***LEdHR4A] [4A] [***LEdHR5A] [5A]We are unable to agree that this case, which in significant aspects is *sui generis*, may be so neatly fitted into the conventional mosaic of constitutional analysis under the *Equal Protection Clause*. Indeed, for the several reasons that follow, we find neither the suspect-classification nor the fundamental-interest analysis persuasive.

A

The wealth discrimination discovered by the District Court in this [**1289] case, and by several other courts that have recently struck down school-financing laws in other States⁴⁸, is quite unlike any of the forms of wealth discrimination [*19] heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged "poor" cannot be identified or defined in customary equal protection terms, and whether the relative -- rather than absolute -- nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

48 *Serrano v. Priest*, 5 Cal. 3d 584, 487 P. 2d 1241 (1971); *Van Duzart v. Hatfield*, 334 F. Supp. 870 (Minn. 1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A. 2d 187 (1972); *Milliken v. Green*, - Mich., 203 N.W. 2d 457 (1972), rehearing granted, Jan. 1973.

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. Examination of the District Court's opinion and of appellees' complaint, briefs, and contentions [***35] at oral argument suggests, however, at least three ways in which the discrimination claimed here might be described. The Texas system of school financing might be regarded as discriminating (1) against "poor" persons whose incomes fall below some identifiable level of

411 U.S. 1, *19; 93 S. Ct. 1278, **1289;
36 L. Ed. 2d 16, ***35; 1973 U.S. LEXIS 91

poverty or who might be characterized as functionally "indigent,"⁴⁹ or [*20] (2) against those who are relatively poorer than others⁵⁰, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts⁵¹. Our task must be to ascertain whether, in fact, the Texas system has been shown to discriminate on any of these possible bases and, if so, whether the resulting [*1290] classification may be regarded as suspect.

49 In their complaint, appellees purported to represent a class composed of persons who are "poor" and who reside in school districts having a "low value of . . . property." Third Amended Complaint, App. 15. Yet appellees have not defined the term "poor" with reference to any absolute or functional level of impecunty. See text, *infra*, at 22-23. See also Brief for Appellees 1, 3; Tr. of Oral Arg. 20-21.

50 Appellees' proof at trial focused on comparative differences in family incomes between residents of wealthy and poor districts. They endeavored, apparently, to show that there exists a direct correlation between personal family income and educational expenditures. See text, *infra*, at 25-27. The District Court may have been relying on this notion of relative discrimination based on family wealth. Citing appellees' statistical proof, the court emphasized that "those districts most rich in property also have the highest median family income . . . while the poor property districts are poor in income ..." 337 F. Supp., at 282.

51 At oral argument and in their brief, appellees suggest that description of the personal status of the residents in districts that spend less on education is not critical to their case. In their view, the Texas system is impermissibly discriminatory even if relatively poor districts do not contain poor people. Brief for Appellees 43-44; Tr. of Oral Arg. 20-21. There are indications in the District Court opinion that it adopted this theory of district discrimination. The opinion repeatedly emphasizes the comparative financial status of districts and early in the opinion it describes appellees' class as being composed of "all . . . children throughout Texas

who live in school districts with low property valuations." 337 F. Supp., at 281.

The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunty they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. In *Griffin v. Illinois*, [*21] 351 U.S. 12 (1956), and its progeny,⁵² the Court invalidated state laws that prevented an indigent criminal defendant from acquiring a transcript, or an adequate substitute for a transcript, for use at several stages of the trial and appeal process. The payment requirements in each case were found to occasion *de facto* discrimination against those who, because of their indigency, were totally unable to [***36] pay for transcripts. And the Court in each case emphasized that no constitutional violation would have been shown if the State had provided some "adequate substitute" for a full stenographic transcript. *Britt v. North Carolina*, 404 U.S. 226, 228 (1971); *Gardner v. California*, 393 U.S. 367 (1969); *Draper v. Washington*, 372 U.S. 487 (1963); *Eskridge v. Washington Prison Board*, 357 U.S. 214 (1958).

52 *Mayer v. City of Chicago*, 404 U.S. 189 (1971); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Gardner v. California*, 393 U.S. 367 (1969); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966); *Draper v. Washington*, 372 U.S. 487 (1963); *Eskridge v. Washington Prison Board*, 357 U.S. 214 (1958).

Likewise, in *Douglas v. California*, 372 U.S. 353 (1963), a decision establishing an indigent defendant's right to court-appointed counsel on direct appeal, the Court dealt only with defendants who could not pay for counsel from their own resources and who had no other way of gaining representation. *Douglas* provides no relief for those on whom the burdens of paying for a criminal defense are, relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.

[***LEdHR6] [6] *Williams v. Illinois*, 399 U.S. 235

411 U.S. 1, *21; 93 S. Ct. 1278, **1290;
36 L. Ed. 2d 16, ***LEdHR6; 1973 U.S. LEXIS 91

(1970), and *Tate v. Short*, 401 U.S. 395 (1971), struck down criminal penalties that subjected indigents to incarceration simply because [*22] of their inability to pay a fine. Again, the disadvantaged class was composed only of persons who were totally unable to pay the demanded sum. Those cases do not touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. The Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.

Finally, in *Bullock v. Carter*, 405 U.S. 134 (1972), the Court invalidated the Texas filing-fee requirement for primary elections. Both of the relevant classifying facts found in the previous cases were present there. The size of the fee, often running into the thousands of dollars and, [**1291] in at least one case, as high as \$ 8,900, effectively barred all potential candidates who were unable to pay the required fee. As the system provided "no reasonable alternative means of access to the ballot" (*id.*, at 149), inability to pay occasioned an absolute denial of a position on the primary ballot.

Only appellees' first possible basis for describing the class disadvantaged by the Texas school-financing system -- discrimination against a class of definably "poor" persons -- might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the "poor," appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any [*23] designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the [***37] poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that "[i]t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts . . . Thus, the major factual assumption of *Serrano* -- that the educational financing system discriminates against the 'poor' -- is simply false in Connecticut." ⁵³ Defining "poor" families as those below

the Bureau of the Census "poverty level," ⁵⁴ the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas -- those same areas that provide the most attractive sources of property tax income for school districts ⁵⁵. Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people -- defined by reference to any level of absolute impecunty -- are concentrated in the poorest districts.

53 Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 Yale L.J. 1303, 1328-1329 (1972).

54 *Id.*, at 1324 and n. 102.

55 *Id.*, at 1328.

[***LEdHR7] [7]Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money [*24] expended for it ⁵⁶, a sufficient answer to appellees' argument is that, at least where wealth is involved, the *Equal Protection Clause* does not require absolute equality or precisely equal advantages. ⁵⁷ Nor, indeed, in view of [**1292] the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. Texas asserts that the Minimum Foundation Program provides an "adequate" education for all children in the State. By providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to "guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education. This is what is meant by 'A Minimum Foundation Program of Education.'" ⁵⁸ The State repeatedly asserted [***38] in its briefs in this Court that it has fulfilled this desire and that it now assures "every child in every school district an adequate education." ⁵⁹ No proof was offered at trial persuasively

discrediting or refuting the State's assertion.

56 Each of appellees' possible theories of wealth discrimination is founded on the assumption that the quality of education varies directly with the amount of funds expended on it and that, therefore, the difference in quality between two schools can be determined simplistically by looking at the difference in per-pupil expenditures. This is a matter of considerable dispute among educators and commentators. See nn. 86 and 101, *infra*.

57 E.g., *Bullock v. Carter*, 405 U.S., at 137, 149; *Mayer v. City of Chicago*, 404 U.S., at 194; *Draper v. Washington*, 372 U.S., at 495-496; *Douglas v. California*, 372 U.S., at 357.

58 Gilmer-Aikin Committee, *supra*, n. 15, at 13. Indeed, even though local funding has long been a significant aspect of educational funding, the State has always viewed providing an acceptable education as one of its primary functions. See *Texas State Bd. of Educ.*, *supra*, n. 11, at 1, 7.

59 Brief for Appellants 35; Reply Brief for Appellants 1.

[*25] For these two reasons -- the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education -- the disadvantaged class is not susceptible of identification in traditional terms⁶⁰.

60 An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people -- definable in terms of their inability to pay the prescribed sum - who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. After all, Texas has undertaken to do a good deal more than

provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to ameliorate by state funding and by the local assessment program the disparities in local tax resources.

As suggested above, appellees and the District Court may have embraced a second or third approach, the second of which might be characterized as a theory of relative or comparative discrimination based on family income. Appellees sought to prove that a direct correlation exists between the wealth of families within each district and the expenditures therein for education. That is, along a continuum, the poorer the family the lower the dollar amount of education received by the family's children.

The principal evidence adduced in support of this comparative-discrimination claim is an affidavit submitted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. The District Court, relying in major part upon this affidavit and apparently accepting the substance of appellees' theory, [*26] noted, first, a positive correlation between the wealth of school districts, measured in terms of assessable property per pupil, and their levels of per-pupil expenditures. Second, the court found a similar correlation between district wealth and the personal wealth of its residents, measured in terms of median family income. *337 F. Supp.*, at 282 n. 3.

[***LEdHR8] [8]If, in fact, these correlations could be sustained, then it might be argued that expenditures on education - equated by appellees to the quality of education -- are dependent on personal wealth. Appellees' comparative-discrimination theory would still face serious unanswered [*1293] questions, including whether a bare positive correlation or some higher degree of correlation⁶¹ is necessary to provide a basis for concluding that the financing system is designed to operate to the peculiar disadvantage of the comparatively poor,⁶² and whether a class of this [***39] size and diversity could ever claim the special protection accorded "suspect" classes. These questions need not be addressed in this case, however, since appellees' proof fails to support their allegations or the District Court's conclusions.

61 Also, it should be recognized that median

411 U.S. 1, *26; 93 S. Ct. 1278, **1293;
36 L. Ed. 2d 16, ***39; 1973 U.S. LEXIS 91

income statistics may not define with any precision the status of individual families within any given district. A more dependable showing of comparative wealth discrimination would also examine factors such as the average income, the mode, and the concentration of poor families in any district.

62 Cf. *Jefferson v. Hackney*, 406 U.S. 535, 547-549 (1972); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1258-1259 (1970); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 Yale L.J. 409, 439-440 (1973).

Professor Berke's affidavit is based on a survey of approximately 10% of the school districts in Texas. His findings, previously set out in the margin⁶³, show only [*27] that the wealthiest few districts in the sample have the highest median family incomes and spend the most on education, and that the several poorest districts have the lowest family incomes and devote the least amount of money to education. For the remainder of the districts -- 96 districts composing almost 90% of the sample -- the correlation is inverted, i.e., the districts that spend next to the most money on education are populated by families having next to the lowest median family incomes while the districts spending the least have the highest median family incomes. It is evident that, even if the conceptual questions were answered favorably to appellees, no factual basis exists upon which to found a claim of comparative wealth discrimination.⁶⁴

63 *Supra*, at 15 n. 38.

64 Studies in other States have also questioned the existence of any dependable correlation between a district's wealth measured in terms of assessable property and the collective wealth of families residing in the district measured in terms of median family income. Ridenour & Ridenour, *Serrano v. Priest: Wealth and Kansas School Finance*, 20 Kan. L. Rev. 213, 225 (1972) ("it can be argued that there exists in Kansas almost an inverse correlation: districts with highest income per pupil have low assessed value per pupil, and districts with high assessed value per pupil have low income per pupil"); Davis, *Taxpaying*

Ability: A Study of the Relationship Between Wealth and Income in California Counties, in *The Challenge of Change in School Finance*, 10th Nat. Educational Assn. Conf. on School Finance 199 (1967). Note, 81 Yale L.J., *supra*, n. 53. See also Goldstein, *supra*, n. 38, at 522-527.

This brings us, then, to the third way in which the classification scheme might be defined -- district wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. Assuming a perfect correlation between district property wealth and expenditures from top to bottom, the disadvantaged class might be [*28] viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the [**1294] most on education⁶⁵. Alternatively, [***40] as suggested in MR. JUSTICE MARSHALL'S dissenting opinion, *post*, at 96, the class might be defined more restrictively to include children in districts with assessable property which falls below the statewide average, or median, or below some other artificially defined level.

65 Indeed, this is precisely how the plaintiffs in *Serrano v. Priest* defined the class they purported to represent: "Plaintiff children claim to represent a class consisting of all public school pupils in California, 'except children in that school district . . . which . . . affords the greatest educational opportunity of all school districts within California.'" 5 Cal. 3d, at 589, 487 P. 2d, at 1244. See also *Van Duzart v. Hatfield*, 334 F. Supp., at 873.

[***LEdHR9A] [9A] [***LEdHR10] [10]However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.⁶⁶ The system of alleged discrimination and the class it defines have none of [HN3] the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to

411 U.S. 1, *28; 93 S. Ct. 1278, **1294;
36 L. Ed. 2d 16, ***LEdHR10; 1973 U.S. LEXIS 91

such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

[***LEdHR9B] [9B]

66 Appellees, however, have avoided describing the Texas system as one resulting merely in discrimination between districts per se since this Court has never questioned the State's power to draw reasonable distinctions between political subdivisions within its borders. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 230-231 (1964); *McGowan v. Maryland*, 366 U.S. 420, 427 (1961); *Salsburg v. Maryland*, 346 U.S. 545, 552 (1954).

[***LEdHR4B] [4B] We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. [*29] But in recognition of the fact that this Court has never heretofore held that [HN4] wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention.⁶⁷ They also assert that the State's system impermissibly interferes with the exercise of a "fundamental" right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. *Graham v. Richardson*, 403 U.S. 365, 375-376 (1971); *Kramer v. Union School District*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969). It is this question -- whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution -- which has so consumed the attention of courts and commentators in recent years⁶⁸.

67 E.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *United States v. Kras*, 409 U.S. 434 (1973). See MR. JUSTICE MARSHALL'S dissenting opinion, post, at 121.

68 See *Serrano v. Priest*, supra; *Van Dusartz v. Hatfield*, supra; *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A. 2d 187 (1972); Coons, Clune & Sugarman, supra, n. 13, at 339-393; Goldstein, supra, n. 38, at 534-541; Vieira, Unequal Educational Expenditures: Some Minority Views on *Serrano v. Priest*, 37 Mo. L. Rev. 617, 618-624 (1972); Comment, Educational Financing, Equal Protection of the Laws, and the Supreme Court, 70 Mich. L. Rev. 1324,

1335-1342 (1972); Note, The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination, 14 Ariz. L. Rev. 88, 120-124 (1972).

B

[**1295] [***LEdHR11] [11] In *Brown v. Board of Education*, 347 U.S. 483 (1954), a [***41] unanimous Court recognized that "education is perhaps the most important function of state and local governments." *Id.*, at 493. What was said there in the context of racial discrimination has lost none of its vitality with the passage of time: S"Compulsory school attendance laws and the great expenditures for education both demonstrate our [*30] recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, [HN5] it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Ibid.*

This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (BURGER, C.J.), 237, 238-239 (WHITE, J.), (1972); *Abington School Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (BRENNAN, J.); *McCullum v. Board of Education*, 333 U.S. 203, 212 (1948) (Mr. Justice Frankfurter); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Interstate Consolidated Street R. Co. v. Massachusetts*, 207 U.S. 79 (1907).

[***LEdHR12] [12] [***LEdHR13] [13] [***LEdHR14] [14] Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave

411 U.S. 1, *30; 93 S. Ct. 1278, **1295;
36 L. Ed. 2d 16, ***LEdHR14; 1973 U.S. LEXIS 91

significance of education both to the individual and to our society" cannot be doubted.⁶⁹ But [HN6] the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the *Equal Protection Clause*. Mr. Justice [*31] Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that "[v]irtually every state statute affects important rights." *Shapiro v. Thompson*, 394 U.S., at 655, 661. In his view, if the degree of judicial scrutiny of state legislation fluctuated depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature.'" *Ibid.* We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence. But MR. JUSTICE STEWART'S response in *Shapiro* to Mr. Justice Harlan's concern correctly articulates the limits of the fundamental-rights rationale employed in the Court's equal protection decisions: S

[HN7] "The Court today does not 'pick out particular human activities, [***42] characterize them as 'fundamental,' and give them added protection ...' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." *Id.*, at 642. (Emphasis in original.)I

69 337 F. Supp., at 283.

[***LEdHR15] [15]MR. [**1296] JUSTICE STEWART'S statement serves to underline what the opinion of the Court in *Shapiro* makes clear. In subjecting to strict judicial scrutiny state welfare eligibility statutes that imposed a one-year durational residency requirement as a precondition to receiving AFDC benefits, the Court explained: S"[I]n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Id.*, at 634. (Emphasis in original.)I [*32] The right to interstate travel had long been recognized as a right of constitutional significance,⁷⁰ and the Court's decision, therefore, did not require an ad hoc determination as to the social or economic importance of that right⁷¹.

70 E.g., *United States v. Guest*, 383 U.S. 745, 757-759 (1966); *Oregon v. Mitchell*, 400 U.S. 112, 229, 237-238 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

71 After *Dandridge v. Williams*, 397 U.S. 471 (1970), there could be no lingering question about the constitutional foundation for the Court's holding in *Shapiro*. In *Dandridge*, the Court applied the rational-basis test in reviewing Maryland's maximum family grant provision under its AFDC program. A federal district court held the provision unconstitutional, applying a stricter standard of review. In the course of reversing the lower court, the Court distinguished *Shapiro* properly on the ground that in that case "the Court found state interference with the constitutionally protected freedom of interstate travel." *Id.*, at 484 n. 16.

[***LEdHR16] [16] [***LEdHR17] [17] [***LEdHR18] [18] [***LEdHR19] [19] *Lindsey v. Normet*, 405 U.S. 56 (1972), decided only last Term, firmly reiterates that social importance is not the critical determinant for subjecting state legislation to strict scrutiny. The complainants in that case, involving a challenge to the procedural limitations imposed on tenants in suits brought by landlords under Oregon's Forcible Entry and Wrongful Detainer Law, urged the Court to examine the operation of the statute under "a more stringent standard than mere rationality." *Id.*, at 73. The tenants argued that the statutory limitations implicated "fundamental interests which are particularly important to the poor," such as the "need for decent shelter" and the "right to retain peaceful possession of one's home." *Ibid.* MR. JUSTICE WHITE'S analysis, in his opinion for the Court, is instructive: S

"We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access [*33] to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent . . . Absent constitutional mandate, the assurance of adequate housing [***43] and the definition of landlord-tenant

relationships are legislative, not judicial, functions." *Id.*, at 74. (Emphasis supplied.)

Similarly, in *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court's explicit recognition of the fact that the "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings," *id.*, at 485, ⁷² provided no basis for departing from the settled mode of constitutional analysis of legislative classifications involving questions of economic and social policy. As in the [**1297] case of housing, the central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some compelling state interest. See also *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971).

72 The Court refused to apply the strict-scrutiny test despite its contemporaneous recognition in *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) that "welfare provides the means to obtain essential food, clothing, housing, and medical care."

[**LEdHR20] [20] [**LEdHR21A] [21A] [**LEdHR22A] [22A] [**LEdHR23A] [23A] The lesson of these cases in addressing the question now before the Court is plain. [HN8] It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. [*34] *Eisenstadt v. Baird*, 405 U.S. 438 (1972) ⁷³; *Dunn v. Blumstein*, 405 U.S. 330 (1972) 74; *Police Dept. of Chicago v. Mosley*, [***44] 408 U.S. 92 (1972) ⁷⁵; *Skinner v. Oklahoma*, 316 U.S. 535 (1942).
76

[**LEdHR21B] [21B]

73 In *Eisenstadt*, the Court struck down a Massachusetts statute that prohibited the distribution of contraceptive devices, finding that the law failed "to satisfy even the more lenient equal protection standard." 405 U.S., at 447 n. 7. Nevertheless, in dictum, the Court recited the correct form of equal protection analysis: "[I]f we

were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold v. Connecticut*, 381 U.S. 479 (1965)], the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest." *Ibid.* (emphasis in original).

[**LEdHR22B] [22B]

74 Dunn fully canvasses this Court's voting rights cases and explains that "this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." 405 U.S., at 336 (emphasis supplied). The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though, as the Court noted in *Harper v. Virginia Bd. of Elections*, 383 U.S., at 665, "the right to vote in state elections is nowhere expressly mentioned." See *Oregon v. Mitchell*, 400 U.S., at 135, 138-144 (MR. JUSTICE DOUGLAS), 229, 241-242 (BRENNAN, WHITE, and MARSHALL, JJ.); *Bullock v. Carter*, 405 U.S., at 140-144; *Kramer v. Union School District*, 395 U.S. 621, 625-630 (1969); *Williams v. Rhodes*, 393 U.S. 23, 29, 30-31 (1968); *Reynolds v. Sims*, 377 U.S. 533, 554-562 (1964); *Gray v. Sanders*, 372 U.S. 368, 379-381 (1963).

[**LEdHR23B] [23B]

75 In *Mosley*, the Court struck down a Chicago antipicketing ordinance that exempted labor picketing from its prohibitions. The ordinance was held invalid under the *Equal Protection Clause* after subjecting it to careful scrutiny and finding that the ordinance was not narrowly drawn. The stricter standard of review was appropriately applied since the ordinance was one "affecting *First Amendment* interests." *Id.*, at 101.

76 *Skinner* applied the standard of close scrutiny to a state law permitting forced sterilization of "habitual criminals." Implicit in the Court's opinion is the recognition that the right of

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procreation is among the rights of personal privacy protected under the Constitution. See *Roe v. Wade*, 410 U.S. 113, 152 (1973).

[*35] [***LEdHR24] [24] [***LEdHR25] [25] Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic [**1298] legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of *First Amendment* freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information ⁷⁷ becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

⁷⁷ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-390 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 306-307 (1965).

[***LEdHR26A] [26A] A similar line of reasoning is pursued with respect to the right to vote. ⁷⁸ Exercise of the franchise, it is contended, cannot be divorced from the educational foundation [*36] of the voter. The electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.

[***LEdHR26B] [26B]

⁷⁸ Since the right to vote, per se, is not a constitutionally protected right, we assume that

appellees' references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population. See n. 74, supra.

[***LEdHR27] [27] [***LEdHR28A] [28A] We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess [***45] either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. ⁷⁹ These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

[***LEdHR28B] [28B]

⁷⁹ The States have often pursued their entirely legitimate interest in assuring "intelligent exercise of the franchise," *Katzenbach v. Morgan*, 384 U.S. 641, 655 (1966), through such devices as literacy tests and age restrictions on the right to vote. See *ibid.*; *Oregon v. Mitchell*, 400 U.S. 112 (1970). And, where those restrictions have been found to promote intelligent use of the ballot without discriminating against those racial and ethnic minorities previously deprived of an equal educational opportunity, this Court has upheld their use. Compare *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959), with *Oregon v. Mitchell*, *supra*, at 133 (Black, J.), 135, 144-147 (DOUGLAS), 152, 216-217 (Harlan), 229, 231-236 (BRENNAN, WHITE, and MARSHALL, JJ.), 281, 282-284 (STEWART, J.), and *Gaston County v. United States*, 395 U.S. 285 (1969).

[***LEdHR5B] [5B] Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the

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present levels of educational expenditure [*37] [**1299] in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where -- as is true in the present case - no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the *First Amendment* ⁸⁰. If so, appellees' thesis would cast serious doubt on the authority of *Dandridge v. Williams, supra*, and *Lindsey v. Normet, supra*.

80 See Schoettle, *The Equal Protection Clause in Public Education*, 71 Col. L. Rev. 1355, 1389-1390 (1971); Vieira, *supra*, n. 68, at 622-623; Comment, *Tenant Interest Representation: Proposal for a National Tenants' Association*, 47 Tex. L. Rev. 1160, 1172-1173, n. 61 (1969).

[**LEdHR29] [29] [**LEdHR30] [30] We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to [**46] strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has [*38] applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. See *Skinner v. Oklahoma, supra*, at 536; *Shapiro v. Thompson,*

supra, at 634; *Dunn v. Blumstein, supra*, at 338-343. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. MR. JUSTICE BRENNAN, writing for the Court in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), expresses well the salient point ⁸¹: "This is not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected [to others similarly situated] . . .

"[The federal law in question] does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. . . . We need only decide whether the challenged limitation on the relief effected . . . was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . [**1300] is [*39] 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,' . . . that a legislature need not 'strike at all evils at the same time,' . . . 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.'" *Id.*, at 656-657. (Emphasis in original.)

The Texas system of school financing is not unlike the federal legislation involved in *Katzenbach* in this regard. Every step leading to the establishment of the system Texas utilizes today - including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid - was implemented in an effort to extend public education and to improve its quality. ⁸² Of course, every reform [**47] that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution. ⁸³

81 *Katzenbach v. Morgan* involved a challenge by registered voters in New York City to a

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provision of the Voting Rights Act of 1965 that prohibited enforcement of a state law calling for English literacy tests for voting. The law was suspended as to residents from Puerto Rico who had completed at least six years of education at an "American-flag" school in that country even though the language of instruction was other than English. This Court upheld the questioned provision of the 1965 Act over the claim that it discriminated against those with a sixth-grade education obtained in non-English-speaking schools other than the ones designated by the federal legislation.

82 Cf. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Hargrave v. Kirk*, 313 F. Supp. 944 (MD Fla. 1970), vacated, 401 U.S. 476 (1971).

83 See *Schilb v. Kuebel*, 404 U.S. 357 (1971); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969).

[*40] C

It should be clear, for the reasons stated above and in accord with the prior decisions of this Court, that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.

[**LEdHR31] [31] [**LEdHR32] [32] We need not rest our decision, however, solely on the inappropriateness of the strict-scrutiny test. A century of Supreme Court adjudication under the *Equal Protection Clause* affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes. This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.⁸⁴ This Court has often admonished

against such interferences with the State's fiscal policies under the *Equal Protection Clause*: S

"The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [The] passage [**1301] of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. [*41] ...It has . . . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. [HN9] Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. ..." *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940).I

[**48] See also *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. - (1973); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940).

84 See, e.g., *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 508-509 (1937); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959).

Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the *Equal Protection Clause*⁸⁵.

85 Those who urge that the present system be invalidated offer little guidance as to what type of school financing should replace it. The most likely result of rejection of the existing system would be statewide financing of all public

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education with funds derived from taxation of property or from the adoption or expansion of sales and income taxes. See Simon, *supra*, n. 62. The authors of *Private Wealth and Public Education*, *supra*, n. 13, at 201-242, suggest an alternative scheme, known as "district power equalizing." In simplest terms, the State would guarantee that at any particular rate of property taxation the district would receive a stated number of dollars regardless of the district's tax base. To finance the subsidies to "poorer" districts, funds would be taken away from the "wealthier" districts that, because of their higher property values, collect more than the stated amount at any given rate. This is not the place to weigh the arguments for and against "district power equalizing," beyond noting that commentators are in disagreement as to whether it is feasible, how it would work, and indeed whether it would violate the equal protection theory underlying appellees' case. President's Commission on School Finance, *Schools, People, & Money* 32-33 (1972); Bateman & Brown, *Some Reflections on Serrano v. Priest*, 49 J. Urban L. 701, 706-708 (1972); Brest, *Book Review*, 23 Stan. L. Rev. 591, 594-596 (1971); Goldstein, *supra*, n. 38, at 542-543; Wise, *School Finance Equalization Lawsuits: A Model Legislative Response*, 2 Yale Rev. of L. & Soc. Action 123, 125 (1971); Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 Wis. L. Rev. 7, 29-30.

[*42] [***LEdHR33A] [33A] In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge v. Williams*, 397 U.S., at 487. [HN10] The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's

efforts to tackle the problems" should be [**1302] entitled to respect. *Jefferson v. Hackney*, 406 U.S., at 546-547. On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major [*43] sources of controversy concerns the [***49] extent to which there is a demonstrable correlation between educational expenditures and the quality of education⁸⁶ - an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education⁸⁷. And the question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

86 The quality-cost controversy has received considerable attention. Among the notable authorities on both sides are the following: C. Jencks, *Inequality* (1972); C. Silberman, *Crisis in the Classroom* (1970); U.S. Office of Education, *Equality of Educational Opportunity* (1966) (the Coleman Report); *On Equality of Educational Opportunity* (F. Mosteller & D. Moynihan eds. 1972); J. Guthrie, G. Kleindorfer, H. Levin & R. Stout, *Schools and Inequality* (1971); President's Commission on School Finance, *supra*, n. 85; Swanson, *The Cost-Quality Relationship*, in *The Challenge of Change in School Finance*, 10th Nat. Educational Assn. Conf. on School Finance 151 (1967).

87 See the results of the Texas Governor's Committee's statewide survey on the goals of education in that State. 1 Governor's Committee Report 59-68. See also Goldstein, *supra*, n. 38, at 519-522; Schoettle, *supra*, n. 80; authorities cited

in n. 86, supra .

[*44] [***LEdHR34] [34] [***LEdHR35] [35] It must be remembered, also, that every claim arising under the *Equal Protection Clause* has implications for the relationship between national and state power under our federal system. [HN11] Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,"⁸⁸ it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

88 *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 530, 532 (1959) (BRENNAN, J., concurring); *Katzenbach v. Morgan*, 384 U.S., at 659, 661 (Harlan, J., dissenting).

[***LEdHR33B] [33B] The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

[***50] III

The basic contours of the Texas school finance system have been traced at the outset of this opinion. We will now describe in more detail that system and how it operates, as these facts bear directly [**1303] upon the demands of the *Equal Protection Clause*.

Apart from federal assistance, each Texas school receives its funds from the State and from its local school [*45] district. On a statewide average, a roughly comparable amount of funds is derived from each source.⁸⁹ The State's contribution, under the Minimum Foundation Program, was designed to provide an adequate minimum educational offering in every school

in the State. Funds are distributed to assure that there will be one teacher -- compensated at the state-supported minimum salary -- for every 25 students.⁹⁰ Each school district's other supportive personnel are provided for: one principal for every 30 teachers⁹¹; one "special service" teacher -- librarian, nurse, doctor, etc. -- for every 20 teachers⁹²; superintendents, vocational instructors, counselors, and educators for exceptional children are also provided.⁹³ Additional funds are earmarked for current operating expenses, for student transportation,⁹⁴ and for free textbooks.⁹⁵

89 In 1970 Texas expended approximately \$ 2.1 billion for education and a little over \$ 1 billion came from the Minimum Foundation Program. Texas Research League, supra, n. 20, at 2.

90 *Tex. Educ. Code Ann.* § 16.13 (1972).

91 *Id.*, § 16.18.

92 *Id.*, § 16.15.

93 *Id.*, §§ 16.16, 16.17, 16.19

94 *Id.*, §§ 16.45, 16.51-16.63.

95 *Id.*, §§ 12.01-12.04.

The program is administered by the State Board of Education and by the Central Education Agency, which also have responsibility for school accreditation⁹⁶ and for monitoring the statutory teacher-qualification standards.⁹⁷ As reflected by the 62% increase in funds allotted to the Edgewood School District over the last three years⁹⁸, the State's financial contribution to education is steadily increasing. None of Texas' school districts, however, [*46] has been content to rely alone on funds from the Foundation Program.

96 *Id.*, § 11.26 (5).

97 *Id.*, § 16.301 et seq.

98 See supra, at 13-14.

By virtue of the obligation to fulfill its Local Fund Assignment, every district must impose an ad valorem tax on property located within its borders. The Fund Assignment was designed to remain sufficiently low to

assure that each district would have some ability to provide a more enriched educational program.⁹⁹ Every district supplements its Foundation grant in this manner. In some districts, the local property tax contribution is insubstantial, as in Edgewood where the supplement was only \$ 26 per pupil in 1967. In other districts, the local share may far exceed even the total Foundation grant. In part, local differences are attributable to differences in the rates of taxation or in the degree to which the market value for any category of property varies from its assessed value.¹⁰⁰ The greatest interdistrict [***51] disparities, however, are attributable to differences in the amount of assessable property available within any district. Those districts that have more property, or more valuable property, have a greater capability for supplementing state funds. In large measure, these additional local revenues are devoted to paying higher salaries to more teachers. Therefore, the primary distinguishing attributes of schools in property-affluent districts are lower pupil-teacher ratios and higher salary schedules.¹⁰¹

99 Gilmer-Aikin Committee, *supra*, n. 15, at 15.

100 There is no uniform statewide assessment practice in Texas. Commercial property, for example, might be assessed at 30% of market value in one county and at 50% in another. 5 Governor's Committee Report 25-26; Berke, Carnevale, Morgan & White, *supra*, n. 29, at 666-667, n. 16.

101 Texas Research League, *supra*, n. 20, at 18. Texas, in this regard, is not unlike most other States. One commentator has observed that "disparities in expenditures appear to be largely explained by variations in teacher salaries." Simon, *supra*, n. 62, at 413.

As previously noted, text accompanying n. 86, *supra*, the extent to which the quality of education varies with expenditure per pupil is debated inconclusively by the most thoughtful students of public education. While all would agree that there is a correlation up to the point of providing the recognized essentials in facilities and academic opportunities, the issues of greatest disagreement include the effect on the quality of education of pupil-teacher ratios and of higher teacher salary schedules. E.g., Office of Education, *supra*, n. 86, at 316-319. The state

funding in Texas is designed to assure, on the average, one teacher for every 25 students, which is considered to be a favorable ratio by most standards. Whether the minimum salary of \$ 6,000 per year is sufficient in Texas to attract qualified teachers may be more debatable, depending in major part upon the location of the school district. But there appear to be few empirical data that support the advantage of any particular pupil-teacher ratio or that document the existence of a dependable correlation between the level of public school teachers' salaries and the quality of their classroom instruction. An intractable problem in dealing with teachers' salaries is the absence, up to this time, of satisfactory techniques for judging their ability or performance. Relatively few school systems have merit plans of any kind, with the result that teachers' salaries are usually increased across the board in a way which tends to reward the least deserving on the same basis as the most deserving. Salaries are usually raised automatically on the basis of length of service and according to predetermined "steps," extending over 10- to 12-year periods.

[*47] [***LEdHR2B] [2B]This, [**1304] then, is the basic outline of the Texas school financing structure. Because of differences in expenditure levels occasioned by disparities in property tax income, appellees claim that children in less affluent districts have been made the subject of invidious discrimination. The District Court found that the State had failed even "to establish a reasonable basis" for a system that results in different levels of per-pupil expenditure. 337 F. Supp., at 284. We disagree.

In its reliance on state as well as local resources, the Texas system is comparable to the systems employed [*48] in virtually every other State.¹⁰² [***52] The power to tax local property for educational purposes has been recognized in Texas at least since 1883¹⁰³. When the growth of commercial and industrial centers and accompanying shifts in population began to create disparities in local resources, Texas undertook a program calling for a considerable investment of state funds.

102 President's Commission on School Finance,

411 U.S. 1, *48; 93 S. Ct. 1278, **1304;
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supra , n. 85, at 9. Until recently, Hawaii was the only State that maintained a purely state-funded educational program. In 1968, however, that State amended its educational finance statute to permit counties to collect additional funds locally and spend those amounts on its schools. The rationale for that recent legislative choice is instructive on the question before the Court today:

"Under existing law, counties are precluded from doing anything in this area, even to spend their own funds if they so desire. This corrective legislation is urgently needed in order to allow counties to go above and beyond the State's standards and provide educational facilities as good as the people of the counties want and are willing to pay for. Allowing local communities to go above and beyond established minimums to provide for their people encourages the best features of democratic government." Haw. Sess. Laws 1968, Act 38, § 1.

103 See text accompanying n. 7, supra .

The "foundation grant" theory upon which Texas legislators and educators based the Gilmer-Aikin bills, was a product of the pioneering work of two New York educational reformers in the 1920's, George D. Strayer and Robert M. Haig.¹⁰⁴ Their efforts were devoted to establishing a means of guaranteeing a minimum statewide educational program without sacrificing the vital element of local participation. The Strayer-Haig thesis [*49] represented an accommodation between [**1305] these two competing forces. As articulated by Professor Coleman: S"The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children."I¹⁰⁵

104 G. Strayer & R. Haig, *The Financing of Education in the State of New York* (1923). For a thorough analysis of the contribution of these reformers and of the prior and subsequent history of educational finance, see Coons, Clune & Sugarman, supra , n. 13, at 39-95.

105 J. Coleman, Foreword to Strayer & Haig, supra, at vii.

The Texas system of school finance is responsive to these two forces. While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972). MR. JUSTICE STEWART stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Id.* , at 469. THE CHIEF JUSTICE, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." *Id.* , at 478.

The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity [*50] it offers for participation in the decision making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments."¹⁰⁶ No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

106 *New State Ice Co. v. Liebmann* , 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting).

[***LEdHR36] [36] [***LEdHR37] [37] [***LEdHR38] [38]Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because, in their view,

it does not provide the same level of local control and fiscal flexibility in all districts. Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in educational expenditures. While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others¹⁰⁷, [*51] the existence of "some inequality" [**1306] " in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). It may not be condemned simply because it imperfectly effectuates the State's goals. *Dandridge v. Williams*, 397 U.S., at 485. Nor must the financing system fail because, as appellees suggest, other methods of satisfying the State's interest, which occasion "less drastic" disparities in expenditures, might be conceived. [HN12] Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative. Cf. *Dunn v. Blumstein*, 405 U.S., at 343; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). It is also well to remember that even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools¹⁰⁸. The people of Texas may [***54] be [*52] justified in believing that other systems of school financing, [**1307] which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe [*53] that along with increased control of the purse strings at the state level will go increased control over local policies.¹⁰⁹

107 MR. JUSTICE WHITE suggests in his dissent that the Texas system violates the *Equal Protection Clause* because the means it has selected to effectuate its interest in local autonomy fail to guarantee complete freedom of choice to every district. He places special emphasis on the statutory provision that establishes a maximum rate of \$ 1.50 per \$ 100 valuation at which a local school district may tax for school maintenance. *Tex. Educ. Code Ann.* § 20.04 (d) (1972). The maintenance rate in Edgewood when this case was litigated in the

District Court was \$.55 per \$100, barely one-third of the allowable rate. (The tax rate of \$ 1.05 per \$100, see *supra*, at 12, is the equalized rate for maintenance and for the retirement of bonds.) Appellees do not claim that the ceiling presently bars desired tax increases in Edgewood or in any other Texas district. Therefore, the constitutionality of that statutory provision is not before us and must await litigation in a case in which it is properly presented. Cf. *Hargrave v. Kirk*, 313 F. Supp. 944 (MD Fla. 1970), vacated, 401 U.S. 476 (1971).

108 MR. JUSTICE MARSHALL states in his dissenting opinion that the State's asserted interest in local control is a "mere sham," post, at 130, and that it has been offered not as a legitimate justification but "as an excuse . . . for interdistrict inequality." *Id.*, at 126. In addition to asserting that local control would be preserved and possibly better served under other systems -- a consideration that we find irrelevant for the purpose of deciding whether the system may be said to be supported by a legitimate and reasonable basis -- the dissent suggests that Texas' lack of good faith may be demonstrated by examining the extent to which the State already maintains considerable control. The State, we are told, regulates "the most minute details of local public education," *ibid.*, including textbook selection, teacher qualifications, and the length of the school day. This assertion, that genuine local control does not exist in Texas, simply cannot be supported. It is abundantly refuted by the elaborate statutory division of responsibilities set out in the Texas Education Code. Although policy decisionmaking and supervision in certain areas are reserved to the State, the day-to-day authority over the "management and control" of all public elementary and secondary schools is squarely placed on the local school boards. *Tex. Educ. Code Ann.* §§ 17.01, 23.26 (1972). Among the innumerable specific powers of the local school authorities are the following: the power of eminent domain to acquire land for the construction of school facilities, *id.*, §§ 17.26, 23.26; the power to hire and terminate teachers and other personnel, *id.*, §§ 13.101-13.103; the power to designate conditions of teacher employment and to establish certain standards of educational policy, *id.*, § 13.901; the power to

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maintain order and discipline, id. , § 21.305, including the prerogative to suspend students for disciplinary reasons, id. , § 21.301; the power to decide whether to offer a kindergarten program, id. , §§ 21.131-21.135, or a vocational training program, id. , § 21.111, or a program of special education for the handicapped, id. , § 11.16; the power to control the assignment and transfer of students, id. , §§ 21.074-21.080; and the power to operate and maintain a school bus program, id. , § 16.52. See also *Pervis v. LaMarque Ind. School Dist.* , 328 F. Supp. 638, 642-643 (SD Tex. 1971), reversed, 466 F. 2d 1054 (CA5 1972); *Nichols v. Aldine Ind. School Dist.* , 356 S.W. 2d 182 (Tex. Civ. App. 1962). Local school boards also determine attendance zones, location of new schools, closing of old ones, school attendance hours (within limits), grading and promotion policies subject to general guidelines, recreational and athletic policies, and a myriad of other matters in the routine of school administration. It cannot be seriously doubted that in Texas education remains largely a local function, and that the preponderating bulk of all decisions affecting the schools is made and executed at the local level, guaranteeing the greatest participation by those most directly concerned.

109 This theme -- that greater state control over funding will lead to greater state power with respect to local educational programs and policies - is a recurrent one in the literature on financing public education. Professor Simon, in his thoughtful analysis of the political ramifications of this case, states that one of the most likely consequences of the District Court's decision would be an increase in the centralization of school finance and an increase in the extent of collective bargaining by teacher unions at the state level. He suggests that the subjects for bargaining may include many "non-salary" items, such as teaching loads, class size, curricular and program choices, questions of student discipline, and selection of administrative personnel - matters traditionally decided heretofore at the local level. Simon, *supra* , n. 62, at 434-436. See, e.g. , Coleman, *The Struggle for Control of Education*, in *Education and Social Policy: Local Control of Education* 64, 77-79 (C. Bowers, I. Housego & D. Dyke eds. 1970); J. Conant, *The Child, The Parent, and The State* 27 (1959) ("Unless a local

community, through its school board, has some control over the purse, there can be little real feeling in the community that the schools are in fact local schools ..."); Howe, *Anatomy of a Revolution*, in *Saturday Review* 84, 88 (Nov. 20, 1971) ("It is an axiom of American politics that control and power follow money ..."); R. Hutchinson, *State-Administered Locally-Shared Taxes* 21 (1931) ("[S]tate administration of taxation is the first step toward state control of the functions supported by these taxes ..."). Irrespective of whether one regards such prospects as detrimental, or whether he agrees that the consequence is inevitable, it certainly cannot be doubted that there is a rational basis for this concern on the part of parents, educators, and legislators.

[***LEdHR39] [39]Appellees further urge that [***55] the Texas system is unconstitutionally arbitrary because it allows the availability of local taxable resources to turn on "happenstance." They see no justification for a system that allows, as they contend, the quality of education to fluctuate on the basis of the fortuitous positioning of the boundary lines of political subdivisions and the location of valuable commercial and industrial property. But any scheme of [*54] local taxation -- indeed the very existence of identifiable local governmental units -- requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others.¹¹⁰ Nor is local wealth a static quantity. Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence. For instance, commercial and industrial enterprises may be encouraged to locate within a district by various actions - public and private.

110 This Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the *Equal Protection Clause* any per se rule of "territorial uniformity." *McGowan v. Maryland* , 366 U.S., at 427. See also *Griffin v. County School Board of Prince Edward County* , 377 U.S., at 230-231; *Salsburg v. Maryland* , 346 U.S. 545 (1954). Cf. *Board of Education of Muskogee v. Oklahoma* , 409 F. 2d 665, 668 (CA10 1969).

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[***LEdHR40] [40]Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions. [HN13] It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens [**1308] or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.

[***LEdHR2C] [2C] [***LEdHR41] [41]In sum, to the extent that the Texas system of school financing results in unequal expenditures between children [*55] who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. Texas has acknowledged its shortcomings and has persistently endeavored - not without some success - to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, [***56] and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911), it is important to remember that at every stage of its development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions. *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913). One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet

tested. [HN14] The constitutional standard under the *Equal Protection Clause* is whether the challenged state action rationally furthers a legitimate state purpose or interest. *McGinnis v. Royster*, 410 U.S. 263, 270 (1973). We hold that the Texas plan abundantly satisfies this standard.

[*56] IV

In light of the considerable attention that has focused on the District Court opinion in this case and on its California predecessor, *Serrano v. Priest*, 5 Cal. 3d 584, 487 P. 2d 1241 (1971), a cautionary postscript seems appropriate. It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. Some commentators have concluded that, whatever the contours of the alternative financing programs that might be devised and approved, the result could not avoid being a beneficial one. But, just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers and their scholarship reflects no such unqualified confidence in the desirability of completely uprooting the existing system.

The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in overburdened core-city school districts would be benefited by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board - an event the likelihood of which is open to considerable [**1309] question ¹¹¹ - these [***57] groups stand to [*57] realize gains in terms of increased per-pupil expenditures only if they reside in districts that presently spend at relatively low levels, i.e., in those districts that would benefit from the redistribution of existing resources. Yet, recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts ¹¹². Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts ¹¹³. Additionally, [*58] several

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research projects have concluded that any financing alternative designed to achieve a greater equality of expenditures is likely to lead to higher taxation and lower educational expenditures in the major urban centers¹¹⁴, a result that would exacerbate rather than ameliorate existing conditions in those areas.

111 Any alternative that calls for significant increases in expenditures for education, whether financed through increases in property taxation or through other sources of tax dollars, such as income and sales taxes, is certain to encounter political barriers. At a time when nearly every State and locality is suffering from fiscal undernourishment, and with demands for services of all kinds burgeoning and with weary taxpayers already resisting tax increases, there is considerable reason to question whether a decision of this Court nullifying present state taxing systems would result in a marked increase in the financial commitment to education. See Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., *Toward Equal Educational Opportunity* 339-345 (Comm. Print 1972); Berke & Callahan, *Serrano v. Priest: Milestone or Millstone for School Finance*, 21 J. Pub. L. 23, 25-26 (1972); Simon, *supra*, n. 62, at 420-421. In Texas, it has been calculated that \$2.4 billion of additional school funds would be required to bring all schools in that State up to the present level of expenditure of all but the wealthiest districts -- an amount more than double that currently being spent on education. Texas Research League, *supra*, n. 20, at 16-18. An amicus curiae brief filed on behalf of almost 30 States, focusing on these practical consequences, claims with some justification that "each of the undersigned states . . . would suffer severe financial stringency." Brief of Amici Curiae in Support of Appellants 2 (filed by Montgomery County, Md. et al.).

112 See Note, *supra*, n. 53. See also authorities cited n. 114, *infra*.

113 See Goldstein, *supra*, n. 38, at 526; Jencks, *supra*, n. 86, at 27; U.S. Comm'n on Civil Rights, *Inequality in School Financing: The Role of the Law* 37 (1972). Coons, Clune & Sugarman, *supra*

, n. 13, at 356-357, n. 47, have noted that in California, for example, "[f]ifty-nine percent . . . of minority students live in districts above the median [average valuation per pupil.]" In Bexar County, the largest district by far - the San Antonio Independent School District -- is above the local average in both the amount of taxable wealth per pupil and in median family income. Yet 72% of its students are Mexican-Americans. And, in 1967-1968 it spent only a very few dollars less per pupil than the North East and North Side Independent School Districts, which have only 7% and 18% Mexican-American enrollment respectively. Berke, Carnevale, Morgan & White, *supra*, n. 29, at 673.

114 See Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., *Issues in School Finance* 129 (Comm. Print 1972) (monograph entitled *Inequities in School Finance* prepared by Professors Berke and Callahan); U.S. Office of Education, *Finances of Large-City School Systems: A Comparative Analysis* (1972) (HEW publication); U.S. Comm'n on Civil Rights, *supra*, n. 113, at 33-36; Simon, *supra*, n. 62, at 410-411, 418.

[***LEdHR42] [42]These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax [***58] systems which [**1310] may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already [*59] have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

Reversed .

CONCUR BY: STEWART**CONCUR**

MR. JUSTICE STEWART, concurring.

The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust¹. It does not follow, however, and I cannot find, that this system violates the Constitution of the United States. I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the *Equal Protection Clause of the Fourteenth Amendment*. The uncharted directions of such a departure are suggested, I think, by the imaginative dissenting opinion my Brother MARSHALL has filed today.

¹ See New York Times, Mar. 11, 1973, p. 1, col. 1.

Unlike other provisions of the Constitution, the *Equal Protection Clause* confers no substantive rights and creates no substantive liberties.² The function of the *Equal Protection Clause*, rather, is simply to measure the validity of classifications created by state laws.

² There is one notable exception to the above statement: It has been established in recent years that the *Equal Protection Clause* confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. See, e.g., *Reynolds v. Sims*, 377 U.S. 533; *Kramer v. Union School District*, 395 U.S. 621; *Dunn v. Blumstein*, 405 U.S. 330, 336. But there is no constitutional right to vote, as such. *Minor v. Happersett*, 21 Wall. 162. If there were such a right, both the *Fifteenth Amendment* and the *Nineteenth Amendment* would have been wholly unnecessary.

[*60] There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the *Equal Protection Clause* is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes.³ And with respect to such legislation, it has long been settled that the *Equal*

Protection Clause is offended only by laws that are invidiously discriminatory -- only by classifications that are wholly arbitrary or capricious. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305. This settled principle of constitutional law was compendiously stated in Mr. Chief Justice Warren's opinion for the Court in *McGowan v. Maryland*, 366 U.S. 420, 425-426, in the following words: S

"Although no precise formula has been developed, the Court has held that the *Fourteenth Amendment* permits the States a wide scope of discretion in enacting laws which affect some groups of [***59] citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."I

³ But see *Bullock v. Carter*, 405 U.S. 134.

This [**1311] doctrine is no more than a specific application of one of the first principles of constitutional adjudication - the basic presumption of the constitutional validity of a duly enacted state or federal law. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

[*61] Under the *Equal Protection Clause*, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently "suspect." Because of the historic purpose of the *Fourteenth Amendment*, the prime example of such a "suspect" classification is one that is based upon race. See, e.g., *Brown v. Board of Education*, 347 U.S. 483; *McLaughlin v. Florida*, 379 U.S. 184. But there are other classifications that, at least in some settings, are also "suspect" -- for example, those based upon national origin⁴, alienage⁵, indigency⁶, or illegitimacy.⁷

⁴ See *Oyama v. California*, 332 U.S. 633, 644-646.

⁵ See *Graham v. Richardson*, 403 U.S. 365, 372.

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6 See *Griffin v. Illinois*, 351 U.S. 12. "Indigency" means actual or functional indigency; it does not mean comparative poverty vis-a-vis comparative affluence. See *James v. Valtierra*, 402 U.S. 137.

7 See *Gomez v. Perez*, 409 U.S. 535; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164.

Moreover, quite apart from the *Equal Protection Clause*, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications. For example, a law that provided that newspapers could be published only by people who had resided in the State for five years could be superficially viewed as invidiously discriminating against an identifiable class in violation of the *Equal Protection Clause*. But, more basically, such a law would be invalid simply because it abridged the freedom of the press. Numerous cases in this Court illustrate this principle⁸.

8 See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (free speech); *Shapiro v. Thompson*, 394 U.S. 618 (freedom of interstate travel); *Williams v. Rhodes*, 393 U.S. 23 (freedom of association); *Skinner v. Oklahoma*, 316 U.S. 535 ("liberty" conditionally protected by *Due Process Clause of Fourteenth Amendment*).

[*62] In refusing to invalidate the Texas system of financing its public schools, the Court today applies with thoughtfulness and understanding the basic principles I have so sketchily summarized. First, as the Court points out, the Texas system has hardly created the kind of objectively [***60] identifiable classes that are cognizable under the *Equal Protection Clause*⁹. Second, even assuming the existence of such discernible categories, the classifications are in no sense based upon constitutionally "suspect" criteria. Third, the Texas system does not rest "on grounds wholly irrelevant to the achievement of the State's objective." Finally, the Texas system impinges upon no substantive constitutional rights or liberties. It follows, therefore, under the established principle reaffirmed in Mr. Chief Justice Warren's opinion for the Court in *McGowan v. Maryland*, *supra*, that the judgment of the District Court must be reversed.

9 See *Katzenbach v. Morgan*, 384 U.S. 641, 660 (Harlan, J., dissenting).

DISSENT BY: BRENNAN; WHITE; MARSHALL

DISSENT

MR. JUSTICE BRENNAN, dissenting.

Although I agree with my Brother WHITE that the Texas statutory scheme [**1312] is devoid of any rational basis, and for that reason is violative of the *Equal Protection Clause*, I also record my disagreement with the Court's rather distressing assertion that a right may be deemed "fundamental" for the purposes of equal protection analysis only if it is "explicitly or implicitly guaranteed by the Constitution." Ante, at 33-34. As my Brother MARSHALL convincingly demonstrates, our prior cases stand for the proposition that "fundamentality" is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, "[a]s the nexus between the specific constitutional guarantee and the nonconstitutional [*63] interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly." Post, at 102-103.

Here, there can be no doubt that education is inextricably linked to the right to participate in the [***53] electoral process and to the rights of free speech and association guaranteed by the *First Amendment*. See post, at 111-115. This being so, any classification affecting education must be subjected to strict judicial scrutiny, and since even the State concedes that the statutory scheme now before us cannot pass constitutional muster under this stricter standard of review, I can only conclude that the Texas school-financing scheme is constitutionally invalid.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The Texas public schools are financed through a combination of state funding, local property tax revenue, and some federal funds¹. Concededly, the system yields wide disparity in per-pupil revenue among the various districts. In a typical year, for example, the Alamo Heights district had total revenues of \$594 per pupil, while the Edgewood district had only \$356 per pupil.² The majority and the State [***61] concede, as they

must, the existence [*64] of major disparities in spendable funds. But the State contends that the disparities do not invidiously discriminate against children and families in districts such as Edgewood, because the Texas scheme is designed "to provide an adequate education for all, with local autonomy to go beyond that as individual school districts desire and are able . . . It leaves to the people of each district the choice whether to go beyond the minimum and, if so, by how much." ³ The majority advances this rationalization: "While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level."

1 The heart of the Texas system is embodied in an intricate series of statutory provisions which make up Chapter 16 of the Texas Education Code, *Tex. Educ. Code Ann. § 16.01 et seq.* See also *Tex. Educ. Code Ann. § 15.01 et seq.*, and § 20.10 *et seq.*

2 The figures discussed are from Palintiffs' Exhibits 7, 8, and 12. The figures are from the 1967-1968 school year. Because the various exhibits relied upon different attendance totals, the per-pupil results do not precisely correspond to the gross figures quoted. The disparity between districts, rather than the actual figures, is the important factor.

3 Brief for Appellants 11-13, 35.

I cannot disagree with the proposition that local control and local decisionmaking play an important part in our democratic system of government. Cf. *James v. Valtierra*, 402 U.S. 137 (1971). Much may be left to local option, and this case would be quite different if it were true that the Texas system, while insuring minimum educational expenditures in every district through state funding, extended a meaningful option to all local districts to increase their per-pupil expenditures [**1313] and so to improve their children's education to the extent that increased funding would achieve that goal. The system would then arguably provide a rational and sensible method of achieving the stated aim of preserving an area for local initiative and decision.

The difficulty with the Texas system, however, is

that it provides a meaningful option to Alamo Heights and like school districts but almost none to Edgewood and those other districts with a low per-pupil real estate tax base. In these latter districts, no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the [*65] real estate property tax. In these districts, the Texas system utterly fails to extend a realistic choice to parents because the property tax, which is the only revenue-raising mechanism extended to school districts, is practically and legally unavailable. That this is the situation may be readily demonstrated.

Local school districts in Texas raise their portion of the Foundation School Program - the Local Fund Assignment -- by levying ad valorem taxes on the property located within their boundaries. In addition, the districts are authorized, by the state constitution and by statute, to levy ad valorem property taxes in order to raise revenues to support educational spending over and above the expenditure of Foundation School Program funds.

Both the Edgewood and Alamo Heights districts are located in Bexar County, Texas. Student enrollment in Alamo Heights is 5,432, in Edgewood 22,862. The per-pupil market value of the taxable property in Alamo Heights is \$ 49,078, in Edgewood \$ 5,960. In a typical, relevant year, Alamo Heights had a maintenance tax rate of \$ 1.20 and a debt service (bond) tax rate of 20 cents per \$ 100 assessed evaluation, while Edgewood had a maintenance rate of 52 cents and a bond rate of 67 cents. These rates, when applied to the respective [***62] tax bases, yielded Alamo Heights \$ 1,433,473 in maintenance dollars and \$ 236,074 in bond dollars, and Edgewood \$ 223,034 in maintenance dollars and \$ 279,023 in bond dollars. As is readily apparent, because of the variance in tax bases between the districts, results, in terms of revenues, do not correlate with effort, in terms of tax rate. Thus, Alamo Heights, with a tax base approximately twice the size of Edgewood's base, realized approximately six times as many maintenance dollars as Edgewood by using a tax rate only approximately two and one-half times larger. Similarly, Alamo Heights realized slightly fewer bond [*66] dollars by using a bond tax rate less than one-third of that used by Edgewood.

Nor is Edgewood's revenue-raising potential only deficient when compared with Alamo Heights. North East District has taxable property with a per-pupil market

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value of approximately \$ 31,000, but total taxable property approximately four and one-half times that of Edgewood. Applying a maintenance rate of \$1, North East yielded \$ 2,818,148. Thus, because of its superior tax base, North East was able to apply a tax rate slightly less than twice that applied by Edgewood and yield more than 10 times the maintenance dollars. Similarly, North East, with a bond rate of 45 cents, yielded \$ 1,249,159 -- more than four times Edgewood's yield with two-thirds the rate.

Plainly, were Alamo Heights or North East to apply the Edgewood tax rate to its tax base, it would yield far greater revenues than Edgewood is able to yield applying those same rates to its base. Conversely, were Edgewood to apply the Alamo Heights or North East rates to its base, the yield would be far smaller than the Alamo Heights or North East yields. The disparity is, therefore, currently operative and its impact on Edgewood is undeniably serious. It is evident from statistics in the record that show that, applying an equalized tax rate of 85 cents per \$ 100 assessed valuation, Alamo Heights was able to provide approximately \$ 330 per pupil in local revenues [**1314] over and above the Local Fund Assignment. In Edgewood, on the other hand, with an equalized tax rate of \$ 1.05 per \$ 100 of assessed valuation, \$ 26 per pupil was raised beyond the Local Fund Assignment ⁴. As in previously noted in Alamo Heights, [*67] total per-pupil revenues from local, state, and federal funds was \$ 594 per pupil, in Edgewood \$ 356 ⁵.

4 Variable assessment practices are also revealed in this record. Appellants do not, however, contend that this factor accounts, even to a small extent, for the interdistrict disparities.

5 The per-pupil funds received from state, federal, and other sources, while not precisely equal, do not account for the large differential and are not directly attacked in the present case.

In order to equal the highest yield in any other Bexar County district, Alamo Heights would be required to tax at the rate of 68 cents per \$ 100 of assessed valuation. Edgewood would be required to tax at the prohibitive rate of \$ 5.76 per \$ 100. But state law places a \$ 1.50 per \$ 100 ceiling on the maintenance tax rate, a limit that would surely be reached long before Edgewood attained an equal yield. Edgewood is thus precluded in law, as well as in fact, from achieving a yield even close to that

of some other districts.

The *Equal Protection Clause* permits [***63] discriminations between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. It is not enough that the Texas system before us seeks to achieve the valid, rational purpose of maximizing local initiative; the means chosen by the State must also be rationally related to the end sought to be achieved. As the Court stated just last Term in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972): S"The tests to determine the validity of state statutes under the *Equal Protection Clause* have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. *Morey v. Doud*, 354 U.S. 457 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe R. Co. v. Ellis*, 165 U.S. 150 (1897); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)."I [*68]

Neither Texas nor the majority heeds this rule. If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture ⁶. In my view, [**1315] the parents and children in Edgewood, and in like districts, suffer from an invidious discrimination violative of the *Equal Protection Clause*.

6 The State of Texas appears to concede that the choice of whether or not to go beyond the state-provided minimum "is easier for some districts than for others. Those districts with large amounts of taxable property can produce more revenue at a lower tax rate and will provide their children with a more expensive education." Brief for Appellants 35. The State nevertheless insists that districts have a choice and that the people in each district have exercised that choice by providing some real property tax money over and above the minimum funds guaranteed by the

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State. Like the majority, however, the State fails to explain why the *Equal Protection Clause* is not violated, or how its goal of providing local government with realistic choices as to how much money should be expended on education is implemented, where the system makes it much more difficult for some than for others to provide additional educational funds and where, as a practical and legal matter, it is impossible for some districts to provide the educational budgets that other districts can make available from real property tax revenues.

This does not, of course, mean that local control may not be a legitimate goal of a school financing system. Nor does it mean that the State must guarantee each district an equal per-pupil revenue from the state school-financing system. Nor does it mean, as the majority appears to believe, that, by affirming the decision below, [*69] this Court would be "imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing [***64] conditions." On the contrary, it would merely mean that the State must fashion a financing scheme which provides a rational basis for the maximization of local control, if local control is to remain a goal of the system, and not a scheme with "different treatment be[ing] accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

Perhaps the majority believes that the major disparity in revenues provided and permitted by the Texas system is inconsequential. I cannot agree, however, that the difference of the magnitude appearing in this case can sensibly be ignored, particularly since the State itself considers it so important to provide opportunities to exceed the minimum state educational expenditures.

There is no difficulty in identifying the class that is subject to the alleged discrimination and that is entitled to the benefits of the *Equal Protection Clause*. I need go no farther than the parents and children in the Edgewood district, who are plaintiffs here and who assert that they are entitled to the same choice as Alamo Heights to augment local expenditures for schools but are denied that choice by state law. This group constitutes a class

sufficiently definite to invoke the protection of the Constitution. They are as entitled to the protection of the *Equal Protection Clause* as were the voters in allegedly unrepresented counties in the reapportionment cases. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204-208 (1962); *Gray v. Sanders*, 372 U.S. 368, 375 (1963); *Reynolds v. Sims*, 377 U.S. 533, 554-556 (1964). And in *Bullock v. Carter*, 405 U.S. 134 (1972), where a challenge to the [*70] Texas candidate filing fee on equal protection grounds was upheld, we noted that the victims of alleged discrimination wrought by the filing fee "cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the *Equal Protection Clause*," but concluded that "we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Id.*, at 144. Similarly, in the present case we would blink reality to ignore the fact that school districts, and students in the end, are differentially affected by the Texas school-financing scheme with respect to their capability to supplement the Minimum Foundation School Program. At the very least, the law discriminates against those children and their parents who live in districts where the per-pupil tax base is sufficiently low to make impossible the provision of comparable school revenues by resort to the real property tax which is the only device the State extends for this purpose.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the [**1316] amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream [***65] of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth.¹ More unfortunately, though, the [*71] majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable

wealth within each district.

1 See *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (Minn. 1971); *Milliken v. Green*, 389 Mich. 1, 203 N.W. 2d 457 (1972), rehearing granted, Jan. 1973; *Serrano v. Priest*, 5 Cal. 3d 584, 487 P. 2d 1241 (1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A. 2d 187, 119 N.J. Super. 40, 289 A. 2d 569 (1972); *Hollins v. Shofstall*, Civil No. C-253652 (Super. Ct. Maricopa County, Ariz., July 7, 1972). See also *Sweetwater County Planning Com. for the Organization of School Districts v. Hinkle*, 491 P. 2d 1234 (Wyo. 1971), juris. relinquished, 493 P. 2d 1050 (Wyo. 1972).

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination.² I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts [*72] and minds in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). I must therefore respectfully dissent.

2 The District Court in this case postponed decision for some two years in the hope that the Texas Legislature would remedy the gross disparities in treatment inherent in the Texas financing scheme. It was only after the legislature failed to act in its 1971 Regular Session that the District Court, apparently recognizing the lack of hope for self-initiated legislative reform, rendered its decision. See Texas Research League, Public School Finance Problems in Texas 13 (Interim Report 1972). The strong vested interest of property-rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in educational financing. See N.Y. Times, Dec. 19, 1972, p. 1, col. 1.

I

The Court acknowledges that "substantial

interdistrict disparities in school expenditures" exist in Texas, ante, at 15, and that these disparities are "largely attributable to differences in the amounts of money collected through local property taxation," ante, at 16. But instead of closely examining the seriousness of these disparities and the invidiousness of the Texas financing scheme, the Court undertakes an elaborate exploration of the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding. Yet, however praiseworthy Texas' equalizing efforts, the issue in this case is not [***66] whether Texas is doing its best to ameliorate the worst features of a discriminatory scheme but, rather, whether the scheme itself is in fact unconstitutionally discriminatory in the face of the *Fourteenth Amendment's* guarantee of equal protection of the laws. When the Texas financing scheme is taken as a whole, I do not think it can be doubted that it produces a discriminatory impact on [**1317] substantial numbers of the schoolage children of the State of Texas.

A

Funds to support public education in Texas are derived from three sources: local ad valorem property taxes; the Federal Government; and the state government
3. It is enlightening to consider these in order.

3 Texas provides its school districts with extensive bonding authority to obtain capital both for the acquisition of school sites and "the construction and equipment of school buildings," *Tex. Educ. Code Ann. § 20.01* (1972), and for the acquisition, construction, and maintenance of "gymnasias, stadia, or other recreational facilities," *id.*, §§ 20.21-20.22. While such private capital provides a fourth source of revenue, it is, of course, only temporary in nature since the principal and interest of all bonds must ultimately be paid out of the receipts of the local ad valorem property tax, see *id.*, §§ 20.01, 20.04, except to the extent that outside revenues derived from the operation of certain facilities, such as gymnasias, are employed to repay the bonds issued thereon, see *id.*, §§ 20.22, 20.25.

[*73] Under Texas law, the only mechanism provided the local school district for raising new, unencumbered revenues is the power to tax property located within its boundaries.⁴ At the same time, the Texas financing scheme effectively restricts the use of

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monies raised by local property taxation to the support of public education within the boundaries of the district in which they are raised, since any such taxes must be approved by a majority of the property-taxpaying voters of the district⁵.

4 See *Tex. Const., Art. 7, § 3*; *Tex. Educ. Code Ann. §§ 20.01-20.02*. As a part of the property tax scheme, bonding authority is conferred upon the local school districts, see n. 3, *supra*.

5 See *Tex. Educ. Code Ann. § 20.04*.

The significance of the local property tax element of the Texas financing scheme is apparent from the fact that it provides the funds to meet some 40% of the cost of public education for Texas as a whole⁶. Yet the amount of revenue that any particular Texas district can raise is dependent on two factors - its tax rate and its amount of taxable property. The first factor is determined by the property-taxpaying voters of the district.⁷ But, regardless of the enthusiasm of the local voters for public [*74] education, the second factor - the taxable property wealth of the district - necessarily restricts the district's ability to raise funds to support public education⁸. Thus, [***67] even though the voters of two Texas districts may be willing to make the same tax effort, the results for the districts will be substantially different if one is property rich while the other is property poor. The necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones.

6 For the 1970-1971 school year, the precise figure was 41.1%. See Texas Research League, *supra*, n. 2, at 9.

7 See *Tex. Educ. Code Ann. § 20.04*.

Theoretically, Texas law limits the tax rate for public school maintenance, see *id.*, § 20.02, to \$ 1.50 per \$ 100 valuation, see *id.*, § 20.04 (d). However, it does not appear that any Texas district presently taxes itself at the highest rate allowable, although some poor districts are approaching it, see App. 174.

8 Under Texas law local districts are allowed to employ differing bases of assessment -- a fact that introduces a third variable into the local funding.

See *Tex. Educ. Code Ann. § 20.03*. But neither party has suggested that this factor is responsible for the disparities in revenues available to the various districts. Consequently, I believe we must deal with this case on the assumption that differences in local methods of assessment do not meaningfully affect the revenue raising power of local districts relative to one another. The Court apparently admits as much. See *ante*, at 46. It should be noted, moreover, that the main set of data introduced before the District Court to establish the disparities at issue here was based upon "equalized taxable property" values which had been adjusted to correct for differing methods of assessment. See App. C to Affidavit of Professor Joel S. Berke.

The seriously disparate consequences of the Texas local property tax, when [**1318] that tax is considered alone, are amply illustrated by data presented to the District Court by appellees. These data included a detailed study of a sample of 110 Texas school districts⁹ for the 1967-1968 school year conducted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. Among other things, this study revealed that the 10 richest districts examined, each of which had more than \$ 100,000 in taxable property per pupil, raised through local effort an average of \$ 610 per pupil, whereas the four poorest districts studied, each of which had less than \$10,000 in taxable property per pupil, were able [*75] to raise only an average of \$63 per pupil.¹⁰ And, as the Court effectively recognizes, *ante*, at 27, this correlation between the amount of taxable property per pupil and the amount of local revenues per pupil holds true for the 96 districts in between the richest and poorest districts¹¹.

9 Texas has approximately 1,200 school districts.

10 See Appendix I, *post*, p. 134.

11 See *ibid*. Indeed, appellants acknowledge that the relevant data from Professor Berke's affidavit show "a very positive correlation, 0.973, between market value of taxable property per pupil and state and local revenues per pupil." Reply Brief for Appellants 6 n. 9.

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While the Court takes issue with much of Professor Berke's data and conclusions, ante, at 15-16, n. 38 and 25-27, I do not understand its criticism to run to the basic finding of a correlation between taxable district property per pupil and local revenues per pupil. The critique of Professor Berke's methodology upon which the Court relies, see Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny*, 120 U. Pa. L. Rev. 504, 523-525, nn. 67, 71 (1972), is directed only at the suggested correlations between family income and taxable district wealth and between race and taxable district wealth. Obviously, the appellants do not question the relationship in Texas between taxable district wealth and per-pupil expenditures; and there is no basis for the Court to do so, whatever the criticisms that may be leveled at other aspects of Professor Berke's study, see *infra*, n. 56.

It is clear, moreover, that the disparity of per-pupil revenues cannot be dismissed as the result of lack of local effort -- that is, lower tax rates -- by property-poor districts. To the contrary, the data presented below indicate that the poorest districts tend to have the highest tax rates and the richest districts tend to have the lowest tax rates.¹² Yet, despite the apparent extra effort being made by the poorest districts, they are unable even to begin to match the richest districts in terms of the production of local revenues. For example, the 10 richest districts studied by Professor Berke were able to produce \$ 585 per pupil with an equalized tax rate of 31 cents [*76] on \$ 100 of equalized valuation, but the four poorest districts studied, with an equalized rate of 70 cents on \$ 100 of [***68] equalized valuation, were able to produce only \$ 60 per pupil.¹³ Without more, this state-imposed system of educational funding presents a serious picture of widely varying treatment of Texas school districts, and thereby of Texas schoolchildren, in terms of the amount of funds available for public education.

¹² See Appendix II, post, p. 135.

¹³ See *ibid*.

Nor are these funding variations corrected by the other aspects of the Texas financing scheme. The Federal

Government provides funds sufficient to cover only some 10% of the total cost of public education in Texas.¹⁴ Furthermore, while these federal funds are not distributed in Texas solely on a per-pupil basis, appellants do not here contend that they are used in such a way as to ameliorate significantly the widely varying consequences for Texas school districts and school children of the local [**1319] property tax element of the state financing scheme.¹⁵

¹⁴ For the 1970-1971 school year, the precise figure was 10.9%. See Texas Research League, *supra*, n. 2, at 9.

¹⁵ Appellants made such a contention before the District Court but apparently have abandoned it in this Court. Indeed, data introduced in the District Court simply belie the argument that federal funds have a significant equalizing effect. See Appendix I, post, p. 134. And, as the District Court observed, it does not follow that remedial action by the Federal Government would excuse any unconstitutional discrimination effected by the state financing scheme. 337 F. Supp. 280, 284.

State funds provide the remaining some 50% of the monies spent on public education in Texas.¹⁶ Technically, they are distributed under two programs. The first is the Available School Fund, for which provision is made in the Texas Constitution.¹⁷ The Available [*77] School Fund is composed of revenues obtained from a number of sources, including receipts from the state ad valorem property tax, one-fourth of all monies collected by the occupation tax, annual contributions by the legislature from general revenues, and the revenues derived from the Permanent School Fund.¹⁸ For the 1970-1971 school year the Available School Fund contained \$ 296,000,000. The Texas Constitution requires that this money be distributed annually on a per capita basis¹⁹ to the local school districts. Obviously, such a flat grant could not alone eradicate the funding differentials attributable to the local property tax. Moreover, today the Available School Fund is in reality simply one facet of the second state financing program, the Minimum Foundation School Program²⁰, since each district's annual share of the Fund is deducted from the sum to which the district is entitled under the Foundation Program.²¹

¹⁶ For the 1970-1971 school year, the precise

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figure was 48%. See Texas Research League, *supra*, n. 2, at 9.

17 See *Tex. Const., Art. 7, § 5* (Supp. 1972). See also *Tex. Educ. Code Ann. § 15.01 (b)*.

18 See *Tex. Educ. Code Ann. § 15.01 (b)*.

The Permanent School Fund is, in essence, a public trust initially endowed with vast quantities of public land, the sale of which has provided an enormous corpus that in turn produces substantial annual revenues which are devoted exclusively to public education. See *Tex. Const., Art. 7, § 5* (Supp. 1972). See also 5 Report of Governor's Committee on Public School Education, *The Challenge and the Chance* 11 (1969) (hereinafter Governor's Committee Report).

19 This is determined from the average daily attendance within each district for the preceding year. *Tex. Educ. Code Ann. § 15.01 (c)*.

20 See *id.*, §§ 16.01-16.975.

21 See *id.*, §§ 16.71 (2), 16.79.

The Minimum Foundation School [***69] Program provides funds for three specific purposes: professional salaries, current operating expenses, and transportation expenses²². The State pays, on an overall basis, for approximately 80% of the cost of the Program; the remaining 20% is distributed among the local school districts under the [*78] Local Fund Assignment.²³ Each district's share of the Local Fund Assignment is determined by a complex "economic index" which is designed to allocate a larger share of the costs to property-rich districts than to property-poor districts.²⁴ Each district pays its share with revenues derived from local property taxation.

22 See *id.*, §§ 16.301-16.316, 16.45, 16.51-16.63.

23 See *id.*, §§ 16.72-16.73, 16.76-16.77.

24 See *id.*, §§ 16.74-16.76. The formula for calculating each district's share is described in 5 Governor's Committee Report 44-48.

The stated purpose of the Minimum Foundation School Program is to provide certain basic funding for each local Texas school district.²⁵ At the same time, the Program was apparently intended to improve, to some degree, the financial position of property-poor districts relative to property-rich districts, since -- through the use of the economic index -- an effort is made to charge a [**1320] disproportionate share of the costs of the Program to rich districts.²⁶ It bears noting, however, that substantial criticism has been leveled at the practical effectiveness of the economic index system of local cost allocation²⁷. In theory, the index is designed to ascertain the relative ability of each district to contribute to the Local Fund Assignment from local property taxes. Yet the index is not developed simply on the basis of each district's taxable wealth. It also takes into account the district's relative income from manufacturing, mining, and agriculture, its payrolls, and its scholastic population.²⁸ [*79] It is difficult to discern precisely how these latter factors are predictive of a district's relative ability to raise revenues through local property taxes. Thus, in 1966, one of the consultants who originally participated in the development of the Texas economic index adopted in 1949 told the Governor's Committee on Public School Education: "The Economic Index approach to evaluating local ability offers a little better measure than sheer chance, but not much."²⁹

25 See *Tex. Educ. Code Ann. § 16.01*.

26 See 5 Governor's Committee Report 40-41.

27 See *id.*, at 45-67; Texas Research League, *Texas Public Schools Under the Minimum Foundation Program - An Evaluation: 1949-1954*, pp. 67-68 (1954).

28 Technically, the economic index involves a two-step calculation. First, on the basis of the factors mentioned above, each Texas county's share of the Local Fund Assignment is determined. Then each county's share is divided among its school districts on the basis of their relative shares of the county's assessable wealth. See *Tex. Educ. Code Ann. §§ 16.74-16.76*; 5 Governor's Committee Report 43-44; Texas Research League, *Texas Public School Finance: A Majority of Exceptions 6-8* (2d Interim Report 1972).

29 5 Governor's Committee Report 48, quoting statement of Dr. Edgar Morphet.

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Moreover, even putting aside these criticisms of the economic index as a device for achieving meaningful district wealth equalization through cost allocation, poor districts still do not necessarily receive more state aid than property-rich districts. For the standards which currently determine the amount received from the Foundation School Program by any particular district ³⁰ [***70] favor property-rich districts. ³¹ Thus, focusing on the same [*80] Edgewood Independent and Alamo Heights School Districts which the majority uses for purposes of illustration, we find that in 1967-1968 property-rich Alamo Heights ³², which raised \$ 333 per [**1321] pupil on an equalized tax rate of 85 cents per \$ 100 valuation, received \$ 225 per pupil from the Foundation School Program, while property-poor Edgewood ³³, which raised only \$ 26 per pupil with an equalized tax rate of \$ 1.05 per \$ 100 valuation, received only \$ 222 per pupil from the Foundation School Program. ³⁴ And, more recent data, which indicate that for the 1970-1971 school year Alamo Heights received \$ 491 per pupil from [*81] the Program while Edgewood received only \$ 356 per pupil, hardly suggest that the wealth gap between the districts is being narrowed by the State Program. To the contrary, whereas in 1967-1968 Alamo Heights received only \$ 3 per pupil, or about 1%, more than Edgewood in state aid, by 1970-1971 the gap had widened to a difference of \$ 135 per pupil, or about 38% ³⁵. It [***71] was data of this character that prompted the District Court to observe that "the current [state aid] system tends to subsidize the rich at the expense of the poor, rather than the other way around." ³⁶ 337 F. Supp. 280, 282. And even the appellants go no further here than to venture that the Minimum Foundation School Program has "a mildly equalizing effect." ³⁷

30 The extraordinarily complex standards are summarized in 5 Governor's Committee Report 41-43.

31 The key element of the Minimum Foundation School Program is the provision of funds for professional salaries -- more particularly, for teacher salaries. The Program provides each district with funds to pay its professional payroll as determined by certain state standards. See *Tex. Educ. Code Ann.* §§ 16.301-16.316. If the district fails to pay its teachers at the levels determined by the state standards it receives nothing from the Program. See *id.*, § 16.301 (c). At the same time, districts are free to pay their teachers

salaries in excess of the level set by the state standards, using local revenues -- that is, property tax revenue -- to make up the difference, see *id.*, § 16.301 (a).

The state salary standards focus upon two factors: the educational level and the experience of the district's teachers. See *id.*, §§ 16.301-16.316. The higher these two factors are, the more funds the district will receive from the Foundation Program for professional salaries.

It should be apparent that the net effect of this scheme is to provide more assistance to property-rich districts than to property-poor ones. For rich districts are able to pay their teachers, out of local funds, salary increments above the state minimum levels. Thus, the rich districts are able to attract the teachers with the best education and the most experience. To complete the circle, this then means, given the state standards, that the rich districts receive more from the Foundation Program for professional salaries than do poor districts. A portion of Professor Berke's study vividly illustrates the impact of the State's standards on districts of varying wealth. See Appendix III, post, p. 136.

32 In 1967-1968, Alamo Heights School District had \$49,478 in taxable property per pupil. See Berke Affidavit, Table VII, App. 216.

33 In 1967-1968, Edgewood Independent School District had \$5.960 in taxable property per pupil. *Ibid.*

34 I fail to understand the relevance for this case of the Court's suggestion that if Alamo Heights School District, which is approximately the same physical size as Edgewood Independent School District but which has only one-fourth as many students, had the same number of students as Edgewood, the former's per-pupil expenditure would be considerably closer to the latter's. Ante, at 13 n. 33. Obviously, this is true, but it does not alter the simple fact that Edgewood does have four times as many students but not four times as much taxable property wealth. From the perspective of Edgewood's school children then --

411 U.S. 1, *81; 93 S. Ct. 1278, **1321;
36 L. Ed. 2d 16, ***71; 1973 U.S. LEXIS 91

the perspective that ultimately counts here -- Edgewood is clearly a much poorer district than Alamo Heights. The question here is not whether districts have equal taxable property wealth in absolute terms, but whether districts have differing taxable wealth given their respective school-age populations.

35 In the face of these gross disparities in treatment which experience with the Texas financing scheme has revealed, I cannot accept the Court's suggestion that we are dealing here with a remedial scheme to which we should accord substantial deference because of its accomplishments rather than criticize it for its failures. Ante , at 38-39. Moreover, Texas' financing scheme is hardly remedial legislation of the type for which we have previously shown substantial tolerance. Such legislation may in fact extend the vote to "persons who otherwise would be denied it by state law," *Katzenbach v. Morgan* , 384 U.S. 641, 657 (1966), or it may eliminate the evils of the private bail bondsman, *Schilb v. Kuebel* , 404 U.S. 357 (1971). But those are instances in which a legislative body has sought to remedy problems for which it cannot be said to have been directly responsible. By contrast, public education is the function of the State in Texas, and the responsibility for any defect in the financing scheme must ultimately rest with the State. It is the State's own scheme which has caused the funding problem, and, thus viewed, that scheme can hardly be deemed remedial.

36 Cf. Appendix I, post , p. 134.

37 Brief for Appellants 3.

Despite these facts, the majority continually emphasizes how much state aid has, in recent years, been given [*82] to property-poor Texas school districts. What the Court fails to emphasize is the cruel irony of how much more state aid is being given to property-rich Texas school districts on top of their already substantial local property tax revenues³⁸. Under any view, then, it is apparent that the state aid provided by the Foundation School Program fails to compensate for the large funding variations attributable to the local property tax element of

the Texas financing scheme. [**1322] And it is these stark differences in the treatment of Texas school districts and school children inherent in the Texas financing scheme, not the absolute amount of state aid provided to any particular school district, that are the crux of this case. There can, moreover, be no escaping the conclusion that the local property tax which is dependent upon taxable district property wealth is an essential feature of the Texas scheme for financing public education.³⁹

38 Thus, in 1967-1968, Edgewood had a total of \$ 248 per pupil in state and local funds compared with a total of \$ 558 per pupil for Alamo Heights. See Berke Affidavit, Table X, App. 219. For 1970-1971, the respective totals were \$ 418 and \$ 913. See Texas Research League, supra , n. 2, at 14.

39 Not only does the local property tax provide approximately 40% of the funds expended on public education, but it is the only source of funds for such essential aspects of educational financing as the payment of school bonds, see n. 3, supra , and the payment of the district's share of the Local Fund Assignment, as well as for nearly all expenditures above the minimums established by the Foundation School Program.

B

The appellants do not deny the disparities in educational funding caused by variations in taxable district property wealth. They do contend, however, that whatever the differences in per-pupil spending among Texas districts, there are no discriminatory consequences for the children of the disadvantaged districts. They recognize that what is at stake in this case is the quality of the [*83] public education provided Texas children in the districts in which they live. But appellants reject the suggestion that the quality of education in any particular district is determined by money -- beyond some minimal level of funding [***72] which they believe to be assured every Texas district by the Minimum Foundation School Program. In their view, there is simply no denial of equal educational opportunity to any Texas schoolchildren as a result of the widely varying per-pupil spending power provided districts under the current financing scheme.

In my view, though, even an unadorned restatement of this contention is sufficient to reveal its absurdity.

411 U.S. 1, *83; 93 S. Ct. 1278, **1322;
36 L. Ed. 2d 16, ***72; 1973 U.S. LEXIS 91

Authorities concerned with educational quality no doubt disagree as to the significance of variations in per-pupil spending.⁴⁰ Indeed, conflicting expert testimony was presented to the District Court in this case concerning the effect of spending variations on educational achievement.⁴¹ We sit, however, not to resolve disputes over educational theory but to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the [*84] former will have greater choice in educational planning than will the latter. In this regard, I believe the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds -- and thus with greater choice in educational planning - may nevertheless excel is to the credit of the child, not the State, cf. [**1323] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938). Indeed, who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.

40 Compare, e.g., J. Coleman, et al., *Equality of Educational Opportunity* 290-330 (1966), Jencks, *The Coleman Report and the Conventional Wisdom*, in *On Equality of Educational Opportunity* 69, 91-104 (F. Mosteller & D. Moynihan eds. 1972), with, e.g., J. Guthrie, G. Kleindorfer, H. Levin, & R. Stout, *Schools and Inequality* 79-90 (1971); Kiesling, *Measuring a Local Government Service: A Study of School Districts in New York State*, 49 *Rev. Econ. & Statistics* 356 (1967).

41 Compare Berke Answers to Interrogatories 10 ("Dollar expenditures are probably the best way of measuring the quality of education afforded students ..."), with Graham Deposition 39 ("[I]t is not just necessarily the money, no. It is how wisely you spend it"). It warrants noting that even appellants' witness, Mr. Graham, qualified the importance of money only by the requirement of wise expenditure. Quite obviously, a district

which is property poor is powerless to match the education provided by a property-rich district, assuming each district allocates its funds with equal wisdom.

Hence, even before this Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the *Equal Protection Clause*. As a basis for striking down state-enforced segregation of a law school, the Court in *Sweatt v. Painter*, 339 U.S. 629, 633-634 (1950), stated: S"[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, [***73] variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [whites-only] Law School is superior. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close."I [*85] See also *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950). Likewise, it is difficult to believe that if the children of Texas had a free choice, they would choose to be educated in districts with fewer resources, and hence with more antiquated plants, less experienced teachers, and a less diversified curriculum. In fact, if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court⁴².

42 See Brief of amici curiae, inter alia, San Marino Unified School District; Beverly Hills Unified School District; Brief of amici curiae, inter alia, Bloomfield Hills, Michigan, School District; Dearborn City, Michigan, School District; Grosse Pointe, Michigan, Public School System.

The consequences, in terms of objective educational input, of the variations in district funding caused by the Texas financing scheme are apparent from the data introduced before the District Court. For example, in 1968-1969, 100% of the teachers in the property-rich Alamo Heights School District had college degrees⁴³. By contrast, during the same school year only 80.02% of

411 U.S. 1, *85; 93 S. Ct. 1278, **1323;
36 L. Ed. 2d 16, ***73; 1973 U.S. LEXIS 91

the teachers had college degrees in the property poor Edgewood Independent School District⁴⁴. Also, in 1968-1969, approximately 47% of the teachers in the Edgewood District were on emergency teaching permits, whereas only 11% of the teachers in Alamo Heights were on such permits.⁴⁵ This is undoubtedly a reflection of the fact that the top of Edgewood's teacher salary scale was [*86] approximately 80% of Alamo Heights'.⁴⁶ And, not surprisingly, the teacher-student ratio varies significantly between the two districts⁴⁷. In other words, as might be expected, a difference in the funds available to districts results in a difference in [**1324] educational inputs available for a child's public education in Texas. For constitutional purposes, I believe this situation, which is directly attributable to the Texas financing scheme, raises a grave question of state-created discrimination in the provision of public education. Cf. *Gaston County v. United States*, 395 U.S. 285, 293-294 (1969).

43 Answers to Plaintiffs' Interrogatories, App. 115.

44 Ibid. Moreover, during the same period, 37.17% of the teachers in Alamo Heights had advanced degrees, while only 14.98% of Edgewood's faculty had such degrees. See *id.*, at 116.

45 *Id.*, at 117.

46 *Id.*, at 118.

47 In the 1967-1968 school year, Edgewood had 22,862 students and 864 teachers, a ratio of 26.5 to 1. See *id.*, at 110, 114. In Alamo Heights, for the same school year, there were 5,432 students and 265 teachers for a ratio of 20.5 to 1. Ibid.

At the very least, in view of the substantial interdistrict disparities in funding and in resulting educational inputs shown by appellees to exist under the Texas financing scheme, the burden of proving that these disparities do not in fact affect the quality of children's education [***74] must fall upon the appellants. Cf. *Hobson v. Hansen*, 327 F. Supp. 844, 860-861 (DC 1971). Yet appellants made no effort in the District Court to demonstrate that educational quality is not affected by variations in funding and in resulting inputs. And, in this Court, they have argued no more than that the relationship is ambiguous. This is hardly sufficient to overcome appellees' prima facie showing of state-created

discrimination between the school children of Texas with respect to objective educational opportunity.

Nor can I accept the appellants' apparent suggestion that the Texas Minimum Foundation School Program effectively eradicates any discriminatory effects otherwise resulting from the local property tax element of the [*87] Texas financing scheme. Appellants assert that, despite its imperfections, the Program "does guarantee an adequate education to every child."⁴⁸ The majority, in considering the constitutionality of the Texas financing scheme, seems to find substantial merit in this contention, for it tells us that the Foundation Program "was designed to provide an adequate minimum educational offering in every school in the State," ante, at 45, and that the Program "assur[es] a basic education for every child," ante, at 49. But I fail to understand how the constitutional problems inherent in the financing scheme are eased by the Foundation Program. Indeed, the precise thrust of the appellants' and the Court's remarks are not altogether clear to me.

48 Reply Brief for Appellants 17. See also, *id.*, at 5, 15-16.

The suggestion may be that the state aid received via the Foundation Program sufficiently improves the position of property-poor districts vis-a-vis property-rich districts -- in terms of educational funds - to eliminate any claim of interdistrict discrimination in available educational resources which might otherwise exist if educational funding were dependent solely upon local property taxation. Certainly the Court has recognized that to demand precise equality of treatment is normally unrealistic, and thus minor differences inherent in any practical context usually will not make out a substantial equal protection claim. See, e.g., *Mayer v. City of Chicago*, 404 U.S. 189, 194-195 (1971); *Draper v. Washington*, 372 U.S. 487, 495-496 (1963); *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931). But, as has already been seen, we are hardly presented here with some de minimis claim of discrimination resulting from the play necessary in any functioning system; to the contrary, it is clear that the Foundation Program utterly fails to [*88] ameliorate the seriously discriminatory effects of the local property tax⁴⁹.

49 Indeed, even apart from the differential treatment inherent in the local property tax, the significant interdistrict disparities in state aid received under the Minimum Foundation School

411 U.S. 1, *88; 93 S. Ct. 1278, **1324;
36 L. Ed. 2d 16, ***74; 1973 U.S. LEXIS 91

Program would seem to raise substantial equal protection questions.

Alternatively, the appellants and the majority may believe that the *Equal Protection Clause* cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education [**1325] which evidently is "enough." 50 The [***75] basis for such a novel view is far from clear. It is, of course, true that the Constitution does not require precise equality in the treatment of all persons. As Mr. Justice Frankfurter explained: S"The equality at which the 'equal protection' clause aims is not a disembodied equality. The *Fourteenth Amendment* enjoins 'the equal protection of the laws,' and laws are not abstract propositions.... The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).¹

See also *Douglas v. California*, 372 U.S. 353, 357 (1963); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). [*89] But this Court has never suggested that because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The *Equal Protection Clause* is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

50 I find particularly strong intimations of such a view in the majority's efforts to denigrate the constitutional significance of children in property-poor districts "receiving a poorer quality education than that available to children in districts having more assessable wealth" with the assertion "that, at least where wealth is involved, the *Equal Protection Clause* does not require absolute equality or precisely equal advantages." Ante, at 23, 24. The Court, to be sure, restricts its remark to "wealth" discrimination. But the logical basis for such a restriction is not explained by the Court, nor is it otherwise apparent, see *infra*, at 117-120 and n. 77.

Even if the *Equal Protection Clause* encompassed some theory of constitutional adequacy, discrimination in the provision of educational opportunity would certainly

seem to be a poor candidate for its application. Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is "enough" to excuse constitutional discrimination. One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is constitutionally sufficient. Indeed, the majority's apparent reliance upon the adequacy of the educational opportunity assured by the Texas Minimum Foundation School Program seems fundamentally inconsistent with its own recognition that educational authorities are unable to agree upon what makes for educational quality, see ante, at 42-43 and n. 86 and at 47 n. 101. If, as the majority stresses, such authorities are uncertain as to the impact of various levels of funding on educational quality, I fail to see where it finds the expertise to divine that the particular levels of funding provided by the Program assure an adequate educational opportunity -- much less an education substantially equivalent in quality to that which a higher level of funding might provide. Certainly appellants' mere assertion before this Court of the adequacy of the education guaranteed by the Minimum [*90] Foundation School Program cannot obscure the constitutional [***76] implications of the discrimination in educational funding and objective educational inputs resulting from the local property tax - particularly since the appellees offered substantial uncontroverted evidence before the District Court impugning the now much touted "adequacy" of the education guaranteed by the Foundation Program⁵¹.

51 See Answers to Interrogatories by Dr. Joel S. Berke, Ans. 17, p. 9; Ans. 48-51, pp. 22-24; Ans. 88-89, pp. 41-42; Deposition of Dr. Daniel C. Morgan, Jr., at 52-55; Affidavit of Dr. Daniel C. Morgan, Jr., App. 242-243.

In [**1326] my view, then, it is inequality -- not some notion of gross inadequacy - of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle. Here appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the school children of Texas. This discrimination is, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient

411 U.S. 1, *90; 93 S. Ct. 1278, **1326;
36 L. Ed. 2d 16, ***76; 1973 U.S. LEXIS 91

showing to raise a substantial question of discriminatory state action in violation of the *Equal Protection Clause*.
52

52 It is true that in two previous cases this Court has summarily affirmed district court dismissals of constitutional attacks upon other state educational financing schemes. See *McInnis v. Shapiro*, 293 F. Supp. 327 (ND Ill. 1968), aff'd per curiam, sub nom. *McInnis v. Ogilvie*, 394 U.S. 322 (1969); *Burruss v. Wilkerson*, 310 F. Supp. 572 (WD Va. 1969), aff'd per curiam, 397 U.S. 44 (1970). But those decisions cannot be considered dispositive of this action, for the thrust of those suits differed materially from that of the present case. In *McInnis*, the plaintiffs asserted that "only a financing system which apportions public funds according to the educational needs of the students satisfies the *Fourteenth Amendment*." 293 F. Supp., at 331. The District Court concluded that "(1) the *Fourteenth Amendment* does not require that public school expenditures be made only on the basis of pupils' educational needs, and (2) the lack of judicially manageable standards makes this controversy nonjusticiable." *Id.*, at 329. The Burruss District Court dismissed that suit essentially in reliance on *McInnis* which it found to be "scarcely distinguishable." 310 F. Supp., at 574. This suit involves no effort to obtain an allocation of school funds that considers only educational need. The District Court ruled only that the State must remedy the discrimination resulting from the distribution of taxable local district wealth which has heretofore prevented many districts from truly exercising local fiscal control. Furthermore, the limited holding of the District Court presents none of the problems of judicial management which would exist if the federal courts were to attempt to ensure the distribution of educational funds solely on the basis of educational need, see *infra*, at 130-132.

[*91] C Despite the evident discriminatory effect of the Texas financing scheme, both the appellants and the majority raise substantial questions concerning the precise character of the disadvantaged class in this case. The District Court concluded that the Texas financing scheme draws "distinction between groups of citizens depending upon the wealth of the district in which they live" and thus creates a disadvantaged class composed of

persons living in property-poor districts. See 337 F. Supp., at 282. See also *id.*, at 281. In light of the data introduced before the District Court, the conclusion that the schoolchildren of property-poor districts constitute a sufficient class for our purposes seems indisputable to me.

Appellants contend, however, that [***77] in constitutional terms this case involves nothing more than discrimination against local school districts, not against individuals, since on its face the state scheme is concerned only with the provision of funds to local districts. The result of the Texas financing scheme, appellants suggest, is merely that some local districts have more available revenues for education; others have less. In that respect, [*92] they point out, the States have broad discretion in drawing reasonable distinctions between their political subdivisions. See *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 231 (1964); *McGowan v. Maryland*, 366 U.S. 420, 427 (1961); *Salsburg v. Maryland*, 346 U.S. 545, 550-554 (1954).

But this Court has consistently recognized that where there is in fact discrimination [**1327] against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location. See *Gordon v. Lance*, 403 U.S. 1, 4 (1971); *Reynolds v. Sims*, 377 U.S. 533, 565-566 (1964); *Gray v. Sanders* 372 U.S. 368, 379 (1963). Texas has chosen to provide free public education for all its citizens, and it has embodied that decision in its constitution.⁵³ Yet, having established public education for its citizens, the State, as a direct consequence of the variations in local property wealth endemic to Texas' financing scheme, has provided some Texas schoolchildren with substantially less resources for their education than others. Thus, while on its face the Texas scheme may merely discriminate between local districts, the impact of that discrimination falls directly upon the children whose educational opportunity is dependent upon where they happen to live. Consequently, the District Court correctly concluded that the Texas financing scheme discriminates, from a constitutional perspective, between schoolchildren on the basis of the amount of taxable property located within their local districts.

⁵³ *Tex. Const., Art. 7, § 1.*

411 U.S. 1, *92; 93 S. Ct. 1278, **1327;
36 L. Ed. 2d 16, ***77; 1973 U.S. LEXIS 91

In my Brother STEWART'S view, however, such a description of the discrimination inherent in this case is apparently not sufficient, for it fails to define the "kind of objectively identifiable classes" that he evidently perceives [*93] to be necessary for a claim to be "cognizable under the *Equal Protection Clause*," ante, at 62. He asserts that this is also the view of the majority, but he is unable to cite, nor have I been able to find, any portion of the Court's opinion which remotely suggests that there is no objectively identifiable or definable class in this case. In any event, if he means to suggest that an essential predicate to equal protection analysis is the precise identification of the particular individuals who compose the disadvantaged class, I fail to find the source from which he derives such a requirement. Certainly such precision is not analytically necessary. So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination -- whatever the standard of equal protection analysis employed⁵⁴. This is clear from [***78] our decision only last Term in *Bullock v. Carter*, 405 U.S. 134 (1972), where the Court, in striking down Texas' primary filing fees as violative of equal protection, found no impediment to equal protection analysis in the fact that the members of the disadvantaged class could not be readily identified. The Court recognized that the filing-fee system tended "to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor." *Id.*, at 144. The [*94] Court also recognized that "[t]his disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the *Equal Protection Clause* ..." *Ibid.* Nevertheless, it [**1328] concluded that "we would ignore reality were we not to recognize that this system falls with unequal weight on voters . . . according to their economic status." *Ibid.* The nature of the classification in *Bullock* was clear, although the precise membership of the disadvantaged class was not. This was enough in *Bullock* for purposes of equal protection analysis. It is enough here.

54 Problems of remedy may be another matter. If provision of the relief sought in a particular case required identification of each member of the affected class, as in the case of monetary relief, the need for clarity in defining the class is apparent. But this involves the procedural

problems inherent in class action litigation, not the character of the elements essential to equal protection analysis. We are concerned here only with the latter. Moreover, it is evident that in cases such as this provision of appropriate relief, which takes the injunctive form, is not a serious problem since it is enough to direct the action of appropriate officials. *Cf. Potts v. Flax*, 313 F. 2d 284, 288-290 (CA5 1963).

It may be, though, that my Brother STEWART is not in fact demanding precise identification of the membership of the disadvantaged class for purposes of equal protection analysis, but is merely unable to discern with sufficient clarity the nature of the discrimination charged in this case. Indeed, the Court itself displays some uncertainty as to the exact nature of the discrimination and the resulting disadvantaged class alleged to exist in this case. See ante, at 19-20. It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue. In fact, the absence of such a clear, articulable understanding of the nature of alleged discrimination in a particular instance may well suggest the absence of any real discrimination. But such is hardly the case here.

A number of theories of discrimination have, to be sure, been considered in the course of this litigation. Thus, the District Court found that in Texas the poor and minority group members tend to live in property-poor districts, suggesting discrimination on the basis of both personal wealth and race. See 337 F. Supp., at 282 and n. 3. The Court goes to great lengths to discredit the data upon which the District Court relied, and thereby its conclusion that poor people live in property-poor districts.⁵⁵ [*95] Although I have serious doubts as to the correctness of the Court's analysis in rejecting the data submitted below⁵⁶, I [**1329] have no need to join issue on these factual disputes.

55 I assume the Court would lodge the same criticism against the validity of the finding of a correlation between poor districts and racial minorities.

56 The Court rejects the District Court's finding of a correlation between poor people and poor districts with the assertion that "there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts" in Texas. Ante, at 23. In support of its

411 U.S. 1, *95; 93 S. Ct. 1278, **1329;
36 L. Ed. 2d 16, ***78; 1973 U.S. LEXIS 91

conclusion the Court offers absolutely no data -- which it cannot on this record -- concerning the distribution of poor people in Texas to refute the data introduced below by appellees; it relies instead on a recent law review note concerned solely with the State of Connecticut, Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L.J. 1303 (1972). Common sense suggests that the basis for drawing a demographic conclusion with respect to a geographically large, urban-rural, industrial-agricultural State such as Texas from a geographically small, densely populated, highly industrialized State such as Connecticut is doubtful at best.

Furthermore, the article upon which the Court relies to discredit the statistical procedures employed by Professor Berke to establish the correlation between poor people and poor districts, see n. 11, *supra*, based its criticism primarily on the fact that only four of the 110 districts studied were in the lowest of the five categories, which were determined by relative taxable property per pupil, and most districts clustered in the middle three groups. See Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of *Serrano v. Priest* and its Progeny, 120 U. Pa. L. Rev. 504, 524 n. 67 (1972). See also *ante*, at 26-27. But the Court fails to note that the four poorest districts in the sample had over 50,000 students which constituted 10% of the students in the entire sample. It appears, moreover, that even when the richest and the poorest categories are enlarged to include in each category 20% of the students in the sample, the correlation between district and individual wealth holds true. See Brief for the Governors of Minnesota, Maine, South Dakota, Wisconsin, and Michigan as amici curiae 17 n. 21.

Finally, it cannot be ignored that the data introduced by appellees went unchallenged in the District Court. The majority's willingness to permit appellants to litigate the correctness of those data for the first time before this tribunal -- where effective response by appellees is impossible -- is both unfair and judicially unsound.

[*96] I [***79] believe it is sufficient that the overarching form of discrimination in this case is between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live. To understand both the precise nature of this discrimination and the parameters of the disadvantaged class it is sufficient to consider the constitutional principle which appellees contend is controlling in the context of educational financing. In their complaint appellees asserted that the Constitution does not permit local district wealth to be determinative of educational opportunity.⁵⁷ This is simply another way of saying, as the District Court concluded, that consistent with the guarantee of equal protection of the laws, "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." 337 F. Supp., at 284. Under such a principle, the children of a district are excessively advantaged if that district has more taxable property per pupil than the average amount of taxable property per pupil considering the State as a whole. By contrast, the children of a district are disadvantaged if that district has less taxable property per pupil than the state average. The majority attempts to disparage such a definition of the disadvantaged class as the product of an " [***80] artificially defined level" of district wealth. *Ante*, at 28. But such is clearly not the case, for this is the [*97] definition unmistakably dictated by the constitutional principle for which appellees have argued throughout the course of this litigation. And I do not believe that a clearer definition of either the disadvantaged class of Texas schoolchildren or the allegedly unconstitutional discrimination suffered by the members of that class under the present Texas financing scheme could be asked for, much less needed.⁵⁸ Whether this discrimination, against the schoolchildren of property-poor districts, inherent in the Texas financing scheme, is violative of the *Equal Protection Clause* is the question to which we must now turn.

57 Third Amended Complaint App. 23. Consistent with this theory, appellees purported to represent, among others, a class composed of "all . . . school children in independent school districts . . . who . . . have been deprived of the equal protection of the law under the *Fourteenth Amendment* with regard to public school education because of the low value of the property lying within the independent school districts in which they reside." *Id.*, at 15.

58 The degree of judicial scrutiny that this particular classification demands is a distinct issue which I consider in Part II, C, *infra* .

II

To avoid having the Texas financing scheme struck down because of the interdistrict variations in taxable property wealth, the District Court determined that it was insufficient for appellants to show merely that the State's scheme was rationally related to some legitimate state purpose; rather, the discrimination inherent in the scheme had to be shown necessary to promote a "compelling state interest" in order to withstand constitutional scrutiny. The basis for this determination was twofold: first, the financing scheme divides citizens on a wealth basis, a classification which the District Court viewed as highly suspect; and second, the discriminatory scheme directly affects what it considered to be a "fundamental interest," namely, education.

This Court has repeatedly held that state discrimination which either adversely affects a "fundamental interest," see, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336-342 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 629-631 (1969), or is based on a distinction of a suspect character, see, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 [*98] (1971); *McLaughlin* [**1330] v. *Florida*, 379 U.S. 184, 191-192 (1964), must be carefully scrutinized to ensure that the scheme is necessary to promote a substantial, legitimate state interest. See, e.g., *Dunn v. Blumstein*, *supra.*, at 342-343; *Shapiro v. Thompson*, *supra.*, at 634. The majority today concludes, however, that the Texas scheme is not subject to such a strict standard of review under the *Equal Protection Clause*. Instead, in its view, the Texas scheme must be tested by nothing more than that lenient standard of rationality which we have traditionally applied to discriminatory state action in the context of economic and commercial matters. See, e.g., *McGowan v. Maryland*, 366 U.S., at 425-426; *Morey v. Doud*, 354 U.S. 457, 465-466 (1957); *F.S. Royster Guano Co. v. Virginia*, 253 U.S., at 415; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). By so doing, the Court avoids the telling task of searching for a substantial state interest which the Texas financing scheme, with its variations in taxable district [***81] property wealth, is necessary to further. I cannot accept such an emasculation of the *Equal Protection Clause* in the context of this case.

A

To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. See *Dandridge v. Williams*, 397 U.S. 471, 519-521 (1970) (dissenting opinion); *Richardson v. Belcher*, 404 U.S. 78, 90 (1971) (dissenting opinion). The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review - strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the *Equal Protection* [*99] *Clause*. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued -- that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Dandridge v. Williams*, *supra.*, at 520-521 (dissenting opinion).

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). Further, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right "was conceived from the beginning to be a necessary concomitant of the stronger [**1331] Union the Constitution created." *United States v. Guest*, 383 U.S. 745, 758 (1966). See also *Crandall v. Nevada*, 6 Wall.

411 U.S. 1, *99; 93 S. Ct. 1278, **1331;
36 L. Ed. 2d 16, ***81; 1973 U.S. LEXIS 91

35, 48 (1868). Consequently, the Court has required that a state classification affecting the constitutionally [*100] protected right to travel must be "shown to be necessary to promote a compelling governmental interest." *Shapiro v. Thompson*, 394 U.S., at 634. But it will not do to suggest that the "answer" to whether an interest is fundamental for purposes of equal [***82] protection analysis is always determined by whether that interest "is a right . . . explicitly or implicitly guaranteed by the Constitution," ante, at 33-34⁵⁹.

59 Indeed, the Court's theory would render the established concept of fundamental interests in the context of equal protection analysis superfluous, for the substantive constitutional right itself requires that this Court strictly scrutinize any asserted state interest for restricting or denying access to any particular guaranteed right, see, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Cox v. Louisiana*, 379 U.S. 536, 545-551 (1965).

I would like to know where the Constitution guarantees the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), or the right to vote in state elections, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964), or the right to an appeal from a criminal conviction, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

Thus, in *Buck v. Bell*, 274 U.S. 200 (1927), the Court refused to recognize a substantive constitutional guarantee of the right to procreate. Nevertheless, in *Skinner v. Oklahoma*, supra, at 541, the Court, without impugning the continuing validity of *Buck v. Bell*, held that "strict scrutiny" of state discrimination affecting procreation "is essential," for "[m]arriage and procreation are fundamental to the very existence and survival of the race." Recently, in *Roe v. Wade*, 410 U.S. 113, 152-154 (1973), [*101] the importance of procreation has indeed been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any "right" to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in

Buck v. Bell. See *Roe v. Wade*, supra, at 154.

Similarly, the right to vote in state elections has been recognized as a "fundamental political right," because the Court concluded very early that it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see, e.g., *Reynolds v. Sims*, 377 U.S., at 561-562. For this reason, "this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S., at 336 (emphasis added). The final source of such protection from inequality in the provision of the state franchise is, of course, the *Equal Protection Clause*. Yet it is clear that whatever degree of importance has been attached to the state electoral process when unequally distributed, the right to vote in state elections has itself never been accorded the stature of an independent [***83] constitutional guarantee.⁶⁰ See *Oregon v. Mitchell*, [**1332] 400 U.S. 112 (1970); *Kramer v. Union School District*, 395 U.S. 621, 626-629 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966).

60 It is interesting that in its effort to reconcile the state voting rights cases with its theory of fundamentality the majority can muster nothing more than the contention that "[t]he constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted ..." Ante, at 34 n. 74 (emphasis added). If, by this, the Court intends to recognize a substantive constitutional "right to equal treatment in the voting process" independent of the *Equal Protection Clause*, the source of such a right is certainly a mystery to me.

[*102] Finally, it is likewise "true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin v. Illinois*, 351 U.S., at 18. Nevertheless, discrimination adversely affecting access to an appellate process which a State has chosen to provide has been considered to require close judicial scrutiny. See, e.g., *Griffin v. Illinois*, supra; *Douglas v. California*, 372 U.S. 353 (1963)⁶¹.

61 It is true that *Griffin* and *Douglas* also involved discrimination against indigents, that is, wealth discrimination. But, as the majority points out, ante, at 28-29, the Court has never deemed wealth discrimination alone to be sufficient to

411 U.S. 1, *102; 93 S. Ct. 1278, **1332;
36 L. Ed. 2d 16, ***83; 1973 U.S. LEXIS 91

require strict judicial scrutiny; rather, such review of wealth classifications has been applied only where the discrimination affects an important individual interest, see, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). Thus, I believe Griffin and Douglas can only be understood as premised on a recognition of the fundamental importance of the criminal appellate process.

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this Court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws," ante, at 33. Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes [*103] more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction [***84] with the established constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the *First Amendment*. And access to criminal appellate processes enhances the integrity of the range of rights⁶² implicit in the *Fourteenth Amendment* guarantee of due process of [**1333] law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our

previous decisions involving interests deemed to be fundamental.

62 See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront one's accusers).

The effect of the interaction of individual interests with established constitutional guarantees upon the degree of care exercised by this Court in reviewing state discrimination affecting such interests is amply illustrated by our decision last Term in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In *Baird*, the Court struck down as violative of the *Equal Protection Clause* a state statute which denied unmarried persons access to contraceptive devices on the same basis as married persons. The Court [*104] purported to test the statute under its traditional standard whether there is some rational basis for the discrimination effected. *Id.*, at 446-447. In the context of commercial regulation, the Court has indicated that the *Equal Protection Clause* "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." See, e.g., *McGowan v. Maryland*, 366 U.S., at 425; *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 557 (1947). And this lenient standard is further weighted in the State's favor by the fact that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived [by the Court] to justify it." *McGowan v. Maryland*, *supra*, at 426. But in *Baird* the Court clearly did not adhere to these highly tolerant standards of traditional rational review. For although there were conceivable state interests intended to be advanced by the statute -- e.g., deterrence of premarital sexual activity and regulation of the dissemination of potentially dangerous articles - the Court was not prepared to accept these interests on their face, but instead proceeded to test their substantiality by independent analysis. See 405 U.S., at 449-454. Such close scrutiny of the State's interests was hardly characteristic of the deference shown state classifications in the context of economic interests. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Kotch v. Board of River Port Pilot Comm'rs*, *supra*. Yet I think the Court's action was entirely appropriate, for access to and use of contraceptives bears a close relationship to the individual's constitutional right of privacy. See 405 U.S., at 453-454; *id.*, at 463-464 (WHITE, J., concurring in

result). See also *Roe v. Wade*, 410 U.S., at 152-153.

[***85] A similar process of analysis with respect to the invidiousness of the basis on which a particular classification is drawn has also influenced the Court as to the [*105] appropriate degree of scrutiny to be accorded any particular case. The highly suspect character of classifications based on race⁶³, nationality⁶⁴, or alienage⁶⁵ is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as "discrete and insular minorities" who are relatively powerless to protect their interests in the political process. See *Graham v. Richardson*, 403 U.S., at 372; cf. *United States v. Carolene Products* [**1334] Co., 304 U.S. 144, 152-153, n. 4 (1938). Moreover, race, nationality, or alienage is "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States*, 320 U.S. 81, 100." *McLaughlin v. Florida*, 379 U.S., at 192. Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality. It may be that all of these considerations, which make for particular judicial solicitude in the face of discrimination on the basis of race, nationality, or alienage, do not coalesce -- or at least not to the same degree - in other forms of discrimination. Nevertheless, these considerations have undoubtedly influenced the care with which the Court has scrutinized other forms of discrimination.

63 See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 191-192 (1964); *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

64 See *Oyama v. California*, 332 U.S. 633, 644-646 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

65 See *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

In *James v. Strange*, 407 U.S. 128 (1972), the Court held unconstitutional a state statute which provided for recoupment from indigent convicts of legal defense fees paid by the State. The Court found that the statute impermissibly differentiated between indigent criminals in debt to the State and civil judgment debtors, since criminal debtors were denied various protective exemptions [*106] afforded civil judgment debtors⁶⁶. The Court suggested that in reviewing the statute under

the *Equal Protection Clause*, it was merely applying the traditional requirement that there be "some rationality" in the line drawn between the different types of debtors. *Id.*, at 140. Yet it then proceeded to scrutinize the statute with less than traditional deference and restraint. Thus the Court recognized "that state recoupment statutes may betoken legitimate state interests" in recovering expenses and discouraging fraud. Nevertheless, MR. JUSTICE POWELL, speaking for the Court, concluded that S"these interests are not thwarted by requiring more even treatment [***86] of indigent criminal defendants with other classes of debtors to whom the statute itself repeatedly makes reference. State recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect." *Id.*, at 141-142.I

The Court, in short, clearly did not consider the problems of fraud and collection that the state legislature might have concluded were peculiar to indigent criminal defendants to be either sufficiently important or at least sufficiently substantiated to justify denial of the protective exemptions afforded to all civil judgment debtors, to a class composed exclusively of indigent criminal debtors.

66 The Court noted that the challenged "provision strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor's personal clothing, books, and tools of trade." 407 U.S., at 135.

Similarly, in *Reed v. Reed*, 404 U.S. 71 (1971), the Court, in striking down a state statute which gave men [*107] preference over women when persons of equal entitlement apply for assignment as an administrator of a particular estate, resorted to a more stringent standard of equal protection review than that employed in cases involving commercial matters. The Court indicated that it was testing the claim of sex discrimination by nothing more than whether the line drawn bore "a rational relationship to a state objective," which it recognized as a legitimate effort to reduce the work of probate courts in

411 U.S. 1, *107; 93 S. Ct. 1278, **1334;
36 L. Ed. 2d 16, ***86; 1973 U.S. LEXIS 91

choosing between competing applications for letters of administration. *Id.*, at 76. Accepting such a purpose, the Idaho Supreme Court had thought the classification to be sustainable on the basis that the legislature might have reasonably concluded that, as a rule, men have more experience than women in business matters relevant to the administration of estate. 93 *Idaho* 511, 514, 465 P. 2d 635, 638 (1970). This Court, however, concluded that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the *Equal Protection Clause of the Fourteenth Amendment* ..." 404 U.S., at 76. This Court, in other words, was unwilling to consider a theoretical and unsubstantiated basis for distinction -- however reasonable it might appear -- sufficient to sustain a statute discriminating on the basis of sex.

James and Reed can only be understood as instances in which the particularly invidious character of the classification caused the Court to pause and scrutinize with more than traditional care the rationality of state discrimination. Discrimination on the basis of past criminality and on the basis of sex posed for the Court the specter of forms of discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences. Still, [*108] the Court's sensitivity to the invidiousness of the basis for discrimination is perhaps most apparent in its decisions protecting the interests of children born out of wedlock from discriminatory state action. See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

In *Weber*, the Court struck down a portion of a state workmen's compensation statute that relegated unacknowledged illegitimate children of the deceased to a lesser status with respect to benefits than that occupied by legitimate children of the deceased. The Court acknowledged the true nature of its inquiry in cases such as these: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Id.*, at 173. Embarking upon a determination of the relative substantiality of the State's justifications for the classification, the Court rejected the contention that the classifications reflected what might be presumed to have been the deceased's preference of beneficiaries as "not compelling . . . where dependency on the deceased is a

prerequisite to anyone's recovery ..." *Ibid.* Likewise, it deemed the relationship between the State's interest in encouraging legitimate family relationships and the burden placed on the illegitimates too tenuous to permit the classification to stand. *Ibid.* A clear insight into the basis of the Court's action is provided by its conclusion: S"[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as an unjust -- way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the *Equal Protection Clause* [*109] does enable us to strike down discriminatory laws relating to status of birth ..." *Id.*, at 175-176.I

Status of birth, like the color of one's skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations. Yet illegitimacy has long been stigmatized by our society. Hence, discrimination on the basis of birth - particularly when it affects innocent children -- warrants special judicial consideration.

In summary, it seems to me inescapably clear that this Court has consistently [*1336] adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. Moreover, "[t]he extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls." *Dandridge v. Williams*, 397 U.S., at 520 (dissenting opinion). But the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a "superlegislature." *Ante*, at 31. I cannot agree. Such an approach seems to me a part of the guarantees [*1338] of our Constitution and of the historic

411 U.S. 1, *109; 93 S. Ct. 1278, **1336;
36 L. Ed. 2d 16, ***88; 1973 U.S. LEXIS 91

experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document. In truth, [*110] the Court itself will be open to the criticism raised by the majority so long as it continues on its present course of effectively selecting in private which cases will be afforded special consideration without acknowledging the true basis of its action.⁶⁷ Opinions such as those in *Reed* and *James* seem drawn more as efforts to shield rather than to reveal the true basis of the Court's decisions. Such obfuscated action may be appropriate to a political body such as a legislature, but it is not appropriate to this Court. Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process.

67 See generally Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

Nevertheless, the majority today attempts to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests. By so doing, the majority singles this case out for analytic treatment at odds with what seems to me to be the clear trend of recent decisions in this Court, and thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than the lenient scrutiny of the Texas financing scheme which the majority pursues. Yet if the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification present in this case, the unconstitutionality of that scheme is unmistakable.

B

Since the Court now suggests that only interests guaranteed by the Constitution are fundamental for purposes of equal protection analysis, and since it rejects [*111] the contention that public education is fundamental, it follows that the Court concludes that public education is not constitutionally guaranteed. It is true that this Court has never deemed the provision of free public education to be required by the Constitution. Indeed, it has on occasion suggested that state supported education is a privilege bestowed by a State on its

citizens. See *Missouri ex rel. Gaines v. Canada*, 305 U.S., at 349. Nevertheless, the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between [**1337] education and some of our most basic constitutional values.

The special concern of this Court with the educational process of our country is a matter of common knowledge. Undoubtedly, this Court's most famous statement on the subject is that contained in *Brown v. Board of Education*, 347 U.S., at 493: S

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance [***89] laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. ..."

Only last Term, the Court recognized that "[p]roviding public schools ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). This is clearly borne out by the fact that in 48 [*112] of our 50 States the provision of public education is mandated by the state constitution⁶⁸. No other state function is so uniformly recognized⁶⁹ as an essential element of our society's well-being. In large measure, the explanation for the special importance attached to education must rest, as the Court recognized in *Yoder, id.*, at 221, on the facts that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system ...," and that "education prepares individuals to be self-reliant and self-sufficient participants in society." Both facets of this observation are suggestive of the substantial relationship which education bears to guarantees of our Constitution.

68 See Brief of the National Education Association et al. as amici curiae App. A. All 48 of the 50 States which mandate public education also have compulsory attendance laws which require school attendance for eight years or more. *Id.*, at 20-21.

411 U.S. 1, *112; 93 S. Ct. 1278, **1337;
36 L. Ed. 2d 16, ***89; 1973 U.S. LEXIS 91

69 Prior to this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), every State had a constitutional provision directing the establishment of a system of public schools. But after *Brown*, South Carolina repealed its constitutional provision, and Mississippi made its constitutional provision discretionary with the state legislature.

Education directly affects the ability of a child to exercise his *First Amendment* rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life. This Court's decision in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), speaks of the right of students "to inquire, to study and to evaluate, to gain new maturity and understanding ..." Thus, we have not casually described the classroom as the "marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The opportunity for formal education may not necessarily be the essential determinant of an individual's ability to enjoy throughout his life the rights of free speech and association [*113] guaranteed to him by the *First Amendment*. But such an opportunity may enhance the individual's enjoyment of those rights, not only during but also following school attendance. Thus, in the final analysis, "the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." ⁷⁰

70 Developments in the Law -- Equal Protection, 82 Harv. L. Rev. 1065, 1129 (1969).

Of [*1338] particular importance is the relationship between education and [***90] the political process. "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." *Abington School Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (BRENNAN, J., concurring). Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. ⁷¹ Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation ⁷². A system of "[c]ompetition in ideas and governmental [*114] policies is at the core of our electoral process and of the *First Amendment* freedoms." *Williams v. Rhodes*, 393

U.S. 23, 32 (1968). But of most immediate and direct concern must be the demonstrated effect of education on the exercise of the franchise by the electorate. The right to vote in federal elections is conferred by Art. I, § 2, and the *Seventeenth Amendment of the Constitution*, and access to the state franchise has been afforded special protection because it is "preservative of other basic civil and political rights," *Reynolds v. Sims*, 377 U.S., at 562. Data from the Presidential Election of 1968 clearly demonstrates a direct relationship between participation in the electoral process and level of educational attainment ⁷³; and, as this Court recognized in *Gaston County v. United States*, 395 U.S. 285, 296 (1969), the quality of education offered may [*115] influence a child's decision to "enter or remain in school." It is this very sort of intimate relationship between a particular personal [***91] interest and specific constitutional guarantees that has heretofore caused the Court to attach special significance, for purposes of equal protection analysis, to individual [*1339] interests such as procreation and the exercise of the state franchise ⁷⁴.

71 The President's Commission on School Finance, Schools, People, & Money: The Need for Educational Reform 11 (1972), concluded that "[I]terally, we cannot survive as a nation or as individuals without [education]." It further observed that:

"[In] a democratic society, public understanding of public issues is necessary for public support. Schools generally include in their courses of instruction a wide variety of subjects related to the history, structure and principles of American government at all levels. In so doing, schools provide students with a background of knowledge which is deemed an absolute necessity for responsible citizenship." *Id.*, at 13-14.

72 See J. Guthrie, G. Kleindorfer, H. Levin, & R. Stout, *Schools and Inequality* 103-105 (1971); R. Hess & J. Torney, *The Development of Political Attitudes in Children* 217-218 (1967); Campbell, *The Passive Citizen*, in 6 *Acta Sociologica*, Nos. 1-2, p. 9, at 20-21 (1962).

That education is the dominant factor in influencing political participation and awareness is sufficient, I believe, to dispose of the Court's suggestion that, in all events, there is no indication that Texas is not providing all of its

411 U.S. 1, *115; 93 S. Ct. 1278, **1339;
36 L. Ed. 2d 16, ***91; 1973 U.S. LEXIS 91

children with a sufficient education to enjoy the right of free speech and to participate fully in the political process. Ante , at 36-37. There is, in short, no limit on the amount of free speech or political participation that the Constitution guarantees. Moreover, it should be obvious that the political process, like most other aspects of social intercourse, is to some degree competitive. It is thus of little benefit to an individual from a property-poor district to have "enough" education if those around him have more than "enough." Cf. *Sweatt v. Painter* , 339 U.S. 629, 633-634 (1950).

73 See United States Department of Commerce, Bureau of the Census, Voting and Registration in the Election of November 1968, Current Population Reports, Series P-20, No. 192, Table 4, p. 17. See also Senate Select Committee on Equal Educational Opportunity, 92d Cong., 2d Sess., Levin, The Costs to the Nation of Inadequate Education 46-47 (Comm. Print 1972).

74 I believe that the close nexus between education and our established constitutional values with respect to freedom of speech and participation in the political process makes this a different case from our prior decisions concerning discrimination affecting public welfare, see, e.g., *Dandridge v. Williams* , 397 U.S. 471 (1970), or housing, see, e.g., *Lindsey v. Normet* , 405 U.S. 56 (1972). There can be no question that, as the majority suggests, constitutional rights may be less meaningful for someone without enough to eat or without decent housing. Ante , at 37. But the crucial difference lies in the closeness of the relationship. Whatever the severity of the impact of insufficient food or inadequate housing on a person's life, they have never been considered to bear the same direct and immediate relationship to constitutional concerns for free speech and for our political processes as education has long been recognized to bear. Perhaps, the best evidence of this fact is the unique status which has been accorded public education as the single public service nearly unanimously guaranteed in the constitutions of our States, see supra , at 111-112 and n. 68. Education, in terms of constitutional values, is much more analogous, in my judgment, to the right to vote in state elections than to public welfare or public housing. Indeed, it is not without significance that we have long recognized education as an essential step in providing the

disadvantaged with the tools necessary to achieve economic self-sufficiency.

While ultimately disputing little of this, the majority seeks refuge in the fact that the Court has "never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice." Ante, at 36. This serves only to blur what is in fact at stake. With due respect, the issue is neither provision of the most effective speech nor of the most informed vote. Appellees [*116] do not now seek the best education Texas might provide. They do seek, however, an end to state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. The issue is, in other words, one of discrimination that affects the quality of the education which Texas has chosen to provide its children; and, the precise question here is what importance should attach to education for purposes of equal protection analysis of that discrimination. As this Court held in *Brown v. Board of Education* , 347 U.S., at 493, the opportunity of education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." The factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts ⁷⁵ - a conclusion [*117] [***92] which is [**1340] only strengthened when we consider the character of the classification in this case.

75 The majority's reliance on this Court's traditional deference to legislative bodies in matters of taxation falls wide of the mark in the context of this particular case. See ante , at 40-41. The decisions on which the Court relies were simply taxpayer suits challenging the constitutionality of a tax burden in the face of exemptions or differential taxation afforded to others. See, e.g., *Allied Stores of Ohio v. Bowers* , 358 U.S. 522 (1959); *Madden v. Kentucky* , 309 U.S. 83 (1940); *Carmichael v. Southern Coal & Coke Co.* , 301 U.S. 495 (1937); *Bell's Gap R. Co. v. Pennsylvania* , 134 U.S. 232 (1890). There

411 U.S. 1, *117; 93 S. Ct. 1278, **1340;
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is no question that, from the perspective of the taxpayer, the *Equal Protection Clause* "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products." *Allied Stores of Ohio v. Bowers, supra*, at 526-527. But in this case we are presented with a claim of discrimination of an entirely different nature -- a claim that the revenue-producing mechanism directly discriminates against the interests of some of the intended beneficiaries; and, in contrast to the taxpayer suits, the interest adversely affected is of substantial constitutional and societal importance. Hence, a different standard of equal protection review than has been employed in the taxpayer suits is appropriate here. It is true that affirmance of the District Court decision would to some extent intrude upon the State's taxing power insofar as it would be necessary for the State to at least equalize taxable district wealth. But contrary to the suggestions of the majority, affirmance would not impose a straitjacket upon the revenue-raising powers of the State, and would certainly not spell the end of the local property tax. See *infra*, at 132.

C

The District Court found that in discriminating between Texas schoolchildren on the basis of the amount of taxable property wealth located in the district in which they live, the Texas financing scheme created a form of wealth discrimination. This Court has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *McDonald v. Board of Election Commrs of Chicago*, 394 U.S. 802, 807 (1969). The majority, however, considers any wealth classification in this case to lack certain essential characteristics which it contends are common to the instances of wealth discrimination that this Court has heretofore recognized. We are told that in every prior case involving a wealth classification, the members of the disadvantaged class have "shared two distinguishing characteristics: because [*118] of their impecuniness they

were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." Ante, at 20. I cannot agree. The Court's distinctions may be sufficient to explain the decisions in *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); and even *Bullock v. Carter*, 405 U.S. 134 (1972). But they are not in fact consistent with the decisions in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), or *Griffin v. Illinois, supra*, or *Douglas v. California, supra*.

In *Harper*, the Court struck down as violative of the *Equal Protection Clause* an annual Virginia poll tax of \$1.50, payment of which by persons [***93] over the age of 21 was a prerequisite to voting in Virginia elections. In part, the Court relied on the fact that the poll tax interfered with a fundamental interest -- the exercise of the state franchise. In addition, though, the Court emphasized that "[l]ines drawn on the basis of wealth or property . . . are traditionally disfavored." *Id.*, at 668. Under the first part of the theory announced by the majority, the disadvantaged class in *Harper*, in terms of a wealth analysis, should have consisted only of those too poor to afford the \$1.50 necessary to vote. But the *Harper* Court did not see it that way. In its view, the *Equal Protection Clause* "bars a system which excludes [from the franchise] those unable to pay a fee to vote or who fail to pay." *Ibid.* (Emphasis added.) So far as the Court was concerned, the "degree of the discrimination [was] irrelevant." *Ibid.* Thus, the Court struck down the poll tax in toto; it did not order merely that those too poor to pay the tax be exempted; complete impecuniness clearly was not determinative of the limits of the disadvantaged class, nor was it essential to make an equal protection claim.

[*119] [**1341] Similarly, *Griffin* and *Douglas* refute the majority's contention that we have in the past required an absolute deprivation before subjecting wealth classifications to strict scrutiny. The Court characterizes *Griffin* as a case concerned simply with the denial of a transcript or an adequate substitute therefor, and *Douglas* as involving the denial of counsel. But in both cases the question was in fact whether "a State that [grants] appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." *Griffin v. Illinois*, 351 U.S., at 18 (emphasis added). In that regard, the Court concluded that inability to purchase a transcript denies "the poor an adequate

411 U.S. 1, *119; 93 S. Ct. 1278, **1341;
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appellate review accorded to all who have money enough to pay the costs in advance," *ibid.* (emphasis added), and that "the type of an appeal a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel," *Douglas v. California, supra.*, at 355-356 (emphasis added). The right of appeal itself was not absolutely denied to those too poor to pay; but because of the cost of a transcript and of counsel, the appeal was a substantially less meaningful right for the poor than for the rich.⁷⁶ It was on these terms that the Court found a denial of equal protection, and those terms clearly encompassed degrees of discrimination on the [*120] basis of wealth which do not amount to outright denial of the affected right or interest.⁷⁷

76 This does not mean that the Court has demanded precise equality in the treatment of the indigent and the person of means in the criminal process. We have never suggested, for instance, that the *Equal Protection Clause* requires the best lawyer money can buy for the indigent. We are hardly equipped with the objective standards which such a judgment would require. But we have pursued the goal of substantial equality of treatment in the face of clear disparities in the nature of the appellate process afforded rich versus poor. See, e.g., *Draper v. Washington*, 372 U.S. 487, 495-496 (1963); cf. *Coppedge v. United States*, 369 U.S. 438, 447 (1962).

77 Even if I put aside the Court's misreading of *Griffin and Douglas*, the Court fails to offer any reasoned constitutional basis for restricting cases involving wealth discrimination to instances in which there is an absolute deprivation of the interest affected. As I have already discussed, see *supra*, at 88-89, the *Equal Protection Clause* guarantees equality of treatment of those persons who are similarly situated; it does not merely bar some form of excessive discrimination between such persons. Outside the context of wealth discrimination, the Court's reapportionment decisions clearly indicate that relative discrimination is within the purview of the *Equal Protection Clause*. Thus, in *Reynolds v. Sims*, 377 U.S. 533, 562-563 (1964), the Court recognized:

"It would appear extraordinary to suggest that

a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. . . . Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. . . . One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'"

See also *Gray v. Sanders*, 372 U.S. 368, 380-381 (1963). The Court gives no explanation why a case involving wealth discrimination should be treated any differently.

This [***94] is not to say that the form of wealth classification in this case does not differ significantly from those recognized in the previous decisions of this Court. Our prior cases have dealt essentially with discrimination on the basis of personal wealth.⁷⁸ Here, by contrast, [**1342] the [*121] children of the disadvantaged Texas school districts are being discriminated against not necessarily because of their personal wealth or the wealth of their families, but because of the taxable property wealth of the residents of the district in which they happen to live. The appropriate question, then, is whether the same degree of judicial solicitude and scrutiny that has previously been afforded wealth classifications is warranted here.

78 But cf. *Bullock v. Carter*, 405 U.S. 134, 144 (1972), where prospective candidates' threatened exclusion from a primary ballot because of their inability to pay a filing fee was seen as discrimination against both the impecunious candidates and the "less affluent segment of the community" that supported such candidates but was also too poor as a group to contribute enough for the filing fees.

As the Court points out, *ante*, at 28-29, no previous decision has deemed the presence of just a wealth classification to be sufficient basis to call forth rigorous

411 U.S. 1, *121; 93 S. Ct. 1278, **1342;
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judicial scrutiny of allegedly discriminatory state action. Compare, e.g., *Harper v. Virginia Bd. of Elections*, *supra*, with, e.g., *James v. Valtierra*, 402 U.S. 137 (1971). That wealth classifications alone have not necessarily been considered to bear the same high degree of suspectness as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The "poor" may not be seen as politically powerless as certain discrete and insular minority groups.⁷⁹ Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups.⁸⁰ But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action [***95] that race or nationality is recognized to have. While the "poor" have frequently been a [*122] legally disadvantaged group⁸¹, it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. Thus, we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests. See *Harper v. Virginia Bd. of Elections*, *supra*.

79 But cf. M. Harrington, *The Other America* 13-17 (Penguin ed. 1963).

80 See E. Banfield, *The Unheavenly City* 63, 75-76 (1970); cf. R. Lynd & H. Lynd, *Middletown in Transition* 450 (1937).

81 Cf. *New York v. Miln*, 11 Pet. 102, 142 (1837).

When evaluated with these considerations in mind, it seems to me that discrimination on the basis of group wealth in this case likewise calls for careful judicial scrutiny. First, it must be recognized that while local district wealth may serve other interests⁸², it bears no relationship whatsoever to the interest of Texas school children in the educational opportunity afforded them by the State of Texas. Given the importance of that interest, we must be particularly sensitive to the invidious characteristics of any form of discrimination that is not clearly intended to serve it, as opposed to some other distinct state interest. Discrimination on the basis of group wealth may not, to be sure, reflect the social stigma frequently attached to personal poverty. Nevertheless, insofar as group wealth discrimination involves wealth

over which the disadvantaged individual has no significant control⁸³, it represents in fact a more serious basis of discrimination than does personal [**1343] wealth. For such discrimination [*123] is no reflection of the individual's characteristics or his abilities. And thus - particularly in the context of a disadvantaged class composed of children - we have previously treated discrimination on a basis which the individual cannot control as constitutionally disfavored. Cf. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

82 Theoretically, at least, it may provide a mechanism for implementing Texas' asserted interest in local educational control, see *infra*, at 126.

83 True, a family may move to escape a property-poor school district, assuming it has the means to do so. But such a view would itself raise a serious constitutional question concerning an impermissible burdening of the right to travel, or, more precisely, the concomitant right to remain where one is. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 629-631 (1969).

The disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests. Here legislative reallocation of the State's property wealth must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo, a problem not completely dissimilar to that faced by underrepresented districts prior to the Court's intervention in the process of reapportionment⁸⁴, see *Baker v. Carr*, 369 U.S. 186, 191-192 (1962).

84 Indeed, the political difficulties that seriously disadvantaged districts face in securing legislative redress are augmented by the fact that little support is likely to be secured from only mildly disadvantaged districts. Cf. *Gray v. Sanders*, 372 U.S. 368 (1963). See also n. 2, *supra*.

Nor can we ignore the extent to [***96] which, in contrast to our prior decisions, the State is responsible for the wealth discrimination in this instance. Griffin, Douglas, Williams, Tate, and our other prior cases have dealt with discrimination on the basis of indigency which

411 U.S. 1, *123; 93 S. Ct. 1278, **1343;
36 L. Ed. 2d 16, ***96; 1973 U.S. LEXIS 91

was attributable to the operation of the private sector. But we have no such simple de facto wealth discrimination here. The means for financing public education in Texas are selected and specified by the State. It is the State that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth. At the same time, governmentally [*124] imposed land use controls have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or commercial use⁸⁵, and thus determined each district's amount of taxable property wealth. In short, this case, in contrast to the Court's previous wealth discrimination decisions, can only be seen as "unusual in the extent to which governmental action is the cause of the wealth classifications."⁸⁶

85 See Tex. Cities, Towns and Villages Code, Civ. Stat. Ann. §§ 1011a-1011j (1963 and Supp. 1972-1973). See also, e.g., *Skinner v. Reed*, 265 S.W. 2d 850 (Tex. Ct. Civ. App. 1954); *Corpus Christi v. Jones*, 144 S.W. 2d 388 (Tex. Ct. Civ. App. 1940).

86 *Serrano v. Priest*, 5 Cal. 3d, at 603, 487 P. 2d, at 1254. See also *Van Dusartz v. Hatfield*, 334 F. Supp. at 875-876.

In the final analysis, then, the invidious characteristics of the group wealth classification present in this case merely serve to emphasize the need for careful judicial scrutiny of the State's justifications for the resulting interdistrict discrimination in the educational opportunity afforded to the schoolchildren of Texas.

D

The nature of our inquiry into the justifications for state discrimination is essentially the same in all equal protection cases: We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests. See *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95. Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake and the invidiousness of the particular classification. In terms of the asserted state interests, the Court has indicated that it will require, for instance, [**1344] a "compelling," *Shapiro v. Thompson*, 394 U.S., at 634, or a "substantial" [*125] or "important," *Dunn v.*

Blumstein, 405 U.S., at 343, state interest to justify discrimination affecting individual interests of constitutional significance. Whatever the differences, if any, in these descriptions of the character of the state interest necessary to sustain such discrimination, basic to each is, I believe, a concern with the legitimacy and the reality of the asserted state interests. Thus, when interests of constitutional importance are at stake, the Court does not stand ready to credit the State's classification with any conceivable legitimate purpose⁸⁷, [***97] but demands a clear showing that there are legitimate state interests which the classification was in fact intended to serve. Beyond the question of the adequacy of the State's purpose for the classification, the Court traditionally has become increasingly sensitive to the means by which a State chooses to act as its action affects more directly interests of constitutional significance. See, e.g., *United States v. Robel*, 389 U.S. 258, 265 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Thus, by now, "less restrictive alternatives" analysis is firmly established in equal protection jurisprudence. See *Dunn v. Blumstein*, *supra*, at 343; *Kramer v. Union School District*, 395 U.S., at 627. It seems to me that the range of choice we are willing to accord the State in selecting the means by which it will act, and the care with which we scrutinize the effectiveness of the means which the State selects, also must reflect the constitutional importance of the interest affected and the invidiousness of the particular classification. Here, both the nature of the interest and the classification dictate close judicial scrutiny of the purposes which Texas seeks to serve with its present educational financing [*126] scheme and of the means it has selected to serve that purpose.

87 Cf., e.g., *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948).

The only justification offered by appellants to sustain the discrimination in educational opportunity caused by the Texas financing scheme is local educational control. Presented with this justification, the District Court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications." 337 F. Supp., at 284. I must agree with this conclusion.

411 U.S. 1, *126; 93 S. Ct. 1278, **1344;
36 L. Ed. 2d 16, ***97; 1973 U.S. LEXIS 91

At the outset, I do not question that local control of public education, as an abstract matter, constitutes a very substantial state interest. We observed only last Term that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972). See also *id.*, at 477-478 (BURGER, C.J., dissenting). The State's interest in local educational control -- which certainly includes questions of educational funding -- has deep roots in the inherent benefits of community support for public education. Consequently, true state dedication to local control would present, I think, a substantial justification to weigh against simply interdistrict variations in the treatment of a State's school children. But I need not now decide how I might ultimately strike the balance were we confronted with a situation where the State's sincere concern for local control inevitably produced educational inequality. For on this record, it is apparent that the State's purported concern with [*1345] local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.

In Texas, statewide laws regulate in fact the most minute details of local public education. For example, [*127] the State prescribes required courses.⁸⁸ All textbooks must be [***98] submitted for state approval⁸⁹, and only approved textbooks may be used.⁹⁰ The State has established the qualifications necessary for teaching in Texas public schools and the procedures for obtaining certification.⁹¹ The State has even legislated on the length of the school day.⁹² Texas' own courts have said: "As a result of the acts of the Legislature our school system is not of mere local concern but it is statewide. While a school district is local in territorial limits, it is an integral part of the vast school system which is coextensive with the confines of the State of Texas." *Treadaway v. Whitney Independent School District*, 205 S.W. 2d 97, 99 Tex. Ct. Civ. App. 1947).I

See also *El Dorado Independent School District v. Tisdale*, 3 S.W. 2d 420, 422 (Tex. Comm'n App. 1928).

88 *Tex. Educ. Code Ann.* §§ 21.101-21.117. Criminal penalties are provided for failure to teach certain required courses. *Id.*, §§ 4.15-4.16.

89 *Id.*, §§ 12.11-12.35.

90 *Id.*, § 12.62.

91 *Id.*, §§ 13.031-13.046.

92 *Id.*, § 21.004.

Moreover, even if we accept Texas' general dedication to local control in educational matters, it is difficult to find any evidence of such dedication with respect to fiscal matters. It ignores reality to suggest -- as the Court does, *ante*, at 49-50 -- that the local property tax element of the Texas financing scheme reflects a conscious legislative effort to provide school districts with local fiscal control. If Texas had a system truly dedicated to local fiscal control, one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as [*128] to the level of sacrifice they wish to make for public education. In fact, the Texas scheme produces precisely the opposite result. Local school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district -- a factor over which local voters can exercise no control.

The study introduced in the District Court showed a direct inverse relationship between equalized taxable district property wealth and district tax effort with the result that the property-poor districts making the highest tax effort obtained the lowest per-pupil yield⁹³. The implications of this situation for local choice are illustrated by again comparing the Edgewood and Alamo Heights School Districts. In 1967-1968, Edgewood, after contributing its share to the Local Fund Assignment, raised only \$ 26 per pupil through its local property tax, whereas Alamo Heights was able to raise \$ 333 per pupil. Since the funds received through the Minimum Foundation School Program are to be used only for minimum professional salaries, transportation costs, and operating expenses, it is not hard to see the lack of local choice -- with respect to higher teacher salaries to attract more and better teachers, physical facilities, library books, and facilities, special courses, or participation in special state and federal matching funds programs -- under which a property-poor district such as Edgewood is forced to labor.⁹⁴ In fact, because [***99] of the difference in taxable [**1346] local property wealth, Edgewood would have to tax itself almost nine times as heavily to obtain the same [*129] yield as Alamo Heights.⁹⁵ At present, then, local control is a myth for

411 U.S. 1, *129; 93 S. Ct. 1278, **1346;
36 L. Ed. 2d 16, ***99; 1973 U.S. LEXIS 91

many of the local school districts in Texas. As one district court has observed, "rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes)." *Van Duszart v. Hatfield*, 334 F. Supp. 870, 876 (Minn. 1971).

93 See Appendix II, *infra*.

94 See Affidavit of Dr. Jose Cardenas, Superintendent of Schools, Edgewood Independent School District, App. 234-238.

95 See Appendix IV, *infra*.

In my judgment, any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local fiscal control.⁹⁶ At the same time, appellees have pointed out a variety of alternative financing schemes which may serve the State's purported interest in local control as well as, if not better than, the present scheme without the current impairment of the educational opportunity of vast numbers of Texas schoolchildren.⁹⁷ I see no need, however, to explore the practical or constitutional merits of those suggested alternatives at this time for, whatever their positive or negative features, experience [*130] with the present financing scheme impugns any suggestion that it constitutes a serious effort to provide local fiscal control. If, for the sake of local education control, this Court is to sustain interdistrict discrimination in the educational opportunity afforded Texas school children, it should require that the State present something more than the mere sham now before us.

96 My Brother WHITE, in concluding that the Texas financing scheme runs afoul of the *Equal Protection Clause*, likewise finds on analysis that the means chosen by Texas -- local property taxation dependent upon local taxable wealth -- is completely unsuited in its present form to the achievement of the asserted goal of providing local fiscal control. Although my Brother WHITE purports to reach this result by application of that lenient standard of mere rationality traditionally applied in the context of commercial interests, it seems to me that the care with which he scrutinizes the practical

effectiveness of the present local property tax as a device for affording local fiscal control reflects the application of a more stringent standard of review, a standard which at the least is influenced by the constitutional significance of the process of public education.

97 See n. 98, *infra*.

III

In conclusion, it is essential to recognize that an end to the wide variations in taxable district property wealth inherent in the Texas financing scheme would entail none of the untoward consequences suggested by the Court or by the appellants.

First, affirmance of the District Court's decisions would hardly sound the death knell for local control of education. It would mean neither centralized decision making nor federal court intervention in the operation of public schools. Clearly, this suit has nothing to do with local decisionmaking with respect to educational policy or even educational spending. It involves only a narrow aspect of local control -- namely, local control over the raising of educational funds. In fact, in striking down interdistrict disparities in taxable local wealth, the District Court [***100] took the course which is most likely to make true local control over educational decisionmaking a reality for all Texas school districts.

Nor does the District Court's decision even necessarily eliminate local control of educational funding. The District Court struck down nothing more than the continued interdistrict wealth discrimination inherent in the present property tax. Both centralized and decentralized plans for educational funding not involving such interdistrict discrimination [**1347] have been put forward.⁹⁸ The choice [*131] among these or other alternatives would remain with the State, not with the federal courts. In this regard, it should be evident that the degree of federal intervention [*132] in matters of local concern would be substantially less in this context than in previous decisions in which we have been asked effectively to impose a particular scheme upon the States under the guise of the *Equal Protection Clause*. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970); cf. *Richardson v. Belcher*, 404 U.S. 78 (1971).

411 U.S. 1, *132; 93 S. Ct. 1278, **1347;
36 L. Ed. 2d 16, ***100; 1973 U.S. LEXIS 91

98 Centralized educational financing is, to be sure, one alternative. On analysis, though, it is clear that even centralized financing would not deprive local school districts of what has been considered to be the essence of local educational control. See *Wright v. Council of the City of Emporia*, 407 U.S. 451, 477-478 (BURGER, C.J., dissenting). Central financing would leave in local hands the entire gamut of local educational policymaking -- teachers, curriculum, school sites, the whole process of allocating resources among alternative educational objectives.

A second possibility is the much discussed theory of district power equalization put forth by Professors Coons, Clune, and Sugarman in their seminal work, *Private Wealth and Public Education* 201-242 (1970). Such a scheme would truly reflect a dedication to local fiscal control. Under their system, each school district would receive a fixed amount of revenue per pupil for any particular level of tax effort regardless of the level of local property tax base. Appellants criticize this scheme on the rather extraordinary ground that it would encourage poorer districts to overtax themselves in order to obtain substantial revenues for education. But under the present discriminatory scheme, it is the poor districts that are already taxing themselves at the highest rates, yet are receiving the lowest returns.

District wealth reapportionment is yet another alternative which would accomplish directly essentially what district power equalization would seek to do artificially. Appellants claim that the calculations concerning state property required by such a scheme would be impossible as a practical matter. Yet Texas is already making far more complex annual calculations -- involving not only local property values but also local income and other economic factors - in conjunction with the Local Fund Assignment portion of the Minimum Foundation School Program. See 5 Governor's Committee Report 43-44.

A fourth possibility would be to remove commercial, industrial, and mineral property from local tax rolls, to tax this property on a statewide basis, and to return the resulting revenues to the

local districts in a fashion that would compensate for remaining variations in the local tax bases.

None of these particular alternatives are necessarily constitutionally compelled; rather, they indicate the breadth of choice which would remain to the State if the present interdistrict disparities were eliminated.

Still, we are told that this case requires us "to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests." Ante, at 40. Yet no one in the course of this entire litigation has ever questioned the constitutionality of the local property tax as a device for raising educational funds. The District Court's decision, at most, restricts the power of the State to make educational funding dependent [***101] exclusively upon local property taxation so long as there exists interdistrict disparities in taxable property wealth. But it hardly eliminates the local property tax as a source of educational funding or as a means of providing local fiscal control.⁹⁹

99 See n. 98, supra.

The Court seeks solace for its action today in the possibility of legislative reform. The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the schoolchildren of Texas' disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more. The possibility of legislative action is, in all events, no answer to this Court's duty under the Constitution to eliminate unjustified state discrimination. In this case we have been presented with an instance of such discrimination, in a particularly invidious form, against an individual interest of [**1348] large constitutional and practical importance. To support the demonstrated discrimination in the provision [*133] of educational opportunity the State has offered a justification which, on analysis, takes on at best an ephemeral character. Thus, I believe that the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas financing scheme render that scheme violative of the *Equal Protection Clause*.¹⁰⁰

100 Of course, nothing in the Court's decision today should inhibit further review of state educational funding schemes under state

411 U.S. 1, *133; 93 S. Ct. 1278, **1348;
36 L. Ed. 2d 16, ***101; 1973 U.S. LEXIS 91

constitutional provisions. See *Milliken v. Green*, 389 Mich. 1, 203 N.W. 2d 457 (1972), rehearing granted, Jan. 1973; *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A. 2d 187, 119 N.J. Super. 40, 289 A. 2d 569 (1972); cf. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P. 2d 1241 (1971).

[Appendices I-IV are on immediately following pages.]

[*134] [***102] APPENDIX I TO OPINION OF MARSHALL, J., DISSENTING

REVENUES OF TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUES AND SOURCE OF FUNDS

I would therefore affirm the judgment of the District Court.

Market Value of Taxable Property Per Pupil	CATEGORIES		
	Local Revenues Per Pupil	State Revenues Per Pupil	State and Local Revenues Per Pupil (Columns 1 and 2)
Above \$100,000(10 districts)	\$610	\$205	\$815
\$100,000-\$50,000(26 districts)	287	257	544
\$50,000-\$30,000(30 districts)	224	260	484
\$30,000-\$10,000(40 districts)	166	295	461
Below \$10,000(4 districts)	63	243	306

Market Value of Taxable Property Per Pupil	CATEGORIES	
	Federal Revenues Per Pupil	Total Revenues Per Pupil (State-Local-Federal, Columns 1, 2 and 4)
Above \$100,000(10 districts)	\$41	\$856
\$100,000-\$50,000(26 districts)	66	610
\$50,000-\$30,000(30 districts)	45	529
\$30,000-\$10,000(40 districts)	85	546
Below \$10,000(4 districts)	135	441

Based on Table V to affidavit of Joel S. Berke, App. 208, which was prepared on the basis of a sample of 110 selected Texas school districts from data for the 1967-1968 school year.

[*135] [***103] APPENDIX II TO OPINION OF MARSHALL, J., DISSENTING

TEXAS SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUES, EQUALIZED

411 U.S. 1, *135; 93 S. Ct. 1278, **1348;
36 L. Ed. 2d 16, ***103; 1973 U.S. LEXIS 91

TAX RATES, AND YIELD OF RATES

CATEGORIES Market Value of Taxable Property Per Pupil	EQUALIZED TAX RATES ON \$100	YIELD PER PUPIL (Equalized Rate Applied to District Market Value)
Above \$100,000(10 districts)	\$.31	\$585
\$100,000-\$50,000(26 districts)	.38	262
\$50,000-\$30,000(30 districts)	.55	213
\$30,000-\$10,000(40 districts)	.72	162
Below \$10,000(4 districts)	.70	60

Based on Table II to affidavit of Joel S. Berke, App. 205, which was prepared on the basis of a sample of 110 selected Texas school districts from data for the 1967-1968 school year.

OPINION OF MARSHALL, J., DISSENTING

SELECTED BEXAR COUNTY, TEXAS, SCHOOL DISTRICTS CATEGORIZED BY EQUALIZED PROPERTY VALUATION AND SELECTED INDICATORS OF EDUCATIONAL QUALITY

[*136] [***104] [**1349] APPENDIX III TO

Selected Districts From High to Low by Market Valuation Per Pupil	Professional Salaries Per Pupil	Per Cent of Teachers With	
		College Degrees	Masters Degrees
ALAMO HEIGHTS	\$372	100%	40%
NORTH EAST	288	99	24
SAN ANTONIO	251	98	29
NORTH SIDE	258	99	20
HARLANDALE	243	94	21
EDGEWOOD	209	96	15

Selected Districts From High to Low by Market Valuation Per Pupil	Per Cent of Total Staff With Emergency Permits	Student-Counsel or Ratios	Professional Personnel
			Per 100 Pupils

411 U.S. 1, *136; 93 S. Ct. 1278, **1349;
36 L. Ed. 2d 16, ***104; 1973 U.S. LEXIS 91

ALAMO HEIGHTS	11%	645	4.80
NORTH EAST	7	1,516	4.50
SAN ANTONIO	17	2,320	4.00
NORTH SIDE	17	1,493	4.30
HARLANDALE	22	1,800	4.00
EDGEWOOD	47	3,098	4.06

Based on Table XI to affidavit of Joel S. Berke, App. 220, which was prepared on the basis of a sample of six selected school districts located in Bexar County, Texas, from data for the 1967-1968 school year.

[*137] [***105] APPENDIX IV TO OPINION

OF MARSHALL, J., DISSENTING

BEXAR COUNTY, TEXAS, SCHOOL DISTRICTS RANKED BY EQUALIZED PROPERTY VALUE AND TAX RATE REQUIRED TO GENERATE HIGHEST YIELD IN ALL DISTRICTS

Districts Ranked from High to Low Market Valuation Per Pupil	Tax Rate Per \$100 Needed to Equal Highest Yield
ALAMO HEIGHTS	\$0.68
JUDSON	1.04
EAST CENTRAL	1.17
NORTH EAST	1.21
SOMERSET	1.32
SAN ANTONIO	1.56
NORTH SIDE	1.65
SOUTH WEST	2.10
SOUTH SIDE	3.03
HARLANDALE	3.20
SOUTH SAN ANTONIO	5.77
EDGEWOOD	5.76

Based on Table IX to affidavit of Joel S. Berke, App. 218, which was prepared on the basis of the 12 school districts located in Bexar County, Texas, from data from the 1967-1968 school year.

REFERENCES

16 Am Jur 2d, Constitutional Law 485-510; Am Jur, Schools (1st ed 76-82)

7 Am Jur Pl & Pr Forms (Rev ed), Constitutional Law, Forms 2, 3

US L Ed Digest, Constitutional Law 345

ALR Digests, Constitutional Law 268.5

L Ed Index to Anno, Equal Protection of the Laws; Schools

411 U.S. 1, *137; 93 S. Ct. 1278, **1349;
36 L. Ed. 2d 16, ***105; 1973 U.S. LEXIS 91

ALR Quick Index, Equal Protection of Law; Schools

Ed 2d 1931, 15 L Ed 2d 904.

Federal Quick Index, Equal Protection of the Laws;
Schools and School Districts

Validity of basing public school financing system on
local property taxes. *41 ALR3d 1220.*

Annotation References:

Necessity and propriety (under *28 USC 2281*) of
three-judge Federal District Court in suit to enjoin
enforcement of state statute or administrative order. *4 L*

Validity of legislative delegation of taxing power to
school districts in absence of express constitutional
provision authorizing such delegation. 113 ALR 1416.

APPENDIX 42



**Mary W. SANNER and Cecil B. Sanner v. The TRUSTEES OF the SHEPPARD
AND ENOCH PRATT HOSPITAL**

Civ. A. No. 17989

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

278 F. Supp. 138; 1968 U.S. Dist. LEXIS 12487

January 2, 1968

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, injured party and spouse, filed suit against defendant charitable hospital (hospital), asserting a cause of action for personal injuries suffered by the injured party as a result of the alleged negligence of the hospital's employees. The hospital filed a motion for summary judgment based upon the charitable immunity doctrine as established under Maryland law.

OVERVIEW: The injured party and spouse alleged that they entered into an agreement with the hospital for the commission of the injured party to the hospital for care and treatment. They further alleged that, as a result of negligent care from the hospital, the injured party fell out of an unlocked or unbarred window and was seriously injured. The hospital filed a motion for summary judgment based upon Maryland's charitable immunity doctrine. The injured party and spouse objected to the motion, arguing that the doctrine was not applicable because the injured party was a paying patient and not a

beneficiary of the hospital. After discussing the history and current status of the charitable immunity doctrine, the court granted summary judgment to the hospital. The court held that Maryland's charitable immunity doctrine was constitutional under both the state and federal constitutions and that, under the doctrine, the hospital was immune from suit. The court also rejected the injured party and spouse's argument that the hospital was an ordinary business corporation, noting that the hospital had been held to be a charitable institution on several past occasions.

OUTCOME: The court granted the hospital's motion for summary judgment.

LexisNexis(R) Headnotes

*Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Healthcare Law > Actions Against Facilities > Governmental & Nonprofit Liability > General*

Overview***Torts > Negligence > Defenses > Private Immunities > Charitable Immunity***

[HN1] Where jurisdiction is based on diversity, the court must follow the substantive law, both decisional and statutory, of the state in which the court sits on the question of the applicability of the doctrine of charitable immunity.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview***Governments > State & Territorial Governments > Claims By & Against******Healthcare Law > Actions Against Facilities > Governmental & Nonprofit Liability > General Overview***

[HN2] Under Maryland law, an eleemosynary corporation is immune from tort liability. To fully effectuate this policy the immunity is complete, extending to all tortious activity. It matters not that the plaintiff is a paying patient and not a beneficiary of the charity.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview***Healthcare Law > Actions Against Facilities > Governmental & Nonprofit Liability > General Overview******Torts > Negligence > Defenses > General Overview***

[HN3] The immunity of eleemosynary institutions to tort claims is grounded on an assumed public policy against the enervation of public charities, established for the benefit of the whole community, by compensation of isolated individuals for injuries inflicted by the negligence of the charities and their agents.

Governments > Courts > Judicial Precedents***Healthcare Law > Actions Against Facilities > Governmental & Nonprofit Liability > General Overview******Torts > Negligence > Defenses > Private Immunities > Charitable Immunity***

[HN4] The vitality of the charitable immunity doctrine in Maryland, until the recent statutory change in 1966, even in the wake of widespread reevaluation of the doctrine and total abandonment by an increasing number of courts, can be attributed to several factors. First, the Maryland court prefers that long-established rules of law

be changed by legislative action rather than by judicial fiat. Second, stare decisis with respect to this doctrine takes on added significance for the Maryland court has held that the legislative recognition of the judicial rule prevented the court from overruling its prior decisions.

Constitutional Law > Substantive Due Process > Scope of Protection***Constitutional Law > State Constitutional Operation Real Property Law > Estates > Present Estates > Fee Simple Estates***

[HN5] The rights guaranteed by these Md. Const. Declaration of Rights arts. 19, 20, and 23 and by *U.S. Const. amend. XIV* are the same. Specifically, Md. Const. Declaration of Rights art. 19 provides that every man, for any injury done to him in his person or property, ought to have remedy by the course of law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land. Md. Const. Declaration of Rights art. 20 provides that the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the people. Md. Const. Declaration of Rights art. 23 provides that no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.

Constitutional Law > Substantive Due Process > Scope of Protection***Constitutional Law > State Constitutional Operation***

[HN6] The words and content of Md. Const. Declaration of Rights arts. 19, 20, and 23 are derived from the Magna Carta and are equivalent to "due process" as that term is used in the *Fourteenth Amendment*. The equivalency of the words and the meaning conveyed is reiterated by the Maryland court time and again. In construing these Articles the Maryland courts hold that the decisions of the Supreme Court are practically direct authorities.

Constitutional Law > Substantive Due Process > Scope of Protection***Healthcare Law > Actions Against Facilities > Governmental & Nonprofit Liability > General Overview******Torts > Negligence > Defenses > Private Immunities > Charitable Immunity***

[HN7] That due process requires more than just fairness of procedures in that it is also a substantive restraint on the content of laws cannot be questioned. The *due process clause of the Fourteenth Amendment* applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right to recover damages against another who negligently inflicts injury is recognized as a property right. This basic right to bring suit against one who wrongfully caused an injury remains unimpaired by the charitable immunity doctrine.

Governments > Courts > Common Law

[HN8] The hallmark of the common-law system is that it is endowed with judicial inventiveness to meet new situations. The common law is not a solidified body of law. Rather, it is a "system" where sometimes evolutionary, sometimes revolutionary changes are made to meet changing conditions and circumstances.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection Constitutional Law > Substantive Due Process > Scope of Protection

Governments > Courts > Common Law

[HN9] Substantive due process does not mean that there are vested rights in particular rules of common law. While there are no vested rights in common law rules, substantive lawmaking is constrained to the extent that it must not be arbitrary or irrational.

Constitutional Law > Substantive Due Process > Scope of Protection

Governments > Courts > Judicial Precedents

[HN10] The plaintiffs have the burden of demonstrating to the court the unreasonableness of law that is contested as unconstitutional. The standard of substantive due process is not "conscience" or "fairness" as in the procedural cases. Substantive due process suggests to the modern court standards for permissible limitations on property different from those on liberty, and perhaps, too, different standards for limitations on different liberties. In regard to property, or even "economic liberties", the standard is reduced to "reasonableness" of ends and means. A presumption of constitutionality is always raised when a law is attacked. This presumption of constitutionality is always stronger when the law

contested has remained for such a long period of time a part of the decisional and statutory law of the state without ever being tested on constitutional grounds.

Governments > State & Territorial Governments > Claims By & Against

Healthcare Law > Actions Against Facilities > Governmental & Nonprofit Liability > General Overview

Torts > Negligence > Defenses > Private Immunities > Charitable Immunity

[HN11] The federal district court cannot substitute its judgment for the Maryland Legislature and say that because it had not passed a better or fairer law in 1948 that that statute recognizing charitable immunity from tort liability is unconstitutional or that the judicial policy behind it is, likewise, lacking in due process.

Healthcare Law > Actions Against Facilities > Apparent Agency & Respondeat Superior > Respondeat Superior

Healthcare Law > Actions Against Facilities > Governmental & Nonprofit Liability > General Overview

Torts > Negligence > Defenses > Private Immunities > Charitable Immunity

[HN12] Even if a state law discriminates in favor of a certain class, the law is not arbitrary and violative of the *equal protection clause* if the discrimination is founded on a reasonable distinction. The state has the power to provide for the health of its citizens. Nonprofit hospitals which are supported in large measure by state funds bear a close relationship with this power. The health of the state's citizens might properly be considered in jeopardy if these charitable hospitals were made liable under the doctrine of respondeat superior for tort injuries caused by their servants. Where a plaintiff does not show that the charitable immunity rule is arbitrary and an unreasonable classification, the court may not declare it to be violative of *U.S. Const. amend. XIV*.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Healthcare Law > Business Administration & Organization > Tax Exemptions > Hospitals

Torts > Negligence > Defenses > General Overview

[HN13] The fact that many patients of a charitable hospital pay their own expenses or that the charitable

hospital pays salaries and owns and profits from properties held, does not affect its status as a charitable institution. The phrase "to sue and be sued" is not a talisman which magically subjects to suit a charitable institution.

COUNSEL: [**1] Joseph I. Huesman, Baltimore, Maryland, and D. Robert Cervera, Washington, District of Columbia, for plaintiffs.

Norman P. Ramsey, James D. Peacock, Cleaveland D. Miller, Semmes, Bowen & Semmes, Baltimore, Maryland, for defendant.

JUDGES: Northrop, District Judge.

OPINION BY: NORTHROP

OPINION

[*139] NORTHROP, District Judge.

Plaintiffs, Mary W. and Cecil B. Sanner, bring this suit against the defendant, the Trustees of the Sheppard and Enoch Pratt Hospital (hereinafter referred to as the Hospital), because of injuries suffered by Mary W. Sanner as a result of the alleged negligence of the Hospital's employees.

Plaintiffs allege that on or about December 9, 1963, they entered into an agreement with the Hospital for the commission of Mary Sanner to the Hospital for care and treatment, and that as a result of the negligent care of Mary Sanner, she fell from an unlocked or unbarred window or door and sustained serious and permanent injuries.

The defendant moves for summary judgment pursuant to *Rule 56(b)* and *(c)* of the *Federal Rules of Civil Procedure*, on the basis of charitable immunity.

[HN1] Jurisdiction is based on diversity. Therefore, the court must follow the substantive law, both decisional [**2] and statutory, of the State of Maryland on the question of the applicability of the doctrine of charitable immunity. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Since 1885, when the doctrine of charitable immunity was established in the case of *Perry v. House of Refuge*, 63 Md. 20 (1885), [HN2] the Maryland courts

have consistently held that an eleemosynary corporation is immune from tort liability. *Loeffler v. Trustees of Sheppard and Enoch Pratt Hospital*, 130 Md. 265, 100 A. 301, L.R.A. 1917, D., 967 (1917); *Howard v. South Baltimore General Hospital*, 191 Md. 617, 62 A.2d 574 (1948); *Thomas v. Board of County Commissioners*, 200 Md. 554, 92 A.2d 452 (1952); *State for Use of Cavanaugh v. Arundel Park Corporation*, 218 Md. 484, 147 A.2d 427 (1958); *Cornelius v. Sinai Hospital*, 219 Md. 116, 148 A.2d 567 (1958). To fully effectuate this policy the immunity is complete, extending to all tortious activity. *Howard v. South Baltimore General Hospital*, *supra*. And it matters not that the plaintiff is a paying patient and not a beneficiary of the charity. In the *Howard* case, the court said:

"The appellant attempts to distinguish the Maryland cases cited [**3] on the grounds that plaintiff in the *House of Refuge* was an incorrigible boy, sent to the reformatory at public expense, and in the *Sheppard and Enoch Pratt* case, a city fireman injured on account of a known defect in the premises owned by the hospital. But we think the fact the plaintiff in the instant case was a 'pay patient', injured through negligence of a servant, is without significance. We think the cases cited are controlling."

The defendant points out that recently this court summarily dismissed several cases brought against the defendant. In *Hannay v. The Trustees of the Sheppard and Enoch Pratt Hospital*, Civil Action No. 14398, D.Md., March 4, 1964, summary judgment was granted in an oral opinion of the then District Judge Winter. In that case the court said:

"[This] is a diversity case, and from the allegations, it is alleged that the tort occurred in Maryland. Certainly, Maryland law would apply and Maryland law in a case of this type, that is, tort liability on behalf of a hospital, is perfectly clear and that is that the hospital, being a charitable institution, is not amenable to suit for tort."

The holding of the court in *Cooper v. The Trustees of the Sheppard and Enoch Pratt Hospital*, Civil Action No. 17891, D.Md., March 10, 1967, oral opinion of the undersigned, was to the same effect. Behind this doctrine of immunity is that damages for tortious acts should be recoverable from the wrongdoer and not from the trust funds which are devoted to charitable purposes.

"In the final analysis it seems that [HN3] the immunity of eleemosynary institutions to tort claims is grounded on an [*140] assumed public policy against the enervation of public charities, established for the benefit of the whole community, by compensation of isolated individuals for injuries inflicted by the negligence of the charities and their agents." 5 Md.L.Rev. 336, 340 (1941).

This argument has lost its persuasiveness with courts in recent years in light of modern conditions, both in law and philanthropy. *President and Directors of Georgetown College v. Hughes*, 76 U.S.App.D.C. 123, 130 F.2d 810 (1942). In the *Georgetown* case the court observed:

"What is at stake, so far as the charity is concerned, is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not the awarding [**5] over in damages of its entire assets.

"Against this, we weigh the costs to the victim of bearing the full burden of his injury." at p. 824.

The prevalence of insurance and its low cost has had a profound influence on the law of tort immunity in general, both charitable and governmental immunity. Most recently the Indiana Appeals Court in *Brinkman v. City of Indianapolis*, 141 Ind. App. 662, 231 N.E.2d 169 (1967) in striking down the doctrine of governmental immunity, said:

"The inherent inequities found in the governmental-proprietary distinction and the availability of liability insurance as a substitute for and a supplement to governmental liability, have caused many

states to abrogate the doctrine of municipal tort immunity. "* * * [The] unfairness to the innocent victim of a principle of complete tort immunity and the social desirability of spreading the loss - a trend now evident in many fields - have been often advanced as arguments in favor of extending the scope of liability. * * * After careful consideration we are of the opinion that the doctrine of sovereign immunity has no proper place in the administration of a municipal corporation."

[HN4] The vitality [**6] of the doctrine in Maryland, until the recent statutory change in 1966, even in the wake of widespread reevaluation of the doctrine and total abandonment by an increasing number of courts, can be attributed to several factors. First, the Maryland court prefers that long-established rules of law be changed by legislative action rather than by judicial fiat. *Griffith v. Benzinger*, 144 Md. 575, 125 A. 512 (1924); *Townsend v. Bethlehem-Fairfield Shipyard*, 186 Md. 406, 47 A.2d 365 (1946). Second, *stare decisis* with respect to this doctrine takes on added significance for the Maryland court has held that the legislative recognition of the judicial rule prevented the court from overruling its prior decisions. In *Howard v. South Baltimore General Hospital* the appellant contended, as the present plaintiffs argue, that the doctrine established in the *Perry* case and reaffirmed in *Loeffler* were wrongly decided and out of line with the modern trend. The court said:

"Whatever the merits of the argument as an original proposition, we are not warranted in overruling our prior decisions. There are special reasons why the doctrine of *stare decisis* should be adhered to in [**7] this case. To withdraw immunity from this type of corporation at this time would be an act of judicial legislation in the face of a contrary policy declared by the legislature itself.

"Not only has the legislature granted exemptions to charitable corporations from various forms of taxation, in order that their field of usefulness might be

enlarged, but it has made direct appropriations to the same end. To establish a liability at this time would run counter to legislative policy and increase potential demands upon the State.

"In 1947, House Bill 99 proposed, in its original form, to estop any charitable corporation from pleading as a defense to tort claims the fact that it was such an institution, and further [*141] provided that the liability should not exceed the amount of liability insurance carried. The bill failed of passage (Senate Journal p. 1462) S.B. 411, at the same session, was introduced as a substitute (Senate Journal 1408) and was adopted as § 68B of Article 48A, Acts 1947, ch. 900. This Section provides that 'each policy issued to cover the liability of any charitable institution for negligence or any other tort shall contain a provision to the effect that [**8] the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such institution is immune from liability on the ground that it is a charitable institution.' It is clear that the legislature has accepted the doctrine announced by this court and dealt with the matter in its own fashion. The plaintiff here has not brought himself within the terms of the section quoted."

More recently, in 1966, the Maryland Legislature dealt with charitable immunity by enacting the following provision:

"Immunity from tort liability. No hospital or related institution as defined in this subtitle shall be immune from liability for negligence or any other tort on the grounds that it is a charitable institution; provided, however, that a hospital or related institution which is a charitable institution and which is insured against such liability in an amount not less than \$100,000 shall not be liable for damages in excess of the limits of such insurance." Md.Code Ann.Art. 43 § 556A

(Supp.1966).

This latter provision is not relevant to the present case for Section 2, ch. 673, Acts 1966, provides that "nothing in this act shall apply to claims for acts [**9] of negligence or other torts occurring before June 1, 1966." The acts complained of by the plaintiffs occurred on or about December 8, 1963. It is cited here only to complete the historical development of charitable immunity in Maryland to the present time.

What distinguishes the present case from those cited above, and what has necessitated a review of the background of charitable immunity in Maryland, is that this appears to be the first constitutional challenge of the Maryland doctrine. Plaintiff contends that to grant summary judgment to the defendant because of its claimed immunity from suit would be in derogation of those rights guaranteed by Articles 19, 20, and 23 of the Maryland Declaration of Rights and by the *Fourteenth Amendment to the United States Constitution*.

[HN5] The rights guaranteed by these Articles of the Declaration of Rights and the *Fourteenth Amendment* are the same. Specifically, Article 19 provides:

"Remedy for injury to person or property.

That every man, for any injury done to him in his person or property, ought to have remedy by the course of Law of the land, and ought to have justice and right, freely without sale, fully without any denial, [**10] and speedily without delay, according to the Law of the land."

Article 20 provides:

"Trial of facts where they arise.

That the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People."

Article 23 provides:

"Due process.

That no man ought to be taken or imprisoned or disseized of his freehold,

liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or the Law of the land."

[HN6] The words and content of these Articles are derived from the Magna Carta and are equivalent to "due process" as that term is used in the *Fourteenth Amendment*. 3 Willoughby, Constitution of the United States, § 1114 (2nd ed. 1929). The equivalency of the words and the meaning conveyed has been reiterated [*142] by the Maryland court time and again. *Wright v. Wright's Lessee*, 2 Md. 429 (1852); *Matter of Easton*, 214 Md. 176, 133 A.2d 441 (1956); *County Commissioners of Anne Arundel County v. English*, 182 Md. 514, 35 A.2d 135, 150 A.L.R. 842 (1943); *Oursler v. Tawes*, 178 Md. 471, 13 A.2d 763 (1940); *Raymond* [**11] v. *State*, 192 Md. 602, 65 A.2d 285 (1948). In construing these Articles the Maryland court has held that the decisions of the Supreme Court are practically direct authorities. *Home Utilities Co., Inc. v. Revere Copper and Brass, Inc.*, 209 Md. 610, 122 A.2d 109 (1955); *Goldsmith v. Mead Johnson & Co.*, 176 Md. 682, 7 A.2d 176, 125 A.L.R. 1339 (1939); *City of Frostburg v. Jenkins*, 215 Md. 9, 136 A.2d 852 (1957).

[HN7] That due process requires more than just fairness of procedures in that it is also a substantive restraint on the content of laws cannot be questioned. Mr. Justice Brandeis in his concurring opinion in *Whitney v. People of State of California*, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), said:

"Despite arguments to the contrary which had seemed to me persuasive, it is settled that the *due process clause of the Fourteenth Amendment* applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states." 274 U.S. at p. 373, 47 S. Ct. at p. 647.

The right to recover damages against another who negligently inflicts injury has [**12] always been recognized as a property right. *Martinez v. Fox Valley Bus Lines*, 17 F. Supp. 576 (N.D.Ill.1936). This basic

right to bring suit against one who wrongfully caused an injury remains unimpaired. The judicial policy of immunity, as recognized by the legislature, did indeed affect the remedy available in that one is not able to recover from the funds of the charity by imputation to the corporation. But it is not a fact, as plaintiffs contend, that the doctrine "summarily and arbitrarily wiped out the basic rights guaranteed by the Declaration of Rights" and the *Fourteenth Amendment*.

The original decision of the Maryland court was, as plaintiffs argue, a change in the common law of this state. [HN8] The hallmark of the common-law system is that it is endowed with judicial inventiveness to meet new situations. The common law is not a solidified body of law. Rather, it is a "system" where sometimes evolutionary, sometimes revolutionary changes are made to meet changing conditions and circumstances.

The case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 L.R.A. 1916 F. 696 (1916) is an example where a new common law right was recognized in a purchaser against a [**13] manufacturer for injuries caused by latent defects in an article purchased at retail. And in *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) is an example of where the ancient common law rule that ownership of the land extends to the outermost limits of the universe was abandoned to meet the needs of the "air age." [HN9] Substantive due process does not mean that there are vested rights in particular rules of common law. *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921).

While there are no vested rights in common law rules, substantive lawmaking is constrained to the extent that it must not be arbitrary or irrational. In a long series of cases, beginning in the nineteen-thirties, the Supreme Court has refused to declare as violative of due process substantive laws so long as the court was able to find "reasonableness of means and ends." *Lincoln Federal Labor Union, etc. v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949); *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952); *Williamson v. Lee Optical*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955).

[*143] [**14] One commentator has observed with regard to these cases that:

"Although there is no longer doubt as to

how the Court will decide cases of this sort, it cannot be said that the Court has limited the due process clause to procedural matters and repudiated the concept of due process as a bar to sufficiently arbitrary or irrational substantive legislation - although Mr. Justice Black's opinion in the Lincoln Union case looks strongly in that direction." Stern, "The Problems of Yesteryear - Commerce and Due Process," in *Essays in Constitutional Law* 150 (1957).

[HN10] The plaintiffs have the burden of demonstrating to this court the unreasonableness of the law contested.

"The standard of substantive due process is not 'conscience' or 'fairness' as in the procedural cases. Substantive due process, we know, has suggested to the modern court standards for permissible limitations on property different from those on liberty, and perhaps, too, different standards for limitations on different liberties. In regard to property, or even 'economic liberties', the standard has been reduced to 'reasonableness' of ends and means." 73 Yale L.J. 74 (1963).

A presumption of constitutionality [*15] is always raised when a law is attacked. This presumption of constitutionality is always stronger when, as here, the law contested has remained for such a long period of time a part of the decisional and statutory law of the state without ever being tested on constitutional grounds.

Surely the ends sought to be accomplished by the doctrine, as enunciated by the court in *Howard v. South Baltimore General Hospital*, are reasonable, i.e. "in order that their field of usefulness might be enlarged" so as not to "increase potential demands upon the State." Charities labor in fields which ordinarily only the state would be concerned - areas of public welfare, health, and safety. The state, like the federal government, affirmatively encourages the operations of charitable institutions, for the larger the extent of their activity, the smaller is the burden of the state. The means used to effectuate this

policy takes many forms, one being an immunity granted to the funds held in trust for charitable purposes. That a better scheme could be devised goes without saying. And one need only refer to the latest pronouncement of the Maryland Legislature to find one. But [HN11] this court cannot substitute [**16] its judgment for the Maryland Legislature and say that because it had not passed a better or fairer law in 1948 that that statute recognizing charitable immunity from tort liability is unconstitutional or that the judicial policy behind it is, likewise, lacking in due process.

The few courts that have had the occasion to pass on the question raised here have all rejected the constitutional attacks on charitable immunity. The opinion of the court in *Weeks v. Children's Hospital of Philadelphia*, 200 F. Supp. 77 (E.D.Pa.1961) is particularly apt. In that case the Pennsylvania rule denying the application of the doctrine of *respondeat superior* to charitable institutions was attacked as unconstitutional under the due process clause. The court said:

"Plaintiff has not sustained her burden of proving that Pennsylvania has denied her due process of law and the equal protection of its laws because its courts exempt charitable institutions from the doctrine of *respondeat superior* in tort cases such as the instant one.

[HN12] "Even if a state law discriminates in favor of a certain class, the law is not arbitrary and violative of the *equal protection clause* if the discrimination is founded [**17] on a reasonable distinction. *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1931). The Supreme Court has found laws based on various distinctions constitutional. Cf. *Helvering* [*144] v. *Bliss*, 293 U.S. 144, 149-151, 55 S. Ct. 17, 79 L. Ed. 246 (1934). * * *

"The state has the power to provide for the health of its citizens. Nonprofit hospitals which are supported in large measure by state funds bear a close relationship with this power. The health

of the state's citizens might properly be considered in jeopardy if these charitable hospitals were made liable under the doctrine of respondeat superior for tort injuries caused by their servants.

"Plaintiff has not shown that this Pennsylvania rule is arbitrary and an unreasonable classification. This court may not, therefore, declare it to be violative of the *Fourteenth Amendment to the United States Constitution*."

Besides this constitutional argument plaintiffs also allege that the defendant is an ordinary business corporation and by its charter had the power "(to) sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in any court [**18] of Law or Equity, or other place whatsoever" and, consequently, should not be immune from suit".

This contention is wholly without substance. As pointed out earlier, the present defendant has been held to

be a charitable institution on several occasions. None of the allegations contained in the plaintiffs' papers, namely [HN13] that many patients of defendant pay their own expenses or that the defendant pays salaries and owns and profits from properties held, affect its status as a charitable institution. *Glass v. Doctors Hospital, Inc.*, 213 Md. 44, 131 A.2d 254 (1957). The phrase "to sue and be sued" is not a talisman which magically subjects to suit a charitable institution. And most courts that have been presented with the question have held that the words do not have that effect. *Hamburger v. Cornell University*, 204 App.Div. 664, 199 N.Y.S. 369 (1923); *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S.W. 351, 11 L.R.A.,N.S., 1179 (1907); *Fordyce v. Woman's Christian Nat. Library Ass'n*, 79 Ark. 550, 96 S.W. 155 7 L.R.A.,N.S., 485 (1906); *Hooten v. Civil Air Patrol*, 161 F. Supp. 478 (E.D.Wis.1958).

For the above reasons, the Hospital's motion for summary judgment must be granted.

[**19] Defendant's counsel will submit an appropriate order.

APPENDIX 43



SHAPIRO, COMMISSIONER OF WELFARE OF CONNECTICUT v.
THOMPSON

No. 9

SUPREME COURT OF THE UNITED STATES

394 U.S. 618; 89 S. Ct. 1322; 22 L. Ed. 2d 600; 1969 U.S. LEXIS 3190

May 1, 1968, Argued
April 21, 1969, Decided *

* Together with No. 33, Washington et al. v. Legrant et al., on appeal from the United States District Court for the District of Columbia, argued May 1, 1968, and No. 34, Reynolds et al. v. Smith et al., on appeal from the United States District Court for the Eastern District of Pennsylvania, argued May 1-2, 1968, both reargued on October 23-24, 1968.

SUBSEQUENT HISTORY: Reargued October 23-24, 1968.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

DISPOSITION: No. 9, 270 *F.Supp.* 331; No. 33, 279 *F.Supp.* 22; and No. 34, 277 *F.Supp.* 65, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners appealed judgments from the United States District Court for the District of Connecticut, which struck down statutes denying public benefits to residents of a state or District of Columbia who had not resided in the jurisdictions for

at least a year preceding their applications for assistance. The ruling was premised on a finding that the statutes restricted the exercise of a fundamental right based on an impermissible classification.

OVERVIEW: Petitioners sought review of judgments, which held unconstitutional, under *U.S. Const. amend. XIV (Equal Protection Clause)*, statutory provisions denying welfare assistance to residents of a state or District of Columbia who had not resided within the jurisdictions for at least a year immediately preceding their applications for assistance. The Court held respondents had a constitutional right to travel from one state to another, and the challenged laws, which penalized the exercise of that right based on a classification created by the one-year waiting period, unless shown to be necessary to promote a compelling governmental interest,

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were unconstitutional. The Court held that while a state had an interest in preventing fraud in applications, and in reducing costs of welfare programs, the classification imposed was impermissible where less drastic measures were available to protect a state's interest. The Court also held that even if federal statutes appeared to authorize a state to adopt such a classification, Congress was not empowered to direct a state to violate the *Equal Protection Clause*. Accordingly, judgments holding challenged statutes unconstitutional were affirmed.

OUTCOME: Judgments holding statutory provisions unconstitutional were affirmed where respondents had a constitutional right to travel from one state to another and the challenged laws, which penalized the exercise of that right based on an impermissible classification, were unconstitutional where they were not necessary to promote a compelling governmental interest.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Judicial Officers > Judges > General Overview

[HN1] 28 U.S.C.S. § 2282 requires a three-judge court to hear a challenge to the constitutionality of any Act of Congress.

Constitutional Law > Equal Protection > Level of Review

Public Health & Welfare Law > Social Security > Assistance to Families > General Overview

[HN2] A constitutional challenge to a public assistance statute cannot be answered by the argument that public assistance benefits are a "privilege" and not a "right."

Constitutional Law > Equal Protection > Poverty

[HN3] Inhibiting migration by needy persons into a state is constitutionally impermissible.

Constitutional Law > Relations Among Governments > Privileges & Immunities

[HN4] The nature of the United States and its constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and

breadth of the land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Constitutional Law > Relations Among Governments > Privileges & Immunities

[HN5] For all the great purposes for which the federal government was formed, citizens are one people, with one common country. Citizens of the United States, 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 their own states.

Constitutional Law > Relations Among Governments > Privileges & Immunities

Transportation Law > Right to Travel

[HN6] The constitutional right to travel from one state to another occupies a position fundamental to the concept of the federal union.

Constitutional Law > Relations Among Governments > Privileges & Immunities

Transportation Law > Right to Travel

[HN7] Freedom to travel throughout the United States has long been recognized as a basic right under the United States Constitution.

Constitutional Law > Relations Among Governments > Privileges & Immunities

[HN8] The right to travel interstate was grounded upon the Privileges and Immunities Clause of U.S. Const. art. IV, § 2.

Constitutional Law > Equal Protection > Level of Review

[HN9] If a law has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional.

Constitutional Law > Equal Protection > Scope of Protection

[HN10] The *Equal Protection Clause* prohibits an apportionment of state services according to the past tax contributions of its citizens.

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Constitutional Law > Equal Protection > Scope of Protection

[HN11] A state has a valid interest in preserving the fiscal integrity of its programs.

Constitutional Law > Equal Protection > Poverty

[HN12] A state may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens.

Constitutional Law > Equal Protection > Poverty

[HN13] Neither deterrence of indigents from migrating to a state nor limitation of welfare benefits to those regarded as contributing to a state is a constitutionally permissible state objective.

Constitutional Law > Equal Protection > Level of Review

Constitutional Law > Equal Protection > Poverty

[HN14] In moving from state to state or to the District of Columbia a person exercises a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

Contracts Law > Types of Contracts > Reciprocal Contracts

Public Health & Welfare Law > Social Security > Assistance to Families > General Overview

[HN15] In Pennsylvania, a one-year waiting-period requirement, but not the residency requirement, is waived under reciprocal agreements. *Pa. Stat., tit. 62, § 432(6)* (1968).

Constitutional Law > Equal Protection > Level of Review

[HN16] There is no need for a state to use a one-year waiting period as a safeguard against fraudulent receipt of benefits; for less drastic means are available, and are employed, to minimize that hazard.

Constitutional Law > Equal Protection > Level of Review

[HN17] A state has a valid interest in preventing fraud by

any applicant, whether a newcomer or a long-time resident.

Constitutional Law > Equal Protection > Scope of Protection

[HN18] A state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents applying for public assistance.

Constitutional Law > Equal Protection > Level of Review

[HN19] When a classification touches on the fundamental right of interstate movement, its constitutionality must be judged by a stricter standard of whether it promotes a compelling state interest.

Constitutional Law > Equal Protection > Level of Review

[HN20] Under the traditional standard, equal protection is denied only if a classification is "without any reasonable basis."

Constitutional Law > Equal Protection > Scope of Protection

Public Health & Welfare Law > Social Security > Assistance to Families > Temporary Assistance to Needy Families > Negative Actions

Public Health & Welfare Law > Social Security > Assistance to Families > Temporary Assistance to Needy Families > State Plans

[HN21] See *42 U.S.C.S. § 602(b)*.

Constitutional Law > Equal Protection > Scope of Protection

Public Health & Welfare Law > Social Security > Assistance to Families > Temporary Assistance to Needy Families > State Plans

[HN22] *42 U.S.C.S. § 602(b)* does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education, and Welfare not to disapprove plans submitted by a state because they include such a requirement.

Constitutional Law > Equal Protection > Scope of Protection

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**Education Law > Discrimination > Racial
Discrimination > Equal Protection**

[HN23] Congress may not authorize a state to violate the *Equal Protection Clause*.

**Constitutional Law > Equal Protection > Scope of
Protection**

[HN24] Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes a state to violate the *Equal Protection Clause*.

**Constitutional Law > Bill of Rights > Fundamental
Rights > Procedural Due Process > Scope of Protection**

[HN25] While *U.S. Const. amend. V* contains no *equal protection clause*, it does forbid discrimination that is "so unjustifiable as to be violative of due process."

**Constitutional Law > Substantive Due Process > Scope
of Protection**

[HN26] The *Due Process Clause of the Fifth Amendment* prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed.

SUMMARY:

This case involved the following three appeals from decisions of three- judge United States District Courts holding unconstitutional a state or District of Columbia statutory provision which denies welfare assistance to residents of the state or District who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance: (1) an appeal (No. 9) from such a decision of the District Court for the District of Connecticut with respect to such a provision in the *Connecticut General Statutes (270 F Supp 331)*; (2) an appeal (No. 33) from such a decision of the District Court for the District of Columbia with respect to such a provision adopted by *Congress in the District of Columbia Code (279 F Supp 22)*; and (3) an appeal (No. 34) from such a decision of the District Court for the Eastern District of Pennsylvania with respect to such a provision in the *Pennsylvania Welfare Code (277 F Supp 65)*.

The United States Supreme Court affirmed the

judgments of the District Courts in all three cases. In an opinion by Brennan, J., expressing the view of six members of the court, it was held that (1) absent a compelling state interest, the Connecticut and Pennsylvania statutory provisions violated the *equal protection clause of the Fourteenth Amendment* by imposing a classification of welfare applicants which impinged upon their constitutional right to travel freely from state to state; (2) absent a compelling governmental interest, the District of Columbia statutory provision violated the *due process clause of the Fifth Amendment* by imposing a discrimination which impinged upon the constitutional right to travel; and (3) 402(b) of the Social Security Act of 1935 did not, and constitutionally could not, authorize the states to impose such one-year waiting period requirement.

Stewart, J., concurred, adding, in response to the dissent of Harlan, J., that the court in its opinion did not "pick out particular human activities, characterize them as 'fundamental,' and give them added protection," but on the contrary simply recognized an established constitutional right--the right to travel from one state to another--and gave to that right no less protection than the Constitution itself demands, which right is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards, but a right broadly assertable against private interference, as well as governmental action, and a virtually unconditional personal right guaranteed by the Constitution.

Warren, Ch. J., joined by Black, J., dissented on the grounds that (1) Congress, under the *commerce clause*, has the power to impose minimal nationwide residence requirements or to authorize the states to do so; (2) Congress constitutionally exercised such power in these cases pursuant to the provision of the District of Columbia Code and 402(b) of the Social Security Act, which authorized the imposition by the states of residence requirements; (3) such congressional action was not invalid merely because it burdened the right to travel; and (4) residence requirements can be imposed by Congress as an exercise of its power to control interstate commerce consistent with the constitutionally guaranteed right to travel, where, as here, the congressional decision to impose such requirement was rational and the restriction on travel insubstantial.

Harlan, J., dissented on the grounds that (1) the

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court's opinion represented an unwise extension of the branch of the "compelling interest" doctrine which requires that classifications based upon "suspect" criteria be supported by a compelling interest, to a classification based upon recent interstate movement, with respect of which classification, since it is based upon the exercise of rights guaranteed against state infringement by the Federal Constitution, there is no need for any resort to the *equal protection clause*, and any undue burden upon such rights may be invalidated under the *Fourteenth Amendment's due process clause*; (2) to extend the branch of the "compelling interest" rule which holds that a statutory classification is subject to the "compelling interest" test if the result of the classification may be to affect a "fundamental right," regardless of the basis of the classification, to the travel rights involved here, went far toward making the court a "super-legislature," the infringement of which rights, since they are assured by the Federal Constitution, can be dealt with under the due process clause; (3) when a statute affects only matters not mentioned in the Constitution, and is not arbitrary or irrational, the court is not entitled to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test; (4) the welfare residence requirements, with respect to equal protection, should be judged by ordinary equal protection standards; (5) applying these standards, the requirements here were not "arbitrary" or "lacking in rational justification," and hence were not objectionable under the *equal protection clause of the Fourteenth Amendment* or under the analogous standards embodied in the *due process clause of the Fifth Amendment*; (6) taking into consideration the constitutional source and nature of the right to travel, the extent of interference with that right, the governmental interests served by welfare residence requirements, and the balancing of competing considerations, the one-year welfare residence requirements in this instance did not amount to an undue burden upon the right of interstate travel.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

COURTS §225.5

congressional act pertaining to District of Columbia
-- constitutionality --

Headnote:[1A][1B]

28 USC 2282, requiring a three-judge United States District Court to hear a challenge to the constitutionality of "any Act of Congress," applies to acts of Congress pertaining solely to the District of Columbia.

[***LEdHN2]

CONSTITUTIONAL LAW §348.5

CONSTITUTIONAL LAW §528.5

welfare assistance -- residency requirements --
discrimination -- equal protection --

Headnote:[2A][2B][2C]

In the absence of a showing that provisions of state statutes and of a District of Columbia statute enacted by Congress, prohibiting public assistance benefits to residents of less than a year, were necessary to promote compelling governmental interests, such prohibitions create a classification which constitutes an invidious discrimination denying such residents equal protection of the laws in violation of the *equal protection clause of the Fourteenth Amendment* with respect to the state provisions and in violation of the *due process clause of the Fifth Amendment* with respect to the District of Columbia provisions.

[***LEdHN3]

CONSTITUTIONAL LAW §348.5

CONSTITUTIONAL LAW §528.5

welfare assistance -- residency requirement --
discrimination -- equal protection --

Headnote:[3A][3B]

A challenge to provisions of state statutes and of a congressionally enacted District of Columbia statute prohibiting public assistance benefits to residents of less than a year, that such provisions create a classification which constitutes an invidious discrimination denying such residents equal protection of the laws in violation of the *equal protection clause of the Fourteenth Amendment* with respect to the state provisions and in violation of the *due process clause of the Fifth Amendment* with respect to the District of Columbia provision, cannot be answered by the argument that public assistance benefits are a "privilege" and not a "right."

[***LEdHN4]

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §348.5

welfare assistance -- residency requirement --
classification --

Headnote:[4A][4B]

The purpose of a state statutory provision requiring a person to have one year's residence in the state before becoming eligible for welfare assistance, of inhibiting or deterring migration by needy persons into the state is not a constitutionally permissible state objective, but constitutes a violation of a person's basic constitutional right to travel freely from one state to another, and hence cannot serve as justification for the classification, created by the one-year waiting period, of needy resident families into two classes--(1) those who have resided in the state a year or more and are thus eligible for welfare assistance, and (2) those who have resided in the state less than one year and are thus ineligible for such assistance.

[***LEdHN5]

CONSTITUTIONAL LAW §101

right to travel --

Headnote:[5]

The nature of the Federal Union and constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of the United States uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

[***LEdHN6]

CONSTITUTIONAL LAW §101

right to travel --

Headnote:[6]

Although not explicitly mentioned in the Federal Constitution, the right freely to travel from one state to another is a basic right under the Constitution.

[***LEdHN7]

CONSTITUTIONAL LAW §101

law chilling assertion of rights --

Headnote:[7]

If a law has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional.

[***LEdHN8]

CONSTITUTIONAL LAW §326

CONSTITUTION LAW §348.5

welfare assistance -- residency requirement --
classification --

Headnote:[8]

The classification of needy resident families in state into two classes--(1) those who have resided a year or more in the state and are thus eligible for welfare assistance, and (2) those who have resided less than a year in the state and are thus ineligible for assistance--resulting from a state statutory provision requiring a person to have one year's residence in the state before becoming eligible for welfare assistance, cannot be justified as a permissible state attempt to discourage those indigents who would enter the state solely to obtain larger benefits, because such attempt is not a constitutionally permissible state objective and constitutes a violation of a person's basic constitutional right to travel freely from one state to another; a state may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally.

[***LEdHN9]

CONSTITUTIONAL LAW §348.5

welfare assistance -- residency requirement --
classification --

Headnote:[9]

Limitation of welfare benefits to those regarded as contributing to the state through the payment of taxes is not a constitutionally permissible state objective but violates the *equal protection clause of the Fourteenth*

Amendment, and hence cannot serve as justification for the classification of needy residence families in a state into two classes--(1) those who have resided a year or more in the state and are thus eligible for benefits, and (2) those who have resided less than a year in the state and are thus ineligible for benefits--resulting from a state statutory provision requiring a person to have one year's residence in the state before becoming eligible for welfare assistance.

[***LEdHN10]

CONSTITUTIONAL LAW §314

equal protection -- state services --

Headnote:[10]

The *equal protection clause of the Fourteenth Amendment* prohibits a state from apportioning all benefits and services according to the past tax contributions of its citizens.

[***LEdHN11]

CONSTITUTIONAL LAW §345

CONSTITUTIONAL LAW §348.5

limiting state expenditures -- discrimination --

Headnote:[11]

Although a state may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program, it may not accomplish such a purpose by invidious distinctions, in violation of the *equal protection clause of the Fourteenth Amendment*, between classes of its citizens, as, for example, by reducing expenditures for education by barring indigent children from its schools.

[***LEdHN12]

CONSTITUTIONAL LAW §348.5

welfare assistance -- residency requirement --
classification --

Headnote:[12]

The saving of welfare costs cannot be an independent ground for a state's invidious classification,

in denial of equal protection of the laws, of needy residence families into two classes--(1) those who have resided a year or more in the state and are thus eligible for welfare assistance, and (2) those who have resided less than a year in the state and are thus ineligible for welfare assistance--resulting from a state statutory provision requiring a person to have one year's residence in the state before becoming eligible for welfare assistance.

[***LEdHN13]

CONSTITUTIONAL LAW §348.5

welfare assistance -- residency requirement --
classification --

Headnote:[13]

A mere showing of a rational relationship between the statutory one-year waiting-period requirement before a new resident of a state becomes eligible for welfare assistance, and the permissible state objectives of (1) facilitating the planning of the welfare budget, (2) providing an objective test of residency, (3) minimizing the opportunity for recipients fraudulently to receive welfare payments from more than one jurisdiction, and (4) encouraging early entry of new residents into the labor force, is insufficient to justify the classification, under the *equal protection clause of the Fourteenth Amendment* of needy resident families into two classes--(1) those who have resided a year or more in the state and thus are eligible for welfare assistance, and (2) those who have resided less than a year in the state and are thus ineligible for welfare assistance.

[***LEdHN14]

CONSTITUTIONAL LAW §101

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §525

classification of citizens -- right to travel --

Headnote:[14]

Any classification of citizens which serves to penalize the exercise of their constitutional right to move from state to state or to the District of Columbia, unless shown to be necessary to promote a compelling

governmental interest, is unconstitutional, a state statute making such a classification being a violation of the *equal protection clause of the Fourteenth Amendment*, and a congressionally enacted statute of the District of Columbia making such a classification being a violation of the *due process clause of the Fifth Amendment*.

[***LEdHN15]

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §348.5

CONSTITUTIONAL LAW §528.5

welfare assistance -- residency requirement --
 classification -- compelling interest --

Headnote:[15]

For purposes of determining whether state statutes violate the *equal protection clause of the Fourteenth Amendment* and whether a congressionally enacted District of Columbia statute violates the *due process clause of the Fifth Amendment*, a classification of needy resident families into two classes--(1) those who have resided for a year or more in the jurisdiction and are thus eligible for welfare assistance, and (2) those who have resided less than a year in the jurisdiction and are thus ineligible for such assistance--resulting from provisions of such statutes requiring a person to have one year's residence in the jurisdiction before becoming eligible for welfare assistance, is not shown to be justified by a compelling governmental interest on the alleged basis that the waiting-period requirement facilitates the planning of the welfare budget or budget predictability, where such classification penalizes the exercise of a needy person's constitutional right to travel freely from state to state or to the District of Columbia, and where the record is utterly devoid of evidence that either of the states in question or the District of Columbia in fact uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year.

[***LEdHN16]

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §348.5

welfare assistance -- residency requirement --

classification -- compelling interest --

Headnote:[16]

For purposes of determining whether state statutes violate the *equal protection clause of the Fourteenth Amendment* and whether a congressionally enacted District of Columbia statute violates the *due process clause of the Fifth Amendment*, a classification of needy resident families into two classes--(1) those who have resided for a year or more in the jurisdiction and are thus eligible for welfare assistance, and (2) those who have resided less than a year in the jurisdiction and are thus ineligible for such assistance--resulting from provisions of such statutes requiring a person to have one year's residence in the jurisdiction before becoming eligible for welfare assistance, is not shown to be justified by a compelling governmental interest on the alleged basis that the waiting-period requirement provides an objective test of residency or an administratively efficient rule of thumb for determining residency, where such classification penalizes the exercise of a needy person's constitutional right to travel freely from state to state or to the District of Columbia, where the residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance under the statute, and where the facts relevant to the determination of each are directly examined by the welfare authorities.

[***LEdHN17]

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §348.5

CONSTITUTIONAL LAW §528.5

welfare assistance -- residency requirement --
 classification -- compelling interest --

Headnote:[17]

For purposes of determining whether state statutes violate the *equal protection clause of the Fourteenth Amendment* and whether a congressionally enacted District of Columbia statute violates the *due process clause of the Fifth Amendment*, a classification of needy resident families into two classes--(1) those who have resided for a year or more in the jurisdiction and are thus eligible for welfare assistance, and (2) those who have resided less than a year in the jurisdiction and are thus

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ineligible for such assistance--resulting from provisions of such statutes requiring a person to have one year's residence in the jurisdiction before becoming eligible for welfare assistance, is not shown to be justified by a compelling governmental interest on the alleged basis that the waiting- period requirement provides a safeguard against fraudulent receipt of welfare benefits from more than one jurisdiction, where such classification penalizes the exercise of a needy person's constitutional right to travel freely from state to state or to the District of Columbia, and where less drastic means are available and are employed to minimize the hazard of fraudulent receipt of benefits.

[***LEdHN18]

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §348.5

welfare assistance -- residency requirement --
classification -- compelling interest --

Headnote:[18]

For purposes of determining whether a state statute violates the *equal protection clause of the Fourteenth Amendment*, a classification of needy resident families into two classes--(1) those who have resided for a year or more in the state and are thus eligible for welfare assistance, and (2) those who have resided less than a year in the state and are thus ineligible for such assistance--resulting from a provision of such statute requiring a person to have one year's residence in the state before becoming eligible for welfare assistance, is not shown to be justified by a compelling governmental interest on the alleged basis that the waiting- period requirement encourages new residents to join the labor force promptly, where such classification penalizes the exercise of a needy person's constitutional right to travel freely from state to state, and where the logic of such alleged justification for the classification would also require a similar waiting period for long-term residents of the state; a state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only.

[***LEdHN19]

CONSTITUTIONAL LAW §348.5

welfare assistance -- residency requirement -- equal

protection --

Headnote:[19]

A classification by a state of welfare applicants according to whether they have lived in the state for one year, so that those who have resided in the state for less than a year are ineligible for welfare assistance, while those who have resided in the state for a year or more are eligible for such assistance, is irrational and unconstitutional in violation of the *equal protection clause of the Fourteenth Amendment*, even under the traditional equal protection test that equal protection is denied only if the classification is "without any reasonable basis."

[***LEdHN20]

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §348.5

welfare assistance -- residency requirement --
classification -- compelling interest --

Headnote:[20]

The constitutionality of a classification by a state of welfare applicants according to whether they have lived in the state for one year, so that those who have resided in the state for less than a year are ineligible for welfare assistance, while those who have resided in the state for a year or more are eligible for such assistance, must be judged not by the traditional equal protection standard that equal protection is denied only if the classification is "without any reasonable basis," but by the stricter standard of whether it promotes a compelling state interest, where such classification of welfare applicants touches on the fundamental constitutional right of interstate movement.

[***LEdHN21]

POVERTY AND WELFARE LAWS §6

AFDC -- state assistance plan -- federal approval --

Headnote:[21]

Section 402(b) of the Social Security Act of 1935 (*42 USC 602(b)*)--which provides that the Secretary of Health, Education, and Welfare shall approve any state

assistance plan which fulfils certain specified conditions, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the state (1) who has resided there for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the state for one year immediately preceding the birth--does not approve, much less prescribe, the imposition by a state, as part of the jointly funded Aid to Families with Dependent Children (AFDC) program, of a requirement that a welfare applicant must have resided in the state for one year before becoming eligible for welfare assistance.

[***LEdHN22]

CONSTITUTIONAL LAW §348.5

state welfare assistance -- residency requirement -- effect of federal approval --

Headnote:[22]

Even if Congress in 402(b) of the Social Security Act of 1935 (*42 USC 602(b)*), dealing with federal approval of state assistance plans as part of the jointly funded Aid to Families with Dependent Children (AFDC) program, approves the imposition by states of a one-year waiting period before a new resident of a state becomes eligible for welfare assistance, it is the responsive state legislation which infringes constitutional rights by imposing a classification in violation of the *equal protection clause of the Fourteenth Amendment*; by itself 402(b) has absolutely no restrictive effect, and it is therefore not that statute, but only the state requirements, which pose the constitutional question.

[***LEdHN23]

CONSTITUTIONAL LAW §326

CONSTITUTIONAL LAW §348.5

state welfare assistance -- residency requirement -- effect of federal approval --

Headnote:[23]

Insofar as 402(b) of the Social Security Act of 1935 (

42 USC 602 (b)), dealing with federal approval of state assistance plans as part of the jointly funded Aid to Families with Dependent Children (AFDC) program, may permit the one-year waiting period requirement imposed by a state before a new resident of the state becomes eligible for welfare assistance, it is unconstitutional, where such requirement violates the *equal protection clause of the Fourteenth Amendment* by imposing a classification which impinges on the constitutional right of welfare applicants to travel freely from state to state.

[***LEdHN24]

CONSTITUTIONAL LAW §314

STATES §14

Congress' power -- equal protection --

Headnote:[24]

Congress may not authorize the states to violate the *equal protection clause of the Fourteenth Amendment*.

[***LEdHN25]

CONSTITUTIONAL LAW §314

UNITED STATES §17

Congress' power -- federal-state programs -- equal protection --

Headnote:[25]

Congress is without power to enlist state co-operation in a joint federal- state program by legislation which authorizes the states to violate the *equal protection clause of the Fourteenth Amendment*.

[***LEdHN26]

CONSTITUTIONAL LAW §316

CONSTITUTIONAL LAW §513

due process -- discrimination --

Headnote:[26]

While the *Fifth Amendment* contains no *equal protection clause*, it does forbid discrimination that is so

unjustifiable as to be violative of due process.

SYLLABUS

These appeals are from decisions of three-judge District Courts holding unconstitutional Connecticut, Pennsylvania, or District of Columbia statutory provisions which deny welfare assistance to persons who are residents and meet all other eligibility requirements except that they have not resided within the jurisdiction for at least a year immediately preceding their applications for assistance. Appellees' main contention on reargument is that the prohibition of benefits to residents of less than one year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. Appellants argue that the waiting period is needed to preserve the fiscal integrity of their public assistance programs, as persons who require welfare assistance during their first year of residence are likely to become continuing burdens on welfare programs. Appellants also seek to justify the classification as a permissible attempt to discourage indigents from entering a State solely to obtain larger benefits, and to distinguish between new and old residents on the basis of the tax contributions they have made to the community. Certain appellants rely in addition on the following administrative and related governmental objectives: facilitating the planning of welfare budgets, providing an objective test of residency, minimizing the opportunity for recipients fraudulently to receive payments from more than one jurisdiction, and encouraging early entry of new residents into the labor force. Connecticut and Pennsylvania also argue that Congress approved the imposition of the one-year requirement in § 402 (b) of the Social Security Act. *Held*:

1. The statutory prohibition of benefits to residents of less than a year creates a classification which denies equal protection of the laws because the interests allegedly served by the classification either may not constitutionally be promoted by government or are not compelling governmental interests. P. 627.

2. Since the Constitution guarantees the right of interstate movement, the purpose of deterring the migration of indigents into a State is impermissible and cannot serve to justify the classification created by the one-year waiting period. Pp. 629-631.

3. A State may no more try to fence out those indigents who seek higher welfare payments than it may

try to fence out indigents generally. Pp. 631-632.

4. The classification may not be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes because the *Equal Protection Clause* prohibits the States from apportioning benefits or services on the basis of the past tax contributions of its citizens. Pp. 632-633.

5. In moving from jurisdiction to jurisdiction appellees were exercising a constitutional right, and any classification which penalizes the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. P. 634.

6. Appellants do not use and have no need to use the one-year requirement for the administrative and governmental purposes suggested, and under the standard of a *compelling* state interest, that requirement clearly violates the *Equal Protection Clause*. Pp. 634-638.

7. Section 402 (b) of the Social Security Act does not render the waiting-period requirements constitutional. Pp. 638-641.

(a) That section on its face does not approve, much less prescribe, a one-year requirement, and the legislative history reveals that Congress' purpose was to curb hardships resulting from excessive residence requirements and not to approve or prescribe any waiting period. Pp. 639-640.

(b) Assuming, *arguendo*, that Congress did approve the use of a one-year waiting period, it is the responsive *state* legislation and not § 402 (b) which infringes constitutional rights. P. 641.

(c) If the constitutionality of § 402 (b) were at issue, that provision, insofar as it permits the one-year waiting period, would be unconstitutional, as Congress may not authorize the States to violate the *Equal Protection Clause*. P. 641.

8. The waiting-period requirement in the District of Columbia Code, adopted by Congress as an exercise of federal power, is an unconstitutional discrimination which violates the *Due Process Clause of the Fifth Amendment*. Pp. 641-642.

COUNSEL: Francis J. MacGregor, Assistant Attorney

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General of Connecticut, argued the cause for appellant in No. 9 on the original argument and on the reargument. With him on the brief on the original argument was Robert K. Killian, Attorney General. Richard W. Barton argued the cause for appellants in No. 33 on the original argument and on the reargument. With him on the brief on the original argument were Charles T. Duncan and Hubert B. Pair. William C. Sennett, Attorney General of Pennsylvania, argued the cause for appellants in No. 34 on the original argument and on the reargument. With him on the brief on the reargument was Edgar R. Casper, Deputy Attorney General, and on the original argument were Mr. Casper and Edward Friedman.

Archibald Cox argued the cause for appellees in all three cases on the reargument. With him on the brief were Peter S. Smith and Howard Lesnick. Brian L. Hollander argued the cause pro hac vice for appellee in No. 9 on the original argument. With him on the brief were Norman Dorsen and William D. Graham. Mr. Smith argued the cause for appellees in No. 33 on the original argument. With him on the brief were Joel J. Rabin, Jonathan Weiss, and Joseph F. Dugan. Thomas K. Gilhool argued the cause pro hac vice for appellees in No. 34 on the original argument. With him on the brief were Harvey N. Schmidt, Paul Bender, and Mr. Lesnick.

Lorna Lawhead Williams, Special Assistant Attorney General, argued the cause for the State of Iowa as amicus curiae in support of appellants in all three cases on the original argument and on the reargument. With her on the briefs on the original argument was Richard C. Turner, Attorney General.

Briefs of amici curiae in support of appellant in No. 9 were filed by David P. Buckson, Attorney General, and Ruth M. Ferrell, Deputy Attorney General, for the State of Delaware; by William B. Saxbe, Attorney General, Winifred A. Dunton, Assistant Attorney General, and Charles S. Lopeman for the State of Ohio; by Crawford C. Martin, Attorney General, Nola White, First Assistant Attorney General, A. J. Carubbi, Jr., Executive Assistant Attorney General, and J. C. Davis, John Reeves, and Pat Bailey, Assistant Attorneys General, for the State of Texas; and by Thomas C. Lynch, Attorney General, and Elizabeth Palmer, Deputy Attorney General, for the State of California.

Briefs of amici curiae in support of appellee in No. 9 were filed by Arthur L. Schiff for Bexar County Legal Aid Association; by Eugene M. Swann for the Legal Aid

Society of Alameda County; and by A. L. Wirin, Fred Okrand, Laurence R. Sperber, and Melvin L. Wulf for the American Civil Liberties Union et al. Brief of amicus curiae in support of appellees in No. 33 was filed by John F. Nagle for the National Federation of the Blind. Briefs of amici curiae in support of appellees in all three cases were filed by J. Lee Rankin and Stanley Buchsbaum for the City of New York; by Joseph B. Robison, Carlos Israels, and Carl Rachlin for the American Jewish Congress et al.; and by Charles L. Hellman and Leah Marks for the Center on Social Welfare Policy and Law et al.

JUDGES: Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall

OPINION BY: BRENNAN

OPINION

[*621] [***608] [**1324] MR. JUSTICE BRENNAN delivered the opinion of the Court.

These three appeals were restored to the calendar for reargument. 392 U.S. 920 (1968). Each is an appeal from a decision of a three-judge District Court holding [*622] unconstitutional a State or District of Columbia statutory provision which denies welfare assistance to residents of the State or District who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance. ¹ We affirm [**1325] the judgments of the District Courts in the three cases.

1 Accord: *Robertson v. Ott*, 284 F.Supp. 735 (D. C. Mass. 1968); *Johnson v. Robinson*, Civil No. 67-1883 (D. C. N. D. Ill., Feb. 20, 1968); *Ramos v. Health and Social Services Bd.*, 276 F.Supp. 474 (D. C. E. D. Wis. 1967); *Green v. Dept. of Pub. Welfare*, 270 F.Supp. 173 (D. C. Del. 1967). Contra: *Waggoner v. Rosem*, 286 F.Supp. 275 (D. C. M. D. Pa. 1968); see also *People ex rel. Heydenreich v. Lyons*, 374 Ill. 557, 30 N. E. 2d 46 (1940).

All but one of the appellees herein applied for assistance under the Aid to Families with Dependent Children (AFDC) program which was established by the Social Security Act of 1935. 49 Stat. 627, as amended, 42 U. S. C. §§ 601-609. The program provides partial federal funding of

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state assistance plans which meet certain specifications. One appellee applied for Aid to the Permanently and Totally Disabled which is also jointly funded by the States and the Federal Government. 42 U. S. C. §§ 1351-1355.

I.

In No. 9, the Connecticut Welfare Department invoked § 17-2d of the Connecticut General Statutes² to [*623] deny the application of appellee Vivian Marie Thompson for assistance under the program for Aid to Families with Dependent Children (AFDC). She was a 19-year-old unwed mother of one child and pregnant with her second child when she changed her residence in June 1966 from Dorchester, Massachusetts, to Hartford, Connecticut, to live with her mother, a Hartford resident. She moved to her own apartment in Hartford in August 1966, when her mother was no longer able to support her and her infant son. Because of her pregnancy, she was unable to work or enter a work training program. Her application for AFDC assistance, filed in August, was denied in November solely on the ground that, as required by § 17-2d, she had not lived in the State for a year before her application was filed. She brought this action in the District Court for the District of Connecticut where a three-judge court, one judge dissenting, declared § 17-2d unconstitutional. 270 F.Supp. 331 (1967). The majority held that the waiting-period requirement is unconstitutional because it "has a chilling effect on the right to travel." *Id.*, at 336. The majority also held that the provision was a violation of the *Equal Protection Clause of the Fourteenth* [***609] *Amendment* because the denial of relief to those resident in the State for less than a year is not based on any permissible purpose but is solely designed, as "Connecticut states quite frankly," "to protect its fisc by discouraging entry of those who come needing relief." *Id.*, at 336-337. We noted probable jurisdiction. 389 U.S. 1032 (1968).

² Conn. Gen. Stat. Rev. § 17-2d (1965 Supp.), now § 17-2c, provides:

"When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under chapter 301 or general assistance under part I of chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for aid to

dependent children shall not continue beyond the maximum federal residence requirement."

An exception is made for those persons who come to Connecticut with a bona fide job offer or are self-supporting upon arrival in the State and for three months thereafter. 1 Conn. Welfare Manual, c. II, §§ 219.1-219.2 (1966).

In No. 33, there are four appellees. Three of them -- appellees Harrell, Brown, and Legrant -- applied for and were denied AFDC aid. The fourth, appellee Barley, applied for and was denied benefits under the program for Aid to the Permanently and Totally Disabled. The denial in each case was on the ground that the applicant had not resided in the District of Columbia for one year [*624] immediately preceding the filing of her application, as required by § 3-203 of the *District of Columbia Code*.³

³ D. C. Code Ann. § 3-203 (1967) provides:

"Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter." See D. C. Handbook of Pub. Assistance Policies and Procedures, HPA-2, EL 9.1, I, III (1966) (hereinafter cited as D. C. Handbook).

Appellee [**1326] Minnie Harrell, now deceased, had moved with her three children from New York to Washington in September 1966. She suffered from cancer and moved to be near members of her family who lived in Washington.

Appellee Barley, a former resident of the District of Columbia, returned to the District in March 1941 and was committed a month later to St. Elizabeths Hospital as mentally ill. She has remained in that hospital ever since. She was deemed eligible for release in 1965, and a plan was made to transfer her from the hospital to a foster home. The plan depended, however, upon Mrs. Barley's obtaining welfare assistance for her support. Her

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application for assistance under the program for Aid to the Permanently and Totally Disabled was denied because her time spent in the hospital did not count in determining compliance with the one-year requirement.

Appellee Brown lived with her mother and two of her three children in Fort Smith, Arkansas. Her third child was living with appellee Brown's father in the District of Columbia. When her mother moved from Fort Smith to Oklahoma, appellee Brown, in February 1966, returned to the District of Columbia where she had lived as a child. Her application for AFDC assistance was approved insofar as it sought assistance for the child who [*625] had lived in the District with her father but was denied to the extent it sought assistance for the two other children.

Appellee Legrant moved with her two children from South Carolina to the District of Columbia in March 1967 after the death of her mother. She planned to live with a sister and brother in Washington. She was pregnant and in ill health when she applied for and was denied AFDC assistance in July 1967.

[***LEdHR1A] [1A]The several cases were consolidated [***610] for trial, and a three-judge District Court was convened. ⁴ The court, one judge dissenting, held § 3-203 unconstitutional. *279 F.Supp. 22 (1967)*. The majority rested its decision on the ground that the one-year requirement was unconstitutional as a denial of the right to equal protection secured by the *Due Process Clause of the Fifth Amendment*. We noted probable jurisdiction. *390 U.S. 940 (1968)*.

⁴ In *Ex parte Cogdell*, *342 U.S. 163 (1951)*, this Court remanded to the Court of Appeals for the District of Columbia Circuit to determine whether [***LEdHR1B] [1B]28 U. S. C. § 2282, requiring a three-judge court when the constitutionality of an Act of Congress is challenged, applied to Acts of Congress pertaining solely to the District of Columbia. The case was mooted below, and the question has never been expressly resolved. However, in *Berman v. Parker*, *348 U.S. 26 (1954)*, this Court heard an appeal from a three-judge court in a case involving the constitutionality of a District of Columbia statute. Moreover, three-judge district courts in the District of Columbia have continued to hear cases involving such statutes. See, e. g., *Hobson v. Hansen*, *265 F.Supp. 902 (1967)*.

Section 2282 [HN1] requires a three-judge court to hear a challenge to the constitutionality of "any Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia.

In No. 34, there are two appellees, Smith and Foster, who were denied AFDC aid on the sole ground that they had not been residents of Pennsylvania for a year prior to their applications as required by § 432 (6) of the [*626] Pennsylvania [**1327] Welfare Code. ⁵ Appellee Smith and her five minor children moved in December 1966 from Delaware to Philadelphia, Pennsylvania, where her father lived. Her father supported her and her children for several months until he lost his job. Appellee then applied for AFDC assistance and had received two checks when the aid was terminated. Appellee Foster, after living in Pennsylvania from 1953 to 1965, had moved with her four children to South Carolina to care for her grandfather and invalid grandmother and had returned to Pennsylvania in 1967. A three-judge District Court for the Eastern District of Pennsylvania, one judge dissenting, declared § 432 (6) unconstitutional. *277 F.Supp. 65 (1967)*. The majority held that the classification established by the waiting-period requirement is "without rational basis and without legitimate purpose or function" and therefore a violation of the *Equal Protection Clause*. *Id.*, at 67. The majority noted further that if the purpose of the statute was "to erect a barrier against the movement of indigent persons into the State or to [*627] effect their prompt [***611] departure after they have gotten there," it would be "patently improper and its implementation plainly impermissible." *Id.*, at 67-68. We noted probable jurisdiction. *390 U.S. 940 (1968)*.

⁵ *Pa. Stat., Tit. 62, § 432 (6) (1968)*. See also *Pa. Pub. Assistance Manual §§ 3150-3151 (1962)*. *Section 432 (6)* provides:

"Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application; (ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year; (iii) is a married woman residing with a husband who meets the requirement prescribed in

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subclause (i) or (ii) of this clause; or (iv) is a child less than one year of age whose parent, or relative with whom he is residing, meets the requirement prescribed in subclause (i), (ii) or (iii) of this clause or resided in Pennsylvania for at least one year immediately preceding the child's birth. Needy persons who do not meet any of the requirements stated in this clause and who are transients or without residence in any state, may be granted assistance in accordance with rules, regulations, and standards established by the department."

II.

[**LEdHR2A] [2A] [**LEdHR3A] [3A] There is no dispute that the effect of the waiting-period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist -- food, shelter, and other necessities of life. In each case, the District Court found that appellees met the test for residence in their jurisdictions, as well as all other eligibility requirements except the requirement of residence for a full year prior to their applications. On reargument, appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws.⁶ We agree. The interests which appellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.

⁶ [**LEdHR3B] [3B]This [HN2] constitutional challenge cannot be answered by the argument that public assistance benefits are a "privilege" and not a "right." See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

III.

[**1328] Primarily, appellants justify the waiting-period requirement as a protective device to preserve the fiscal integrity of state public assistance programs. It is asserted that people who require welfare

assistance during their first [*628] year of residence in a State are likely to become continuing burdens on state welfare programs. Therefore, the argument runs, if such people can be deterred from entering the jurisdiction by denying them welfare benefits during the first year, state programs to assist long-time residents will not be impaired by a substantial influx of indigent newcomers.⁷

⁷ The waiting-period requirement has its antecedents in laws prevalent in England and the American Colonies centuries ago which permitted the ejection of individuals and families if local authorities thought they might become public charges. For example, the preamble of the English Law of Settlement and Removal of 1662 expressly recited the concern, also said to justify the three statutes before us, that large numbers of the poor were moving to parishes where more liberal relief policies were in effect. See generally Coll, *Perspectives in Public Welfare: The English Heritage*, 4 *Welfare in Review*, No. 3, p. 1 (1966). The 1662 law and the earlier Elizabethan Poor Law of 1601 were the models adopted by the American Colonies. Newcomers to a city, town, or county who might become public charges were "warned out" or "passed on" to the next locality. Initially, the funds for welfare payments were raised by local taxes, and the controversy as to responsibility for particular indigents was between localities in the same State. As States -- first alone and then with federal grants -- assumed the major responsibility, the contest of nonresponsibility became interstate.

There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions. In the Congress, sponsors of federal legislation to eliminate [**612] all residence requirements have been consistently opposed by representatives of state and local welfare agencies who have stressed the fears of the States that elimination of the requirements would result in a heavy influx of individuals into States providing the most generous benefits. See, e. g., Hearings on H. R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 309-310, 644 (1962); Hearings on H. R. 6000 before the Senate Committee on Finance, 81st Cong., [*629] 2d Sess., 324-327 (1950). The sponsor of the Connecticut requirement said in its support: "I doubt that Connecticut can and should continue to allow

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unlimited migration into the state on the basis of offering instant money and permanent income to all who can make their way to the state regardless of their ability to contribute to the economy." H. B. 82, Connecticut General Assembly House Proceedings, February Special Session, 1965, Vol. II, pt. 7, p. 3504. In Pennsylvania, shortly after the enactment of the one-year requirement, the Attorney General issued an opinion construing the one-year requirement strictly because "any other conclusion would tend to attract the dependents of other states to our Commonwealth." 1937-1938 Official Opinions of the Attorney General, No. 240, p. 110. In the District of Columbia case, the constitutionality of § 3-203 was frankly defended in the District Court and in this Court on the ground that it is designed to protect the jurisdiction from an influx of persons seeking more generous public assistance than might be available elsewhere.

[**LEdHR4A] [4A]We do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute. But **1329 the purpose of [HN3] inhibiting migration by needy persons into the State is constitutionally impermissible.

[**LEdHR5] [5]This Court long ago recognized that [HN4] the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That *630 proposition was early stated by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492 (1849):

[HN5] "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."

[**LEdHR6] [6] We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. ⁸ It suffices [**613] that, as MR. JUSTICE STEWART said for the Court in *United States v. Guest*, 383 U.S. 745, 757-758 (1966):

[HN6] "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

". . . The right finds no explicit mention in the Constitution. The reason, it has been suggested, is [*631] that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, [HN7] freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

⁸ In *Corfield v. Coryell*, 6 F. Cas. 546, 552 (No. 3230) (C. C. E. D. Pa. 1825), *Paul v. Virginia*, 8 Wall. 168, 180 (1869), and *Ward v. Maryland*, 12 Wall. 418, 430 (1871), [HN8] the right to travel interstate was grounded upon the Privileges and Immunities Clause of Art. IV, § 2. See also *Slaughter-House Cases*, 16 Wall. 36, 79 (1873); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908). In *Edwards v. California*, 314 U.S. 160, 181, 183-185 (1941) (DOUGLAS and JACKSON, JJ., concurring), and *Twining v. New Jersey*, *supra*, reliance was placed on the Privileges and Immunities Clause of the *Fourteenth Amendment*. See also *Crandall v. Nevada*, 6 Wall. 35 (1868). In *Edwards v. California*, *supra*, and the *Passenger Cases*, 7 How. 283 (1849), a *Commerce Clause* approach was employed.

See also *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500, 505-506 (1964); *Zemel v. Rusk*, 381 U.S. 1, 14 (1965), where the freedom of Americans to travel outside the country was grounded upon the

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Due Process Clause of the Fifth Amendment.

[**LEdHR4B] [4B] [**LEdHR7] [7] Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. [HN9] If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *United States v. Jackson*, 390 U.S. 570, 581 (1968).

[**LEdHR8] [8] Alternatively, appellants argue that even if it is impermissible for a State to attempt to deter the entry of all indigents, the challenged classification may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits. We observe first that none of the statutes before us is [**1330] tailored to serve that objective. Rather, the class of barred newcomers is all-inclusive, lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. In actual operation, therefore, the three statutes enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption.

More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not [*632] take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State's public [**614] assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.

[**LEdHR9] [9] [**LEdHR10] [10] Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes.

We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. If the argument is based on contributions made in the past by the long-term residents, there is some question, as a factual matter, whether this argument is applicable in Pennsylvania where the record suggests that some 40% of those denied public assistance because of the waiting period had lengthy prior residence in the State.⁹ But we need not rest on the particular facts of these cases. Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its [*633] citizens. [HN10] The *Equal Protection Clause* prohibits such an apportionment of state services¹⁰.

9 Furthermore, the contribution rationale can hardly explain why the District of Columbia and Pennsylvania bar payments to children who have not lived in the jurisdiction for a year regardless of whether the parents have lived in the jurisdiction for that period. See *D. C. Code* § 3-203; *D. C. Handbook*, EL 9.1, I (C) (1966); *Pa. Stat., Tit. 62, § 432 (6)* (1968). Clearly, the children who were barred would not have made a contribution during that year.

10 We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions.

[**LEdHR11] [11] [**LEdHR12] [12] We recognize that [HN11] a State has a valid interest in preserving the fiscal integrity of its programs. It [HN12] may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.¹¹

11 In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), New Jersey attempted to reduce expenditures by requiring prisoners who took an unsuccessful appeal to reimburse the State out of their

institutional earnings for the cost of furnishing a trial transcript. This Court held the New Jersey statute unconstitutional because it did not require similar repayments from unsuccessful appellants given a suspended sentence, placed on probation, or sentenced only to a fine. There was no rational basis for the distinction between unsuccessful appellants who were in prison and those who were not.

In [**1331] sum, [HN13] neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.

IV.

Appellants next advance as justification certain administrative and related governmental objectives allegedly served by the waiting-period requirement.¹² They argue [*634] that the [***615] requirement (1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages early entry of new residents into the labor force.

¹² Appellant in No. 9, the Connecticut Welfare Commissioner, disclaims any reliance on this contention. In No. 34, the District Court found as a fact that the Pennsylvania requirement served none of the claimed functions. *277 F.Supp. 65, 68 (1967)*.

[***LEdHR13] [13] [***LEdHR14] [14]At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But [HN14] in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

[***LEdHR15] [15]The argument that the waiting-period requirement facilitates budget predictability is wholly unfounded. The records in all three cases are utterly devoid of evidence that either State or the District of Columbia in fact uses the one-year requirement as a means to predict the number of people who will require assistance in the budget year. None of the appellants takes a census of new residents or collects any other data that would reveal the number of newcomers in the State less than a year. [*635] Nor are new residents required to give advance notice of their need for welfare assistance.¹³ Thus, the welfare authorities cannot know how many new residents come into the jurisdiction in any year, much less how many of them will require public assistance. In these circumstances, there is simply no basis for the claim that the one-year waiting requirement serves the purpose of making the welfare budget more predictable. [**1332] In Connecticut and Pennsylvania the irrelevance of the one-year requirement to budgetary planning is further underscored by the fact that temporary, partial assistance is given to some new residents¹⁴ and full assistance is given to other new residents under reciprocal agreements.¹⁵ Finally, the claim that a one-year waiting requirement [***616] is used for planning purposes is plainly belied by the fact that the requirement is not also imposed on applicants who are long-term residents, the group that receives the bulk of welfare payments. In short, the States rely on methods other than the one-year requirement to make budget estimates. In No. 34, the Director of the Pennsylvania Bureau of Assistance Policies and Standards testified that, based on experience in Pennsylvania and elsewhere, her office had already estimated how much the elimination of the one-year requirement would cost and that the estimates of costs of other changes in regulations "have proven exceptionally accurate."

¹³ Of course, such advance notice would inevitably be unreliable since some who registered would not need welfare a year later while others who did not register would need welfare.

¹⁴ See Conn. Gen. Stat. Rev. § 17-2d, now § 17-2c, and Pa. Pub. Assistance Manual § 3154

394 U.S. 618, *635; 89 S. Ct. 1322, **1332;
22 L. Ed. 2d 600, ***616; 1969 U.S. LEXIS 3190

(1968).

15 Both Connecticut and Pennsylvania have entered into open-ended interstate compacts in which they have agreed to eliminate the durational requirement for anyone who comes from another State which has also entered into the compact. Conn. Gen. Stat. Rev. § 17-21a (1968); Pa. Pub. Assistance Manual § 3150, App. I (1966).

[*636] [***LEdHR16] [16]The argument that the waiting period serves as an administratively efficient rule of thumb for determining residency similarly will not withstand scrutiny. The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance under these three statutes, and the facts relevant to the determination of each are directly examined by the welfare authorities. ¹⁶ Before granting an application, the welfare authorities investigate the applicant's employment, housing, and family situation and in the course of the inquiry necessarily learn the facts upon which to determine whether the applicant is a resident. ¹⁷

16 [HN15] In Pennsylvania, the one-year waiting-period requirement, but not the residency requirement, is waived under reciprocal agreements. *Pa. Stat., Tit. 62, § 432 (6)* (1968); Pa. Pub. Assistance Manual § 3151.21 (1962).

1 Conn. Welfare Manual, c. II, § 220 (1966), provides that "residence within the state shall mean that the applicant is living in an established place of abode and the plan is to remain." A person who meets this requirement does not have to wait a year for assistance if he entered the State with a bona fide job offer or with sufficient funds to support himself without welfare for three months. *Id.*, at § 219.2.

HEW Handbook of Pub. Assistance Administration, pt. IV, § 3650 (1946), clearly distinguishes between residence and duration of residence. It defines residence, as is conventional, in terms of intent to remain in the jurisdiction, and it instructs interviewers that residence and length of residence "are two distinct aspects . . ."

¹⁷ See, e. g., D. C. Handbook, chapters on Eligibility Payments, Requirements, Resources, and Reinvestigation for an indication of how thorough these investigations are. See also 1

Conn. Welfare Manual, c. I (1967); Pa. Pub. Assistance Manual §§ 3170-3330 (1962).

The Department of Health, Education, and Welfare has proposed the elimination of individual investigations, except for spot checks, and the substitution of a declaration system, under which the "agency accepts the statements of the applicant for or recipient of assistance, about facts that are within his knowledge and competence . . . as a basis for decisions regarding his eligibility and extent of entitlement." HEW, Determination of Eligibility for Public Assistance Programs, *33 Fed. Reg. 17189* (1968). See also Hoshino, Simplification of the Means Test and its Consequences, *41 Soc. Serv. Rev. 237, 241-249* (1967); Burns, What's Wrong With Public Welfare?, *36 Soc. Serv. Rev. 111, 114-115* (1962). Presumably the statement of an applicant that he intends to remain in the jurisdiction would be accepted under a declaration system.

[*637] [***LEdHR17] [17]Similarly, [**1333] [HN16] there is no need for a State to use the one-year waiting period as a safeguard against fraudulent receipt of benefits; ¹⁸ for less drastic means are available, and are employed, to minimize that hazard. Of course, [HN17] a State has a valid [***617] interest in preventing fraud by any applicant, whether a newcomer or a long-time resident. It is not denied, however, that the investigations now conducted entail inquiries into facts relevant to that subject. In addition, cooperation among state welfare departments is common. The District of Columbia, for example, provides interim assistance to its former residents who have moved to a State which has a waiting period. As a matter of course, District officials send a letter to the welfare authorities in the recipient's new community "to request the information needed to continue assistance." ¹⁹ A like procedure would be an effective safeguard against the hazard of double payments. Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year.

¹⁸ The unconcern of Connecticut and Pennsylvania with the one-year requirement as a means of preventing fraud is made apparent by the waiver of the requirement in reciprocal

agreements with other States. See n. 15, *supra*.
19 D. C. Handbook, RV 2.1, I, II (B) (1967).
See also Pa. Pub. Assistance Manual § 3153
(1962).

[***LEdHR18] [18] Pennsylvania suggests that the one-year waiting period is justified as a means of encouraging new residents to join the labor force promptly. But this logic would also require a similar waiting period for long-term residents of the State. [HN18] A state purpose to encourage employment [*638] provides no rational basis for imposing a one-year waiting-period restriction on new residents only.

[***LEdHR2B] [2B] [***LEdHR19] [19] [***LEdHR20] [20] We conclude therefore that appellants in these cases do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.²⁰ But, of course, the traditional criteria do not apply in these cases. Since the [HN19] classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting-period requirement clearly violates the *Equal Protection Clause*.²¹

20 [HN20] Under the traditional standard, equal protection is denied only if the classification is "without any reasonable basis," *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); see also *Flemming v. Nestor*, 363 U.S. 603 (1960).

21 We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

V.

Connecticut and Pennsylvania argue, however, that the constitutional challenge to the waiting-period requirements must fail because Congress expressly

approved the imposition of the requirement by the States as part of the jointly funded AFDC program.

Section 402 (b) of the Social Security Act of 1935, as amended, 42 U. S. C. § 602 (b), provides that:

[HN21] "The Secretary shall approve any [state assistance] plan which fulfills the conditions specified in subsection [*639] (a) of this section, except that he [**1334] shall not approve any plan which imposes as a condition of eligibility for aid to families with [***618] dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

[***LEdHR21] [21] On its face, the statute [HN22] does not approve, much less prescribe, a one-year requirement. It merely directs the Secretary of Health, Education, and Welfare not to disapprove plans submitted by the States because they include such a requirement.²² The suggestion that Congress enacted that directive to encourage state participation in the AFDC program is completely refuted by the legislative history of the section. That history discloses that Congress enacted the directive to curb hardships resulting from lengthy residence requirements. Rather than constituting an approval or a prescription of the requirement in state plans, the directive was the means chosen by Congress to deny federal funding to any State which persisted in stipulating excessive residence requirements as a condition of the payment of benefits.

22 As of 1964, 11 jurisdictions imposed no residence requirement whatever for AFDC assistance. They were Alaska, Georgia, Hawaii, Kentucky, New Jersey, New York, Rhode Island, Vermont, Guam, Puerto Rico, and the Virgin Islands. See HEW, Characteristics of State Public Assistance Plans under the Social Security Act (Pub. Assistance Rep. No. 50, 1964 ed.).

One year before the Social Security Act was passed, 20 of the 45 States which had aid to dependent children programs required residence in the State for two or more years. Nine other States required two or more years of [*640] residence in a particular town or county. And 33

394 U.S. 618, *640; 89 S. Ct. 1322, **1334;
22 L. Ed. 2d 600, ***LEdHR21; 1969 U.S. LEXIS 3190

jurisdictions required at least one year of residence in a particular town or county.²³ Congress determined to combat this restrictionist policy. Both the House and Senate Committee Reports expressly stated that the objective of § 402 (b) was to compel "liberality of residence requirement."²⁴ Not a single instance can be found in the debates or committee reports supporting the contention that § 402 (b) was enacted to encourage participation by the States in the AFDC program. To the contrary, those few who addressed themselves to waiting-period requirements emphasized that participation would depend on a State's repeal or drastic revision of existing requirements. A congressional demand on 41 States to repeal or drastically revise offending statutes is hardly a way to enlist their cooperation.²⁵

23 Social Security Board, *Social Security in America* 235-236 (1937).

24 H. R. Rep. No. 615, 74th Cong., 1st Sess., 24; S. Rep. No. 628, 74th Cong., 1st Sess., 35. Furthermore, the House Report cited President Roosevelt's statement in his Social Security Message that "People want decent homes to live in; they want to locate them where they can engage in productive work . . ." H. R. Rep., *supra*, at 2. Clearly this was a call for greater freedom of movement.

In addition to the statement in the above Committee report, see the remarks of Rep. Doughton (floor manager of the Social Security bill in the House) and Rep. Vinson. 79 Cong. Rec. 5474, 5602-5603 (1935). These remarks were made in relation to the waiting-period requirements for old-age assistance, but they apply equally to the AFDC program.

25 Section 402 (b) required the repeal of 30 state statutes which imposed too long a waiting period in the State or particular town or county and 11 state statutes (as well as the Hawaii statute) which required residence in a particular town or county. See Social Security Board, *Social Security in America* 235-236 (1937).

It is apparent that Congress was not intimating any view of the constitutionality of a one-year limitation. The constitutionality of any scheme of federal social security legislation was a matter of doubt at that time in light of the decision

in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Throughout the House debates congressmen discussed the constitutionality of the fundamental taxing provisions of the Social Security Act, see, e. g., 79 Cong. Rec. 5783 (1935) (remarks of Rep. Cooper), but not once did they discuss the constitutionality of § 402 (b).

[*641] [***LEdHR22] [22]But [***619] [**1335] even if we were to assume, *arguendo*, that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself § 402 (b) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.

[***LEdHR23] [23] [***LEdHR24] [24] [***LEdHR25] [25]Finally, even if it could be argued that the constitutionality of § 402 (b) is somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional. [HN23] Congress may not authorize the States to violate the *Equal Protection Clause*. Perhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But could it seriously be contended that Congress would be constitutionally justified in such authorization by the need to secure state cooperation? [HN24] Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the *Equal Protection Clause*. *Katzenbach v. Morgan*, 384 U.S. 641, 651, n. 10 (1966).

VI.

[***LEdHR2C] [2C] [***LEdHR26] [26]The waiting-period requirement in the District of Columbia Code involved in No. 33 is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the *Due* [*642] *Process Clause of the Fifth Amendment*. "[HN25] While the *Fifth Amendment* contains no *equal protection clause*, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). For the reasons we have stated in invalidating the Pennsylvania

and Connecticut provisions, the District of Columbia provision is also invalid -- [HN26] the *Due Process Clause of the Fifth Amendment* prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed.

Accordingly, the judgments in Nos. 9, 33, and 34 are

Affirmed.

CONCUR BY: STEWART

CONCUR

MR. JUSTICE STEWART, concurring.

In joining the opinion of the Court, I add a word in response to the dissent of my Brother HARLAN, who, I think, has quite misapprehended [***620] what the Court's opinion says.

The Court today does *not* "pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . ." To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.

"The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized." *United States v. Guest*, 383 U.S. 745, 757. This constitutional right, which, of course, includes the right of "entering and abiding in any State in [**1336] the Union," *Truax v. Raich*, 239 U.S. 33, 39, is *not* a mere conditional liberty subject to regulation and control under conventional [*643] due process or equal protection standards. ¹ "The right to travel freely from State to State finds constitutional protection that is quite independent of the *Fourteenth Amendment*." *United States v. Guest*, *supra*, at 760, n. 17. ² As we made clear in *Guest*, it is a right broadly assertable against private interference as well as governmental action. ³ Like the right of association, *NAACP v. Alabama*, 357 U.S. 449, it is a virtually unconditional personal right, ⁴ guaranteed by the Constitution to us all.

¹ By contrast, the "right" of international travel has been considered to be no more than an aspect

of the "liberty" protected by the *Due Process Clause of the Fifth Amendment*. *Kent v. Dulles*, 357 U.S. 116, 125; *Aptheker v. Secretary of State*, 378 U.S. 500, 505-506. As such, this "right," the Court has held, can be regulated within the bounds of due process. *Zemel v. Rusk*, 381 U.S. 1.

² The constitutional right of interstate travel was fully recognized long before adoption of the *Fourteenth Amendment*. See 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."

³ MR. JUSTICE HARLAN was alone in dissenting from this square holding in *Guest*. *Supra*, at 762.

⁴ The extent of emergency governmental power temporarily to prevent or control interstate travel, *e. g.*, to a disaster area, need not be considered in these cases.

It follows, as the Court says, that "the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible." And it further follows, as the Court says, that any *other* purposes offered in support of a [*644] law that so clearly impinges upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest. This is necessarily true whether the impinging law be a classification statute to be tested against the *Equal Protection Clause*, or a state or federal regulatory law, to be tested against the *Due Process Clause of the Fourteenth or Fifth Amendment*. As MR. JUSTICE HARLAN wrote for the Court more than a decade ago, "To justify the deterrent effect . . . on the free exercise . . . of their constitutionally protected right . . . a ' . . . subordinating interest of the State must be compelling.'" *NAACP v. [***621] Alabama, supra*, at 463.

The Court today, therefore, is not "contriving new constitutional principles." It is deciding these cases under

the aegis of established constitutional law.⁵

5 It is to be remembered that the Court today *affirms* the judgments of three different federal district courts, and that at least four other federal courts have reached the same result. See *ante*, at 622, n. 1.

DISSENT BY: WARREN; HARLAN

DISSENT

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK joins, dissenting.

In my opinion the issue before us can be simply stated: May Congress, acting under one of its enumerated powers, impose minimal nationwide residence requirements or authorize the States to do so? Since I believe that Congress does have this power and has constitutionally exercised it in these cases, I must dissent.

[**1337] I.

The Court insists that § 402 (b) of the Social Security Act "does not approve, much less prescribe, a one-year requirement." *Ante*, at 639. From its reading of the legislative history it concludes that Congress did not intend to authorize the States to impose residence requirements. [*645] An examination of the relevant legislative materials compels, in my view, the opposite conclusion, *i. e.*, Congress intended to authorize state residence requirements of up to one year.

The Great Depression of the 1930's exposed the inadequacies of state and local welfare programs and dramatized the need for federal participation in welfare assistance. See J. Brown, *Public Relief 1929-1939* (1940). Congress determined that the Social Security Act, containing a system of unemployment and old-age insurance as well as the categorical assistance programs now at issue, was to be a major step designed to ameliorate the problems of economic insecurity. The primary purpose of the categorical assistance programs was to encourage the States to provide new and greatly enhanced welfare programs. See, *e. g.*, S. Rep. No. 628, 74th Cong., 1st Sess., 5-6, 18-19 (1935); H. R. Rep. No. 615, 74th Cong., 1st Sess., 4 (1935). Federal aid would mean an immediate increase in the amount of benefits

paid under state programs. But federal aid was to be conditioned upon certain requirements so that the States would remain the basic administrative units of the welfare system and would be unable to shift the welfare burden to local governmental units with inadequate financial resources. See Advisory Commission on Intergovernmental Relations, *Statutory and Administrative Controls Associated with Federal Grants for Public Assistance* 9-26 (1964). Significantly, the categories of assistance programs created by the Social Security Act corresponded to those already in existence in a number of States. See J. Brown, *Public Relief 1929-1939*, at 26-32. Federal entry into the welfare area can therefore be best described as a major experiment in "cooperative federalism," *King v. Smith*, 392 U.S. 309, 317 (1968), combining state and federal participation to solve the problems of the depression.

[*646] Each of the categorical assistance programs contained in the Social Security Act allowed participating States to impose residence requirements as a condition of eligibility for benefits. Congress also imposed a [***622] one-year requirement for the categorical assistance programs operative in the District of Columbia. See H. R. Rep. No. 891, 74th Cong., 1st Sess. (1935) (old-age pensions); H. R. Rep. No. 201, 74th Cong., 1st Sess. (1935) (aid to the blind). The congressional decision to allow the States to impose residence requirements and to enact such a requirement for the District was the subject of considerable discussion. Both those favoring lengthy residence requirements¹ and those opposing all requirements² pleaded their case during the congressional hearings on the Social Security Act. Faced with the competing claims of States which feared that abolition of residence requirements would result in an influx of persons seeking higher welfare payments and of organizations which stressed the unfairness of such requirements to transient workers forced by the economic dislocation of the depression to seek work far from their homes, Congress chose a middle course. It required those States seeking federal grants for categorical assistance to reduce their existing residence requirements to what Congress viewed as an acceptable maximum. However, [**1338] Congress accommodated state fears by allowing the States to retain minimal residence requirements.

1 See, *e. g.*, Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831-832, 861-871 (1935).

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2 See, e. g., Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522-540, 643, 656 (1935).

Congress quickly saw evidence that the system of welfare assistance contained in the Social Security Act including residence requirements was operating to encourage States to expand and improve their categorical [*647] assistance programs. For example, the Senate was told in 1939:

"The rapid expansion of the program for aid to dependent children in the country as a whole since 1935 stands in marked contrast to the relatively stable picture of mothers' aid in the preceding 4-year period from 1932 through 1935. The extension of the program during the last 3 years is due to Federal contributions which encouraged the matching of State and local funds." S. Rep. No. 734, 76th Cong., 1st Sess., 29 (1939).

The trend observed in 1939 continued as the States responded to the federal stimulus for improvement in the scope and amount of categorical assistance programs. See Wedemeyer & Moore, *The American Welfare System*, 54 Calif. L. Rev. 326, 347-356 (1966). Residence requirements have remained a part of this combined state-federal welfare program for 34 years. Congress has adhered to its original decision that residence requirements were necessary in the face of repeated attacks against these requirements.³ The decision to retain residence requirements, combined with Congress' continuing desire to encourage wider state participation in categorical assistance programs, indicates to me that Congress has authorized the imposition by the States of residence requirements.

3 See e. g., Hearings on H. R. 10032 before the House Committee on Ways and Means, 87th Cong., 2d Sess., 355, 385-405, 437 (1962); Hearings on H. R. 6000 before the Senate Committee on Finance, 81st Cong., 2d Sess., 142-143 (1950).

Congress has imposed a residence [***623] requirement in the District of Columbia and authorized the States to impose similar requirements. The issue before us must therefore be framed in terms of whether Congress may [*648] create minimal residence requirements, not whether the States, acting alone, may do so. See *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946); *In re Rahrer*, 140 U.S. 545 (1891). Appellees insist that a congressionally mandated residence requirement would violate their right to travel. The import of their contention is that Congress, even under its "plenary"⁴ power to control interstate commerce, is constitutionally prohibited from imposing residence requirements. I reach a contrary conclusion for I am convinced that the extent of the burden on interstate travel when compared with the justification for its imposition requires the Court to uphold this exertion of federal power.

4 See e. g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256-260 (1964).

Congress, pursuant to its commerce power, has enacted a variety of restrictions upon interstate travel. It has taxed air and rail fares and the gasoline needed to power cars and trucks which move interstate. 26 U. S. C. § 4261 (air fares); 26 U. S. C. § 3469 (1952 ed.), repealed in part by Pub. L. 87-508, § 5 (b), 76 Stat. 115 (rail fares); 26 U. S. C. § 4081 (gasoline). Many of the federal safety regulations of common carriers which cross state lines burden the right to travel. 45 U. S. C. §§ 1-43 (railroad safety appliances); 49 U. S. C. § 1421 (air safety regulations). And Congress has prohibited by criminal statute interstate travel for certain purposes. E. g., 18 U. S. C. § 1952. Although these restrictions operate as a limitation upon free [**1339] interstate movement of persons, their constitutionality appears well settled. See *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 41 (1916); *Southern R. Co. v. United States*, 222 U.S. 20 (1911); *United States v. Zizzo*, 338 F.2d 577 (C. A. 7th Cir., 1964), cert. denied, 381 U.S. 915 (1965). As the Court observed in *Zemel v. Rusk*, 381 U.S. 1, 14 (1965), "the fact that a liberty cannot be inhibited without due [*649] process of law does not mean that it can under no circumstances be inhibited."

The Court's right-to-travel cases lend little support to the view that congressional action is invalid merely because it burdens the right to travel. Most of our cases fall into two categories: those in which state-imposed

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restrictions were involved, see, e. g., *Edwards v. California*, 314 U.S. 160 (1941); *Crandall v. Nevada*, 6 Wall. 35 (1868), and those concerning congressional decisions to remove impediments to interstate movement, see, e. g., *United States v. Guest*, 383 U.S. 745 (1966). Since the focus of our inquiry must be whether Congress would exceed permissible bounds by imposing residence requirements, neither group of cases offers controlling principles.

In only three cases have we been confronted with an assertion that Congress has impermissibly burdened the right to travel. *Kent v. Dulles*, 357 U.S. 116 (1958), did invalidate a burden on the right to travel; [***624] however, the restriction was voided on the nonconstitutional basis that Congress did not intend to give the Secretary of State power to create the restriction at issue. *Zemel v. Rusk*, *supra*, on the other hand, sustained a flat prohibition of travel to certain designated areas and rejected an attack that Congress could not constitutionally impose this restriction. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), is the only case in which this Court invalidated on a constitutional basis a congressionally imposed restriction. *Aptheker* also involved a flat prohibition but in combination with a claim that the congressional restriction compelled a potential traveler to choose between his right to travel and his *First Amendment* right of freedom of association. It was this Hobson's choice, we later explained, which forms the rationale of *Aptheker*. See *Zemel v. Rusk*, *supra*, at 16. *Aptheker* thus contains two characteristics distinguishing it from the appeals now before the Court: a combined [*650] infringement of two constitutionally protected rights and a flat prohibition upon travel. Residence requirements do not create a flat prohibition, for potential welfare recipients may move from State to State and establish residence wherever they please. Nor is any claim made by appellees that residence requirements compel them to choose between the right to travel and another constitutional right.

Zemel v. Rusk, the most recent of the three cases, provides a framework for analysis. The core inquiry is "the extent of the governmental restriction imposed" and the "extent of the necessity for the restriction." *Id.*, at 14. As already noted, travel itself is not prohibited. Any burden inheres solely in the fact that a potential welfare recipient might take into consideration the loss of welfare benefits for a limited period of time if he changes his residence. Not only is this burden of uncertain degree,⁵

but appellees themselves assert [**1340] there is evidence that few welfare recipients have in fact been deterred by residence requirements. See Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 Calif. L. Rev. 567, 615-618 (1966); Note, *Residence Requirements in State Public Welfare Statutes*, 51 Iowa L. Rev. 1080, 1083-1085 (1966).

5 The burden is uncertain because indigents who are disqualified from categorical assistance by residence requirements are not left wholly without assistance. All of the appellees in these cases found alternative sources of assistance after their disqualification.

The insubstantiality of the restriction imposed by residence requirements must then be evaluated in light of the possible congressional reasons for such requirements. See, e. g., *McGowan v. Maryland*, 366 U.S. 420, 425-427 (1961). One fact which does emerge with clarity from the legislative history is Congress' belief that a program of cooperative federalism combining federal aid with [*651] enhanced state participation would result in an increase in the scope of welfare programs and level of benefits. Given the apprehensions of many States that an increase in benefits without minimal residence requirements would result in an inability to provide an adequate welfare system, Congress deliberately adopted the intermediate course of a cooperative program. Such a program, Congress believed, [***625] would encourage the States to assume greater welfare responsibilities and would give the States the necessary financial support for such an undertaking. Our cases require only that Congress have a rational basis for finding that a chosen regulatory scheme is necessary to the furtherance of interstate commerce. See, e. g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). Certainly, a congressional finding that residence requirements allowed each State to concentrate its resources upon new and increased programs of rehabilitation ultimately resulting in an enhanced flow of commerce as the economic condition of welfare recipients progressively improved is rational and would justify imposition of residence requirements under the *Commerce Clause*. And Congress could have also determined that residence requirements fostered personal mobility. An individual no longer dependent upon welfare would be presented with an unfettered range of choices so that a decision to migrate could be made

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without regard to considerations of possible economic dislocation.

Appellees suggest, however, that Congress was not motivated by rational considerations. Residence requirements are imposed, they insist, for the illegitimate purpose of keeping poor people from migrating. Not only does the legislative history point to an opposite conclusion, but it also must be noted that "into the motives which induced members of Congress to [act] . . . this Court may not enquire." *Arizona v. California*, 283 U.S. 423, 455 (1931). We do not attribute [*652] an impermissible purpose to Congress if the result would be to strike down an otherwise valid statute. *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *McCray v. United States*, 195 U.S. 27, 56 (1904). Since the congressional decision is rational and the restriction on travel insubstantial, I conclude that residence requirements can be imposed by Congress as an exercise of its power to control interstate commerce consistent with the constitutionally guaranteed right to travel.

Without an attempt to determine whether any of Congress' enumerated powers would sustain residence requirements, the Court holds that congressionally imposed requirements violate the *Due Process Clause of the Fifth Amendment*. It thus suggests that, even if residence requirements would be a permissible exercise of the commerce power, they are "so unjustifiable as to be violative of due process." *Ante*, at 642. While the reasons for this conclusion are not fully explained, the Court apparently [**1341] believes that, in the words of *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), residence requirements constitute "an arbitrary deprivation" of liberty.

If this is the import of the Court's opinion, then it seems to have departed from our precedents. We have long held that there is no requirement of uniformity when Congress acts pursuant to its commerce power. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 401 (1940); *Currin v. Wallace*, 306 U.S. 1, 13-14 [***626] (1939).⁶ I do not suggest that Congress is completely free when legislating under one of its enumerated powers to enact wholly arbitrary classifications, for *Bolling v. Sharpe*, *supra*, and *SSchneider v. Rusk*, 377 U.S. 163 (1964), [*653] counsel otherwise. Neither of these cases, however, is authority for invalidation of congressionally imposed residence requirements. The classification in *Bolling* required racial segregation in the public schools

of the District of Columbia and was thus based upon criteria which we subject to the most rigid scrutiny. *Loving v. Virginia*, 388 U.S. 1, 11 (1967). *Schneider* involved an attempt to distinguish between native-born and naturalized citizens solely for administrative convenience. By authorizing residence requirements Congress acted not to facilitate an administrative function but to further its conviction that an impediment to the commercial life of this Nation would be removed by a program of cooperative federalism combining federal contributions with enhanced state benefits. Congress, not the courts, is charged with determining the proper prescription for a national illness. I cannot say that Congress is powerless to decide that residence requirements would promote this permissible goal and therefore must conclude that such requirements cannot be termed arbitrary.

6 Some of the cases go so far as to intimate that at least in the area of taxation Congress is not inhibited by any problems of classification. See *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941); *Steward Machine Co. v. Davis*, 301 U.S. 548, 584 (1937); *LaBelle Iron Works v. United States*, 256 U.S. 377, 392 (1921).

The Court, after interpreting the legislative history in such a manner that the constitutionality of § 402 (b) is not at issue, gratuitously adds that § 402 (b) is unconstitutional. This method of approaching constitutional questions is sharply in contrast with the Court's approach in *Street v. New York*, *ante*, at 585-590. While in *Street* the Court strains to avoid the crucial constitutional question, here it summarily treats the constitutionality of a major provision of the Social Security Act when, given the Court's interpretation of the legislative materials, that provision is not at issue. Assuming that the constitutionality of § 402 (b) is properly treated by the Court, the cryptic footnote in *Katzenbach v. Morgan*, 384 U.S. 641, 651-652, n. 10 (1966), does not support its conclusion. Footnote 10 indicates that Congress is without power to undercut the equal-protection guarantee of racial equality in the guise of implementing [*654] the *Fourteenth Amendment*. I do not mean to suggest otherwise. However, I do not understand this footnote to operate as a limitation upon Congress' power to further the flow of interstate commerce by reasonable residence requirements. Although the Court dismisses § 402 (b) with the remark that Congress cannot authorize the States to violate equal

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protection, I believe that the dispositive issue is whether under its commerce power Congress can impose residence requirements.

[**1342] Nor can I understand the Court's implication, *ante*, at 638, n. 21, that other state residence requirements such as those employed in determining eligibility [***627] to vote do not present constitutional questions. Despite the fact that in *Drueding v. Devlin*, 380 U.S. 125 (1965), we affirmed an appeal from a three-judge District Court after the District Court had rejected a constitutional challenge to Maryland's one-year residence requirement for presidential elections, the rationale employed by the Court in these appeals would seem to require the opposite conclusion. If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote. There is nothing in the opinion of the Court to explain this dichotomy. In any event, since the constitutionality of a state residence requirement as applied to a presidential election is raised in a case now pending, *Hall v. Beals*, No. 950, 1968 Term, I would await that case for a resolution of the validity of state voting residence requirements.

III.

The era is long past when this Court under the rubric of due process has reviewed the wisdom of a congressional decision that interstate commerce will be fostered by the enactment of certain regulations. Compare [*655] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), with *United States v. Darby*, 312 U.S. 100 (1941). Speaking for the Court in *Helvering v. Davis*, 301 U.S. 619, 644 (1937), Mr. Justice Cardozo said of another section of the Social Security Act:

"Whether wisdom or unwisdom resides in the scheme of benefits set forth . . . is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."

I am convinced that Congress does have power to enact residence requirements of reasonable duration or to authorize the States to do so and that it has exercised this power.

The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored. I dissent.

MR. JUSTICE HARLAN, dissenting.

The Court today holds unconstitutional Connecticut, Pennsylvania, and District of Columbia statutes which restrict certain kinds of welfare benefits to persons who have lived within the jurisdiction for at least one year immediately preceding their applications. The Court has accomplished this result by an expansion of the comparatively new constitutional doctrine that some state statutes will be deemed to deny equal protection of the laws unless justified by a "compelling" governmental interest, and by holding that the *Fifth Amendment's Due Process Clause* imposes a similar limitation on federal enactments. Having decided that the "compelling interest" principle [*656] is applicable, the Court then finds that the governmental interests here asserted are either wholly impermissible or are not " [***628] compelling." For reasons which follow, I disagree both with the Court's result and with its reasoning.

I.

These three cases present two separate but related questions for decision. The [**1343] first, arising from the District of Columbia appeal, is whether Congress may condition the right to receive Aid to Families with Dependent Children (AFDC) and Aid to the Permanently and Totally Disabled in the District of Columbia upon the recipient's having resided in the District for the preceding year.¹ The second, presented in the Pennsylvania and Connecticut appeals, is whether a State may, with the approval of Congress, impose the same conditions with [*657] respect to eligibility for AFDC assistance.² In each instance, the welfare residence requirements are alleged to be unconstitutional on two grounds: *first*, because they impose an undue burden upon the constitutional right of welfare applicants to travel interstate; *second*, because they deny to persons who have recently moved interstate and would otherwise be eligible for welfare assistance the equal protection of the laws assured by the *Fourteenth Amendment* (in [***629] the state cases) or the analogous protection afforded by

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the *Fifth Amendment* (in the District of Columbia case). Since the Court basically relies upon the equal protection ground, I shall discuss it first.

1 Of the District of Columbia appellees, all sought AFDC assistance except appellee Barley, who asked for Aid to the Permanently and Totally Disabled. In *42 U. S. C. § 602 (b)*, Congress has authorized "States" (including the District of Columbia, see *42 U. S. C. § 1301 (a)(1)*) to require up to one year's immediately prior residence as a condition of eligibility for AFDC assistance. See n. 15, *infra*. In *42 U. S. C. §§ 1352 (b)(1)* and *1382 (b)(2)*, Congress has permitted "States" to condition disability payments upon the applicant's having resided in the State for up to five of the preceding nine years. However, *D. C. Code § 3-203* prescribes a one-year residence requirement for both types of assistance, so the question of the constitutionality of a longer required residence period is not before us.

Appellee Barley also challenged in the District Court the constitutionality of a District of Columbia regulation which provided that time spent in a District of Columbia institution as a public charge did not count as residence for purposes of welfare eligibility. The District Court held that the regulation must fall for the same reasons as the residence statute itself. Since I believe that the District Court erred in striking down the statute, and since the issue of the regulation's constitutionality has been argued in this Court only in passing, I would remand appellee Barley's cause for further consideration of that question.

2 I do not believe that the Pennsylvania appeal presents the additional question of the validity of a residence condition for a purely state-financed and state-authorized public assistance program. The Pennsylvania welfare eligibility provision, *Pa. Stat. Ann., Tit. 62, § 432* (1968), states:

"Except as hereinafter otherwise provided . . . , needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

"(1) Persons for whose assistance Federal financial participation is available to the

Commonwealth as . . . aid to families with dependent children, . . . and which assistance is not precluded by other provisions of law.

"(2) Other persons who are citizens of the United States

. . . .

"(6) Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application"

As I understand it, this statute initially divides Pennsylvania welfare applicants into two classes: (1) persons for whom federal financial assistance is available and not precluded by other provisions of federal law (if state law, including the residence requirement, were intended, the "Except as hereinafter otherwise provided" proviso at the beginning of the entire section would be surplusage); (2) other persons who are citizens. The residence requirement applies to both classes. However, since all of the Pennsylvania appellees clearly fall into the first or federally assisted class, there is no need to consider whether residence conditions may constitutionally be imposed with respect to the second or purely state-assisted class.

[*658] II.

[**1344] In upholding the equal protection argument,³ the Court has applied an equal protection doctrine of relatively recent vintage: the rule that statutory classifications which either are based upon certain "suspect" criteria or affect "fundamental rights" will be held to deny equal protection unless justified by a "compelling" governmental interest. See *ante*, at 627, 634, 638.

3 In characterizing this argument as one based on an alleged denial of equal protection of the laws, I do not mean to disregard the fact that this contention is applicable in the District of Columbia only through the terms of the *Due Process Clause of the Fifth Amendment*. Nor do I mean to suggest that these two constitutional phrases are "always interchangeable," see *Bolling*

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v. Sharpe, 347 U.S. 497, 499 (1954). In the circumstances of this case, I do not believe myself obliged to explore whether there may be any differences in the scope of the protection afforded by the two provisions.

The "compelling interest" doctrine, which today is articulated more explicitly than ever before, constitutes an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective.⁴ The "compelling interest" doctrine has two branches. The branch which requires that classifications based upon "suspect" criteria be supported by a compelling interest apparently had its genesis in cases involving racial classifications, which have, at least since *Korematsu v. United States*, 323 U.S. 214, 216 (1944), been regarded as inherently "suspect."⁵ The criterion of "wealth" apparently was added to the list of "suspects" as an alternative justification for the rationale in *Harper* [*659] *v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966), in which Virginia's poll tax was struck down. The criterion of political allegiance may have been added in *Williams v. Rhodes*, 393 U.S. 23 (1968).⁶ Today the list apparently has been further enlarged to include classifications based upon recent interstate movement, and perhaps those based upon the exercise of any constitutional right, for the Court states, *ante*, at 634:

"The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."⁷

4 See, e. g., *Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938). See also *infra*, at 662.

5 See *Loving v. Virginia*, 388 U.S. 1, 11 (1967); cf. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). See also *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

6 See n. 9, *infra*.

7 See n. 9, *infra*.

I think that this branch of the "compelling interest"

doctrine is [***630] sound when applied to racial classifications, for historically the *Equal Protection Clause* was largely a product of the desire to eradicate legal distinctions founded upon race. However, I believe that the more recent extensions have been unwise. For the reasons stated in my dissenting opinion in *Harper v. Virginia Bd. of Elections*, *supra*, at 680, 683-686, I do not consider wealth a "suspect" statutory criterion. And when, as in *Williams v. Rhodes*, *supra*, and the present case, a classification is based upon the exercise of rights guaranteed against state infringement by the Federal [**1345] Constitution, then there is no need for any resort to the *Equal Protection Clause*; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the *Fourteenth Amendment's Due Process Clause*. See, e. g., my separate opinion in *Williams v. Rhodes*, *supra*, at 41.

[*660] The second branch of the "compelling interest" principle is even more troublesome. For it has been held that a statutory classification is subject to the "compelling interest" test if the result of the classification may be to affect a "fundamental right," regardless of the basis of the classification. This rule was foreshadowed in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), in which an Oklahoma statute providing for compulsory sterilization of "habitual criminals" was held subject to "strict scrutiny" mainly because it affected "one of the basic civil rights." After a long hiatus, the principle re-emerged in *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964), in which state apportionment statutes were subjected to an unusually stringent test because "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.*, at 562. The rule appeared again in *Carrington v. Rash*, 380 U.S. 89, 96 (1965), in which, as I now see that case,⁸ the Court applied an abnormally severe equal protection standard to a Texas statute denying certain servicemen the right to vote, without indicating that the statutory distinction between servicemen and civilians was generally "suspect." This branch of the doctrine was also an alternate ground in *Harper v. Virginia Bd. of Elections*, *supra*, see 383 U.S., at 670, and apparently was a basis of the holding in *Williams v. Rhodes*, *supra*.⁹ It [*661] has reappeared today in the Court's cryptic suggestion, *ante*, at 627, that the "compelling [***631] interest" test is applicable merely because the result of the classification may be to deny the appellees "food, shelter, and other necessities of life," as well as in the Court's statement, *ante*, at 638, that "since the classification here

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touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." ¹⁰

8 I recognize that in my dissenting opinion in *Harper v. Virginia Bd. of Elections*, *supra*, at 683, I characterized the test applied in *Carrington* as "the traditional equal protection standard." I am now satisfied that this was too generous a reading of the Court's opinion.

9 Analysis is complicated when the statutory classification is grounded upon the exercise of a "fundamental" right. For then the statute may come within the first branch of the "compelling interest" doctrine because exercise of the right is deemed a "suspect" criterion and also within the second because the statute is considered to affect the right by deterring its exercise. *Williams v. Rhodes*, *supra*, is such a case insofar as the statutes involved both inhibited exercise of the right of political association and drew distinctions based upon the way the right was exercised. The present case is another instance, insofar as welfare residence statutes both deter interstate movement and distinguish among welfare applicants on the basis of such movement. Consequently, I have not attempted to specify the branch of the doctrine upon which these decisions rest.

¹⁰ See n. 9, *supra*.

I think this branch of the "compelling interest" doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental [^{**1346}] matters as the right to pursue a particular occupation, ¹¹ the right to receive greater or smaller wages ¹² or to work more or less hours, ¹³ and the right to inherit property. ¹⁴ Rights such as these are in principle indistinguishable from those involved here, and to extend the "compelling interest" rule to all cases in which such rights are affected would go far toward making this Court a "super-legislature." This branch of the doctrine is also unnecessary. When the right affected is one assured by [^{*662}] the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a

statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles this Court to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test.

¹¹ See, e. g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Kotch v. Board of River Pilot Comm'rs*, 330 U.S. 552 (1947).

¹² See, e. g., *Bunting v. Oregon*, 243 U.S. 426 (1917).

¹³ See, e. g., *Miller v. Wilson*, 236 U.S. 373 (1915).

¹⁴ See, e. g., *Ferry v. Spokane, P. & S. R. Co.*, 258 U.S. 314 (1922).

I shall consider in the next section whether welfare residence requirements deny due process by unduly burdening the right of interstate travel. If the issue is regarded purely as one of equal protection, then, for the reasons just set forth, this nonracial classification should be judged by ordinary equal protection standards. The applicable criteria are familiar and well established. A legislative measure will be found to deny equal protection only if "it is without any reasonable basis and therefore is purely arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). It is not enough that the measure results incidentally "in some inequality," or that it is not drawn "with mathematical nicety," *ibid.*; the statutory classification must instead cause "different treatments . . . so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954). Similarly, this Court has stated that where, as here, the issue concerns the authority of Congress to withhold "a noncontractual benefit under [^{**632}] a social welfare program . . . , the Due Process Clause [of the *Fifth Amendment*] can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

For reasons hereafter set forth, see *infra*, at 672-677, a legislature might rationally find that the imposition of a welfare residence requirement would aid in the accomplishment of at least four valid governmental objectives. [^{*663}] It might also find that residence requirements have advantages not shared by other methods of achieving the same goals. In light of this

undeniable relation of residence requirements to valid legislative aims, it cannot be said that the requirements are "arbitrary" or "lacking in rational justification." Hence, I can find no objection to these residence requirements under the *Equal Protection Clause of the Fourteenth Amendment* or under the analogous standard embodied in the *Due Process Clause of the Fifth Amendment*.

III.

The next issue, which I think requires fuller analysis than that deemed necessary [**1347] by the Court under its equal protection rationale, is whether a one-year welfare residence requirement amounts to an undue burden upon the right of interstate travel. Four considerations are relevant: *First*, what is the constitutional source and nature of the right to travel which is relied upon? *Second*, what is the extent of the interference with that right? *Third*, what governmental interests are served by welfare residence requirements? *Fourth*, how should the balance of the competing considerations be struck?

The initial problem is to identify the source of the right to travel asserted by the appellees. Congress enacted the welfare residence requirement in the District of Columbia, so the right to travel which is invoked in that case must be enforceable against *congressional* action. The residence requirements challenged in the Pennsylvania and Connecticut appeals were authorized by Congress in *42 U. S. C. § 602 (b)*, so the right to travel relied upon in those cases must be enforceable against the States even though they have acted with congressional approval.

In my view, it is playing ducks and drakes with the statute to argue, as the Court does, *ante*, at 639-641, that Congress did not mean to *approve* these state residence [*664] requirements. In *42 U. S. C. § 602 (b)*, quoted more fully, *ante*, at 638-639, Congress directed that:

"the Secretary shall approve any [state assistance] plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for [AFDC aid] a residence requirement [equal to or greater than one year]."

I think that by any fair reading this section must be regarded as conferring congressional approval upon any

plan containing a residence requirement of up to one year.

If any reinforcement is needed for taking this statutory language at face value, the overall scheme of the AFDC program and the context in which it was enacted suggest strong reasons why Congress would [***633] have wished to approve limited state residence requirements. Congress determined to enlist state assistance in financing the AFDC program, and to administer the program primarily through the States. A previous Congress had already enacted a one-year residence requirement with respect to aid for dependent children in the District of Columbia.¹⁵ In these circumstances, I think it only sensible to conclude that in allowing the States to impose limited residence conditions despite their possible impact on persons who wished to move interstate,¹⁶ Congress was motivated by a desire to encourage state participation in [*665] the AFDC program,¹⁷ as well as by a feeling that the States should at least be permitted to impose residence requirements as strict as that already authorized for the District of Columbia. Congress therefore had a genuine federal purpose in allowing the States to use residence tests. And I fully agree with THE CHIEF JUSTICE that this purpose would render § 602 (b) a permissible exercise [**1348] of Congress' power under the *Commerce Clause*, unless Congress were prohibited from acting by another provision of the Constitution.

¹⁵ See 44 Stat. 758, § 1.

¹⁶ The arguments for and against welfare residence requirements, including their impact on indigent migrants, were fully aired in congressional committee hearings. See, *e. g.*, Hearings on H. R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess., 831-832, 861-871 (1935); Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 522-540, 643, 656 (1935).

¹⁷ I am not at all persuaded by the Court's argument that Congress' sole purpose was to compel "liberality of residence requirement." See *ante*, at 640. If that was the only objective, it could have been more effectively accomplished by specifying that to qualify for approval under the Act a state assistance plan must contain *no* residence requirement.

Nor do I find it credible that Congress intended to

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refrain from expressing approval of state residence requirements because of doubts about their constitutionality or their compatibility with the Act's beneficent purposes. With respect to constitutionality, a similar residence requirement was already in effect for the District of Columbia, and the burdens upon travel which might be caused by such requirements must, even in 1935, have been regarded as within the competence of Congress under its commerce power. If Congress had thought residence requirements entirely incompatible with the aims of the Act, it could simply have provided that state assistance plans containing such requirements should not be approved at all, rather than having limited approval to plans containing residence requirements of less than one year. Moreover, when Congress in 1944 revised the AFDC program in the District of Columbia to conform with the standards of the Act, it chose to condition eligibility upon one year's residence, ¹⁸ thus strongly indicating that [*666] it doubted neither the constitutionality of such a provision nor its consistency with the Act's purposes. ¹⁹

18 See Act to provide aid to dependent children in the District of Columbia § 3, 58 Stat. 277 (1944). In 1962, this Act was repealed and replaced by *D. C. Code § 3-203*, the provision now being challenged. See 76 Stat. 914.

19 Cf. *ante*, at 639-641 and nn. 24-25.

Opinions of this Court and of individual Justices have suggested four provisions of the Constitution as possible sources of a right to travel enforceable against the federal or state governments: the [***634] *Commerce Clause*; ²⁰ the Privileges and Immunities Clause of Art. IV, § 2; ²¹ the Privileges and Immunities Clause of the *Fourteenth Amendment*; ²² and the *Due Process Clause of the Fifth Amendment*. ²³ The *Commerce Clause* can be of no assistance to these appellees, since that clause grants plenary power to Congress, ²⁴ and Congress either enacted or approved all of the residence requirements here challenged. The Privileges and Immunities Clause of Art. IV, § 2, ²⁵ is irrelevant, for it appears settled that this clause neither limits federal power nor prevents a State from distinguishing among its own citizens, but simply "prevents a State from discriminating against citizens of other States in favor of its own." *Hague v. CIO*, 307 U.S. 496, 511 (1939) (opinion of Roberts, J.); see *Slaughter-House Cases*, 16 Wall. 36, 77 (1873). Since Congress enacted the District of Columbia residence

statute, and since the Pennsylvania and Connecticut appellees were residents [*667] and therefore citizens of those States when they sought welfare, the clause can have no application in any of these cases.

20 See, e. g., *Edwards v. California*, 314 U.S. 160 (1941); the *Passenger Cases*, 7 How. 283 (1849).

21 See, e. g., *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (1825) (Mr. Justice Washington).

22 See, e. g., *Edwards v. California*, 314 U.S. 160, 177, 181 (1941) (DOUGLAS and Jackson, JJ., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (dictum).

23 See, e. g., *Kent v. Dulles*, 357 U.S. 116, 125-127 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500, 505-506 (1964).

24 See, e. g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946). See also *Maryland v. Wirtz*, 392 U.S. 183, 193-199 (1968).

25 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The [**1349] Privileges and Immunities Clause of the *Fourteenth Amendment* provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is evident that this clause cannot be applicable in the District of Columbia appeal, since it is limited in terms to instances of state action. In the Pennsylvania and Connecticut cases, the respective States did impose and enforce the residence requirements. However, Congress approved these requirements in 42 U. S. C. § 602 (b). The fact of congressional approval, together with this Court's past statements about the nature of the *Fourteenth Amendment* Privileges and Immunities Clause, leads me to believe that the clause affords no additional help to these appellees, and that the decisive issue is whether Congress itself may impose such requirements. The view of the Privileges and Immunities Clause which has most often been adopted by the Court and by individual Justices is that it extends only to those "privileges and immunities" which "arise or grow out of the relationship of United States citizens to the national government." *Hague v. CIO*, 307 U.S. 496, 520 (1939) (opinion of Stone, J.). ²⁶ On the authority [***635] of *Crandall v. Nevada*, 6 Wall. 35 (1868), those privileges and immunities have repeatedly been said to include the right to travel from State to State, ²⁷ presumably for the reason

394 U.S. 618, *667; 89 S. Ct. 1322, **1349;
22 L. Ed. 2d 600, ***635; 1969 U.S. LEXIS 3190

assigned in *Crandall*: that state restrictions on travel [*668] might interfere with intercourse between the Federal Government and its citizens. ²⁸ This kind of objection to state welfare residence requirements would seem necessarily to vanish in the face of congressional authorization, for except in those instances when its authority is limited by a constitutional provision binding upon it (as the *Fourteenth Amendment* is not), Congress has full power to define the relationship between citizens and the Federal Government.

26 See *Slaughter-House Cases*, 16 Wall. 36, 79 (1873); *In re Kemmler*, 136 U.S. 436, 448 (1890); *McPherson v. Blacker*, 146 U.S. 1, 38 (1892); *Giozza v. Tiernan*, 148 U.S. 657, 661 (1893); *Duncan v. Missouri*, 152 U.S. 377, 382 (1894); *Twining v. New Jersey*, 211 U.S. 78, 97-98 (1908).

27 See, e. g., *Slaughter-House Cases*, *supra*, at 79; *Twining v. New Jersey*, *supra*, at 97.

28 The *Crandall* Court stressed the "right" of a citizen to come to the national capital, to have access to federal officials, and to travel to seaports. See 6 Wall., at 44. Of course, *Crandall* was decided before the enactment of the *Fourteenth Amendment*.

Some Justices, notably the dissenters in the *Slaughter-House Cases*, 16 Wall. 36, 83, 111, 124 (1873) (Field, Bradley, and Swayne, JJ., dissenting), and the concurring Justices in *Edwards v. California*, 314 U.S. 160, 177, 181 (1941) (DOUGLAS and Jackson, JJ., concurring), have gone further and intimated that the *Fourteenth Amendment* right to travel interstate is a concomitant of federal citizenship which stems from sources even more basic than the need to protect citizens in their relations with the Federal Government. The *Slaughter-House* dissenters suggested that the privileges and immunities of national citizenship, including freedom to travel, were those natural rights "which of right belong to the citizens of all free governments," 16 Wall., at 98 (Field, J.). However, since such rights are "the rights of citizens of any free government," *id.*, at 114 (Bradley, J.), it would appear that they must be immune from national as well as state abridgment. To the extent that they may be validly limited by Congress, there would seem to be no reason why they may not be similarly abridged by States acting with congressional approval.

[**1350] The concurring Justices in *Edwards* laid

emphasis not upon natural rights but upon a generalized concern for the functioning of the federal system, stressing that to [*669] allow a State to curtail "the rights of *national* citizenship would be to contravene every conception of national unity," 314 U.S., at 181 (DOUGLAS, J.), and that "if national citizenship means less than [the right to move interstate] it means nothing." *Id.*, at 183 (Jackson, J.). However, even under this rationale the clause would appear to oppose no obstacle to congressional delineation of the rights of national citizenship, insofar as Congress may do so without infringing other provisions of the Constitution. Mr. Justice Jackson explicitly recognized in *Edwards* that: "The right of the citizen to migrate from state to state . . . [is] subject to all constitutional limitations imposed by the federal government," *id.*, at 184. And nothing in the nature of [***636] federalism would seem to prevent Congress from authorizing the States to do what Congress might validly do itself. Indeed, this Court has held, for example, that Congress may empower the States to undertake regulations of commerce which would otherwise be prohibited by the negative implications of the *Commerce Clause*. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Hence, as has already been suggested, the decisive question is whether Congress may legitimately enact welfare residence requirements, and the *Fourteenth Amendment* Privileges and Immunities Clause adds no extra force to the appellees' attack on the requirements.

The last possible source of a right to travel is one which does operate against the Federal Government: the *Due Process Clause of the Fifth Amendment*. ²⁹ It is now settled [*670] that freedom to travel is an element of the "liberty" secured by that clause. In *Kent v. Dulles*, 357 U.S. 116, 125-126 (1958), the Court said:

"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*. . . . Freedom of movement across frontiers . . . , and inside frontiers as well, was a part of our heritage. . . ."

The Court echoed these remarks in *Aptheker v. Secretary of State*, 378 U.S. 500, 505-506 (1964), and added:

"Since this case involves a personal liberty protected by the *Bill of Rights*, we believe that the proper approach to

394 U.S. 618, *670; 89 S. Ct. 1322, **1350;
22 L. Ed. 2d 600, ***636; 1969 U.S. LEXIS 3190

legislation curtailing that liberty must be that adopted by this Court in *NAACP v. Button*, 371 U.S. 415, and *Thornhill v. Alabama*, 310 U.S. 88. . . . Since freedom of travel is a constitutional liberty closely related to rights of free speech and association, we believe that appellants . . . should not be required to assume the burden of demonstrating that Congress could not have written a statute constitutionally prohibiting their travel." *Id.*, at 516-517.

However, in *Zemel v. Rusk*, 381 U.S. 1 (1965), the *First Amendment* cast of the *Aptheker* opinion was explained as having stemmed from the fact that *Aptheker* was forbidden to travel because of "expression or association on his part," *id.*, at 16. The Court noted that *Zemel* was "not being forced to [*1351] choose between membership in an organization and freedom to travel," *ibid.*, and held that the mere circumstance that *Zemel's* proposed journey to Cuba might be used to collect information of political and social significance was not enough to bring the case within the *First Amendment* category.

29 Professor Chafee has suggested that the *Due Process Clause of the Fourteenth Amendment* may similarly protect the right to travel against state interference. See Z. Chafee, *Three Human Rights in the Constitution of 1787*, p. 192 (1956). However, that clause surely provides no greater protection against the States than does the *Fifth Amendment* clause against the Federal Government; so the decisive question still is whether Congress may enact a residence requirement.

Finally, in *United States v. Guest*, 383 U.S. 745 (1966), the Court again had occasion to consider the right of [*671] interstate travel. Without specifying [***637] the source of that right, the Court said:

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . [The] 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. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Id.*, at 757-758. (Footnotes omitted.)

I therefore conclude that the right to travel interstate is a "fundamental" right which, for present purposes, should be regarded as having its source in the *Due Process Clause of the Fifth Amendment*.

The next questions are: (1) To what extent does a one-year residence condition upon welfare eligibility interfere with this right to travel?; and (2) What are the governmental interests supporting such a condition? The consequence of the residence requirements is that persons who contemplate interstate changes of residence, and who believe that they otherwise would qualify for welfare payments, must take into account the fact that such assistance will not be available for a year after arrival. The number or proportion of persons who are actually deterred from changing residence by the existence of these provisions is unknown. If one accepts evidence put forward by the appellees,³⁰ to the effect [*672] that there would be only a minuscule increase in the number of welfare applicants were existing residence requirements to be done away with, it follows that the requirements do not deter an appreciable number of persons from moving interstate.

30 See Brief for Appellees in No. 33, pp. 49-51 and n. 70; Brief for Appellees in No. 34, p. 24, n. 11; Supplemental Brief for Appellees on Reargument 27-30.

Against this indirect impact on the right to travel must be set the interests of the States, and of Congress with respect to the District of Columbia, in imposing residence conditions. There appear to be four such interests. First, it is evident that a primary concern of Congress and the Pennsylvania and Connecticut Legislatures was to deny welfare benefits to persons who moved into the jurisdiction primarily in order to collect those benefits.³¹ This seems to me an entirely legitimate objective. A legislature is certainly not obliged to furnish welfare assistance to every inhabitant of the jurisdiction,

and it is entirely rational to deny benefits to those who enter primarily in order to receive them, since this will make more funds available for those whom the legislature deems more worthy of subsidy.³²

31 For Congress, see, *e. g.*, Problems of Hungry Children in the District of Columbia, Hearings before the Subcommittee on Public Health, Education, Welfare, and Safety of the Senate Committee on the District of Columbia, 85th Cong., 1st Sess. For Connecticut, see Connecticut General Assembly, 1965 Feb. Spec. Sess., House of Representatives Proceedings, Vol. II, pt. 7, at 3505. For Pennsylvania, see Appendix in No. 34, pp. 96a-98a.

32 There is support for the view that enforcement of residence requirements can significantly reduce welfare costs by denying benefits to those who come solely to collect them. For example, in the course of a long article generally critical of residence requirements, and after a detailed discussion of the available information, Professor Harvith has stated:

"A fair conclusion seems to be that, in at least some states, it is not unreasonable for the legislature to conclude that a useful saving in welfare costs may be obtained by residence tests discouraging those who would enter the state solely because of its welfare programs. In New York, for example, a one per cent saving in welfare costs would amount to several million dollars." Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 Calif. L. Rev. 567, 618 (1966). (Footnotes omitted.) See also *Helvering v. Davis*, 301 U.S. 619, 644 (1937).

For essentially the same reasons, I would uphold the Connecticut welfare regulations which except from the residence requirement persons who come to Connecticut with a bona fide job offer or with resources sufficient to support them for three months. See 1 Conn. Welfare Manual, c. II, §§ 219.1-219.2 (1966). Such persons are very unlikely to have entered the State primarily in order to receive welfare benefits.

[*673] A [***638] [**1352] second possible purpose of residence requirements is the prevention of fraud. A residence requirement provides an objective and

workable means of determining that an applicant intends to remain indefinitely within the jurisdiction. It therefore may aid in eliminating fraudulent collection of benefits by nonresidents and persons already receiving assistance in other States. There can be no doubt that prevention of fraud is a valid legislative goal. Third, the requirement of a fixed period of residence may help in predicting the budgetary amount which will be needed for public assistance in the future. While none of the appellant jurisdictions appears to keep data sufficient to permit the making of detailed budgetary predictions in consequence of the requirement,³³ it is probable that in the event of a very large increase or decrease in the number of indigent newcomers the waiting period would give the legislature time to make needed adjustments in the welfare laws. Obviously, this is a proper objective. Fourth, the residence requirements conceivably may have been predicated upon a legislative desire to restrict welfare payments financed in part by state tax funds to persons who have [*674] recently made some contribution to the State's economy, through having been employed, having paid taxes, or having spent money in the State. This too would appear to be a legitimate purpose.³⁴

33 For precise prediction to be possible, it would appear that a residence requirement must be combined with a procedure for ascertaining the number of indigent persons who enter the jurisdiction and the proportion of those persons who will remain indigent during the residence period.

34 I do not mean to imply that each of the above purposes necessarily was sought by each of the legislatures that adopted durational residence requirements. In Connecticut, for example, the welfare budget is apparently open-ended, suggesting that this State is not seriously concerned with the need for more accurate budgetary estimates.

The next question is the decisive one: whether the governmental interests served by residence requirements outweigh the burden imposed upon the right to travel. In my view, a number of considerations militate in favor of constitutionality. First, as just shown, four separate, legitimate governmental interests are furthered by residence requirements. Second, the impact of the requirements upon the freedom of individuals to travel interstate is indirect and, according to evidence put forward by the appellees themselves, insubstantial.

394 U.S. 618, *674; 89 S. Ct. 1322, **1352;
22 L. Ed. 2d 600, ***638; 1969 U.S. LEXIS 3190

Third, these are not cases in which a State or States, acting alone, have attempted to interfere with the right of citizens to travel, but one [***639] in which the States have acted within the terms of a limited authorization by the National Government, and in which Congress itself has laid down a like rule for the [**1353] District of Columbia. Fourth, the legislatures which enacted these statutes have been fully exposed to the arguments of the appellees as to why these residence requirements are unwise, and have rejected them. This is not, therefore, an instance in which legislatures have acted without mature deliberation.

Fifth, and of longer-range importance, the field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence [*675] requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments. Sixth and finally, a strong presumption of constitutionality attaches to statutes of the types now before us. Congressional enactments come to this Court with an extremely heavy presumption of validity. See, e. g., *Brown v. Maryland*, 12 *Wheat.* 419, 436 (1827); *Insurance Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931); *United States v. Butler*, 297 U.S. 1, 67 (1936); *United States v. National Dairy Corp.*, 372 U.S. 29, 32 (1963). A similar presumption of constitutionality attaches to state statutes, particularly when, as here, a State has acted upon a specific authorization from Congress. See, e. g., *Powell v. Pennsylvania*, 127 U.S. 678, 684-685 (1888); *United States v. Des Moines N. & R. Co.*, 142 U.S. 510, 544-545 (1892).

I do not consider that the factors which have been urged to outweigh these considerations are sufficient to render unconstitutional these state and federal enactments. It is said, first, that this Court, in the opinions discussed, *supra*, at 669-671, has acknowledged that the right to travel interstate is a "fundamental" freedom. Second, it is contended that the governmental objectives mentioned above either are ephemeral or could be accomplished by means which do not impinge as heavily on the right to travel, and hence that the requirements are unconstitutional because they "sweep unnecessarily broadly and thereby invade the area of

protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). The appellees claim that welfare payments could be denied those who come primarily to collect welfare by means of less restrictive provisions, such as New York's [*676] Welfare Abuses Law; ³⁵ that fraud could be prevented by investigation of individual applicants or by a much shorter residence period; that budgetary predictability is a remote and speculative goal; and that assurance of investment in the community could be obtained by a shorter residence period or by taking into account [***640] prior intervals of residence in the jurisdiction.

35 That law, N. Y. Soc. Welfare Law § 139-a, requires public welfare officials to conduct a detailed investigation in order to ascertain whether a welfare "applicant came into the state for the purpose of receiving public assistance or care and accordingly is undeserving of and ineligible for assistance"

Taking all of these competing considerations into account, I believe that the balance definitely favors constitutionality. In reaching that conclusion, I do not minimize the importance of the right to travel interstate. However, the impact of residence conditions upon that right is indirect and apparently quite insubstantial. On the other hand, the governmental purposes served by the requirements are legitimate and real, and the residence requirements are clearly [**1354] suited to their accomplishment. To abolish residence requirements might well discourage highly worthwhile experimentation in the welfare field. The statutes come to us clothed with the authority of Congress and attended by a correspondingly heavy presumption of constitutionality. Moreover, although the appellees assert that the same objectives could have been achieved by less restrictive means, this is an area in which the judiciary should be especially slow to fetter the judgment of Congress and of some 46 state legislatures ³⁶ in the choice of methods. Residence requirements have [*677] advantages, such as administrative simplicity and relative certainty, which are not shared by the alternative solutions proposed by the appellees. In these circumstances, I cannot find that the burden imposed by residence requirements upon ability to travel outweighs the governmental interests in their continued employment. Nor do I believe that the period of residence required in these cases -- one year -- is so excessively long as to justify a finding of

394 U.S. 618, *677; 89 S. Ct. 1322, **1354;
22 L. Ed. 2d 600, ***640; 1969 U.S. LEXIS 3190

unconstitutionality on that score.

36 The figure may be variously calculated. There was testimony before the District Court in the Pennsylvania case that 46 States had some form of residence requirement for welfare assistance. Appendix in No. 34, pp. 92a-93a. It was stipulated in the Connecticut case that in 1965, 40 States had residence requirements for aid to dependent children. Appendix to Appellant's Brief in No. 9, p. 45a. See also *ante*, at 639-640 and n. 22.

I conclude with the following observations. Today's decision, it seems to me, reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises. For anyone who, like myself, believes that it is an essential function of this Court to maintain the constitutional divisions between state and federal authority and among the three branches of the Federal Government, today's decision is a step in the wrong direction. This resurgence of the expansive view of "equal protection" carries the seeds of more judicial interference with the state and federal legislative process, much more indeed than does the judicial application of "due process" according to traditional concepts (see my dissenting opinion in *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968)), about which some members of this Court have expressed fears as to its potentialities for setting us judges "at large." ³⁷ I consider it particularly unfortunate that this judicial roadblock to the powers of Congress in this field

[***641] should occur at the very threshold of the current discussions regarding the "federalizing" of these aspects of welfare relief.

37 Cf. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670, 675-680 (BLACK, J., dissenting).

REFERENCES

16 Am Jur 2d, Constitutional Law 485 et seq., 551; *Am Jur 2d, Welfare Laws (1st ed Poor and Poor Laws 28-30)*

US L Ed Digest, Constitutional Law 101, 326, 348.5, 528.5; Poor and Poor Laws 2

ALR Digests, Constitutional Law 294, 411, 458, 574; Poor and Poor Laws 4

L Ed Index to Anno, Constitutional Law; Poor Persons

ALR Quick Index, Due Process of Law; Equal Protection of Law; Poor and Poor Laws; Social Security

Annotation References:

Constitutionality of poor relief law, as affected by requirement as to period of residence as condition of relief. 132 ALR 518.

Construction and application of state social security or unemployment compensation act as affected by terms of the Federal act or judicial or administrative rulings thereunder. 139 ALR 892.

Requisite residence for purpose of old age assistance. 43 *ALR2d 1427*.

APPENDIX 44



SORANNO'S GASCO, Incorporated, a California corporation; LEONARD SORANNO; DIANA SORANNO, Husband and Wife, Plaintiffs-Appellants, v. WAYNE MORGAN, individually; MIKE TAULIER, individually; GORDON M. DEWERS, individually and each in their official capacities as officers of the County of Stanislaus, Stanislaus County Air Pollution Control District, Defendants-Appellees

No. 87-2249

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

874 F.2d 1310; 1989 U.S. App. LEXIS 6545

**December 12, 1988, Argued and Submitted
May 15, 1989, Filed**

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of California, D.C. No. CV-83-0568-REC, Robert E. Coyle, District Judge, Presiding.

CASE SUMMARY:

PROCEDURAL POSTURE: In plaintiff petroleum seller's *42 U.S.C.S. § 1983* action against defendants, a county and an air pollution control district, the United States District Court for the Eastern District of California granted defendants' motion for summary judgment. The petroleum seller appealed the judgment.

OVERVIEW: After the county and air pollution control district suspended the petroleum seller's petroleum bulk plant permits and discouraged the seller's customers from doing business with it, the seller filed a lawsuit alleging that defendants' actions were taken in retaliation for the seller's public criticism of and legal action taken against defendants' regulations and in violation of due process. The trial court granted defendants' motion for summary judgment. On appeal, the court reversed summary judgment on the retaliation claim because defendants failed to establish that they would have suspended the

permits if the seller had not challenged their regulations, which was from the seller's perspective, a protected activity. Because this was a genuine issue of material fact, summary judgment was improper. The court affirmed summary judgment on the seller's procedural due process claim because, given the public interest in ongoing enforcement of pollution control regulations, the statutory procedure authorizing prompt post-deprivation hearings after the seller's permits were suspended was sufficient to afford the seller with due process of law.

OUTCOME: The judgment was reversed insofar as it granted defendants summary judgment on the petroleum seller's retaliatory motivation claim because genuine issues of material fact existed regarding defendant's motivation. The judgment was affirmed insofar as it granted defendants summary judgment on the petroleum seller's procedural due process claims.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1] An appellate court reviews de novo a district court's grant of summary judgment. The court views the evidence in the light most favorable to the non-moving party; it may affirm only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The court may affirm a grant of summary judgment on any ground supported by the record before the district court at the time of the ruling.

Civil Rights Law > Section 1983 Actions > Elements > Color of State Law > General Overview

Civil Rights Law > Section 1983 Actions > Scope

[HN2] To make out a cause of action under 42 U.S.C.S. § 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the U.S. Constitution or federal statutes.

***Civil Rights Law > Section 1983 Actions > Scope
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Political Speech***

[HN3] It is clear that state action designed to retaliate against and chill political expression strikes at the heart of U.S. Const. amend. I.

***Civil Rights Law > Section 1983 Actions > Scope
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition***

[HN4] The right of access to the courts is subsumed under the *first amendment* right to petition the government for redress of grievances. Deliberate retaliation by state actors against an individual's exercise of this right is actionable under 42 U.S.C.S. § 1983.

Civil Rights Law > Section 1983 Actions > Scope

[HN5] A plaintiff alleging retaliation for the exercise of constitutionally protected rights must initially show that the protected conduct was a "substantial" or "motivating" factor in the defendant's decision. At that point, the burden shifts to the defendant to establish that it would have reached the same decision even in the absence of the protected conduct.

Civil Rights Law > Section 1983 Actions > Scope

[HN6] The Mt. Healthy test requires defendants to show, by a preponderance of the evidence, that they would have reached the same decision in the absence of the protected conduct.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

Civil Rights Law > Section 1983 Actions > Scope

[HN7] Motivation generally presents a jury question.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

Civil Rights Law > Section 1983 Actions > Scope

[HN8] The potential 42 U.S.C.S. § 1983 liability depends upon the defendants' motivation. This is a genuine issue of material fact, *Fed. R. Civ. P. 56(c)*, and is therefore inappropriate for summary judgment.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN9] The procedural due process guarantees of U.S. Const. amend. XIV apply only when a constitutionally protected liberty or property interest is at stake.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Constitutional Law > Substantive Due Process > Scope of Protection***

[HN10] The goodwill of one's business is a property interest entitled to protection; the owner cannot be deprived of it without due process.

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > Due Process

Real Property Law > Eminent Domain Proceedings > Valuation

Torts > Business Torts > General Overview

[HN11] A federal appellate court looks to independent sources such as state law to define the dimensions of protected property interests. California recognizes business goodwill as a property interest. *Cal. Bus. & Prof. Code § 14102* (1987) states that the good will of a business is property and is transferable. Thus, for

example, damage to goodwill is recoverable in an eminent domain proceeding. Similar protection afforded business goodwill under Florida law has been deemed sufficient to give rise to due process protection.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN12] Due process generally includes an opportunity for some type of hearing before the deprivation of a protected property interest. However, there are exceptions to the pre-deprivation hearing requirement. The U.S. Supreme Court has stated that either the necessity of quick action by the state or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of post-deprivation procedures, can satisfy the requirements of procedural due process. Where a deprivation of property is the result of a random and unauthorized act by a state employee, meaningful predeprivation process is not possible, and that due process requirements may therefore be satisfied by adequate post-deprivation procedures for obtaining a remedy.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Public Health & Welfare Law > Social Security > Medicare > Providers > Types > Physicians

[HN13] The "random and unauthorized" deprivation is only one of two situations in which post-deprivation process may be adequate. It is well-settled that protection of the public interest can justify an immediate seizure of property without a prior hearing. That principle has also been applied in holding that a physician is not entitled to a pre-deprivation hearing before suspension from Medicare, and publication of that suspension in a local newspaper.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN14] The relevant inquiry is not whether a suspension should have been issued in a particular case, but whether the statutory procedure itself is incapable of affording due process.

Business & Corporate Law > Corporations >

Shareholders > Actions Against Corporations > Direct Actions

Civil Procedure > Justiciability > Standing > General Overview

Civil Rights Law > Section 1983 Actions > Scope

[HN15] A shareholder lacks standing to bring a 42 U.S.C.S. § 1983 action on behalf of the corporation in which he owns shares. Similarly, it is not sufficient for the plaintiff to assert a personal economic injury resulting from a wrong to the corporation. However, a shareholder does have standing where he or she has been injured directly and independently of the corporation.

Business & Corporate Law > Corporations > Shareholders > General Overview

[HN16] The same conduct can result in both corporate and individual injuries.

Governments > State & Territorial Governments > Claims By & Against

[HN17] Government officials performing discretionary functions have qualified immunity from personal liability to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Civil Procedure > Summary Judgment > Standards > General Overview

Governments > State & Territorial Governments > Claims By & Against

[HN18] A material issue of fact regarding whether defendants' actions were based on retaliatory motive precludes summary judgment on qualified immunity grounds.

Civil Procedure > Remedies > Damages > Monetary Damages

Governments > State & Territorial Governments > Claims By & Against

[HN19] A suit against state officials that seeks the payment of retroactive money damages to be paid from the state treasury is barred by *U.S. Const. amend. XI*.

COUNSEL: Paul M. Ostroff, Los Angeles, California, for the Plaintiffs-Appellants.

David M. Jamieson, Cardozo, Nickerson, Martelli, Curtis & Arata, Modesto, California, for the

Defendants-Appellees.

JUDGES: Betty B. Fletcher, Robert R. Beezer and Diarmuid F. O'Scannlain, Circuit Judges.

OPINION BY: FLETCHER

OPINION

[*1312] FLETCHER, United States Circuit Judge

Plaintiffs Soranno's Gasco, Incorporated, and Leonard and Dianna Soranno brought this action under 42 U.S.C. § 1983 against the County of Stanislaus and its Air Pollution Control District, Air Pollution Control Officer Gordon Dewers, Deputy Air Pollution Control Officer Wayne Morgan and Air Pollution Control Specialist Mike Taulier. The plaintiffs contend that the defendants suspended Gasco's petroleum bulk plant permits and discouraged its customers from doing business with Gasco in retaliation for Mr. Soranno's exercise of constitutionally protected rights and in violation of due process. The district court granted the defendants' motion for summary judgment, holding that the plaintiffs failed [**2] to establish that they were deprived of a protected interest, and that even if such a deprivation occurred, available post-deprivation remedies were sufficient to comport with due process. The plaintiffs timely appeal. We affirm in part, reverse in part and remand.

I.

FACTS

Leonard and Dianna Soranno, husband and wife, are the officers and sole shareholders of Soranno's Gasco, Incorporated ("Gasco"). Gasco is engaged in the business of selling and distributing petroleum products in central California. Gasco owns two petroleum bulk plants in Ceres, California which are operated under permits issued by the County of Stanislaus and the Stanislaus County Air Pollution Control District ("APCD"). Gasco has over three hundred wholesale, commercial and industrial bulk customers. Gasco also owns a chain of twelve retail gasoline stations.

Beginning in 1979, the APCD and the County promulgated regulations pertaining to the use of vapor recovery devices. These devices are designed to reduce the escape of hydrocarbon vapors into the atmosphere.

Under the regulations, Gasco was required to install vapor recovery devices at its bulk plants and its retail stations.

Mr. Soranno publicly criticized [**3] the APCD and the County with respect to various aspects of the vapor recovery regulations. His actions included the institution of public hearings before the County Board of Supervisors to protest certain exemptions from the regulations granted to some local businesses. Soranno also initiated litigation challenging the vapor recovery regulations, and exemptions granted under them.

In September of 1983, the APCD requested that Gasco and Soranno furnish information concerning "bob-tail," or partial load, delivery by Gasco during 1982. This request was refused on the basis that it was an improper attempt to subvert the discovery processes available in an ongoing civil proceeding.¹

1 In March of 1983, the Stanislaus County District Attorney's Office filed an action in state court seeking civil penalties against Gasco. The suit alleged, *inter alia*, that Gasco violated APCD rules by failing to provide information regarding operation of Gasco's bulk plants in 1982. According to an affidavit filed by Gasco corporate counsel Walter J. Schmidt, the information requested by the APCD in September of 1983 was inappropriate outside of discovery to be conducted in the state civil suit.

On [**4] December 2, 1983, the APCD again demanded the "bob-tail" information, and advised Soranno that if he did not comply, his bulk plant permits would be suspended. On December 14, 1983, the APCD suspended the permits under the authority of *California Health & Safety Code* §§ 42303 and 42304.²

2 *Section 42303* provides:

An air pollution control officer, at any time, may require from an applicant for, or the holder of, any permit provided for by the regulations of the district board, such information, analyses, plans, or specifications which will disclose the nature, extent, quantity, or degree of air contaminants which are, or may be, discharged by the source for which the permit was issued or applied. *Cal. Health & Safety Code* § 42303 (West 1986).

Section 42304 provides:

If, within a reasonable time, the holder of any permit issued by a district board willfully fails and refuses to furnish the information, analyses, plans, or specifications requested by the district air pollution control officer, such officer may suspend the permit. Such officer shall serve notice in writing of such suspension and the reasons therefor on the permittee. *Cal. Health & Safety Code § 42304* (West 1986).

[**5] [*1313] On December 29, 1983, defendant Morgan directed defendant Taulier to send a letter to Gasco's customers informing them that Gasco's bulk plant permits were suspended and that Gasco could not lawfully deliver gasoline while under suspension. The letter also informed them that their own permits might be subject to suspension if they continued to receive gasoline from Gasco. Plaintiffs contend that these letters were false because Gasco could still lawfully deliver gasoline to its customers. Plaintiffs also contend that Gasco lost business as a result of the December 29 notices.

On December 29, the same day that the customer notices were mailed, Gasco's counsel informed Morgan and Taulier that he would provide the "bob-tail" information requested on December 2. Approximately fifteen days later, the APCD reinstated the bulk plant permits.

The Sorannos, individually and on behalf of Gasco, filed this action on December 30, 1983. They allege that the defendants, acting under color of state law, deprived them of various constitutional rights by suspending their bulk plant permits and notifying their customers of the suspension. The plaintiffs advance two theories. First, they contend that [**6] the defendants' acts deprived them of property and liberty without due process. Second, the plaintiffs contend that the defendants' acts were motivated by a desire to retaliate against Soranno for the constitutionally protected acts of publicly criticizing the defendants and initiating litigation against them. The plaintiffs seek damages for loss of business profits, and for mental and emotional distress caused by defendants' conduct, as well as an injunction against further violation of their constitutional rights.

On September 12, 1986, the defendants filed a motion for summary judgment. Argument on the motions

was held on October 20, 1986. On May 5, 1987, the district court issued an order granting summary judgment in favor of the defendants. The district court held that Gasco had no protected property interest in preservation of the bulk plant permits. The court also concluded that the alleged injury to the Sorannos' business reputation was not a constitutionally protected liberty interest. Thus, it found no constitutional deprivation to give rise to *section 1983* liability.

Alternatively, the district court held that, assuming plaintiffs had been deprived of a constitutionally [**7] protected interest, available post-deprivation remedies, including reinstatement of the permit and review of the suspension decision, were sufficient to comport with due process. The plaintiffs timely appeal. We have jurisdiction under *28 U.S.C. § 1291*.

II.

STANDARD OF REVIEW

[HN1] We review *de novo* a district court's grant of summary judgment. *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989). We view the evidence in the light most favorable to the non-moving party; we may affirm only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* We may affirm a grant of summary judgment on any ground supported by the record before the district court at the time of the ruling. *Jewel Cos. v. Pay Less Drug Stores Northwest, Inc.*, 741 F.2d 1555, 1564-65 (9th Cir. 1984).

III.

DISCUSSION

A. *The Retaliation Claim*

"[HN2] To make out a cause of action under *section 1983*, plaintiffs must plead that (1) [*1314] the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054, 107 S. Ct. 928, 93 L. Ed. 2d 979 (1987). The district [**8] court concluded that plaintiffs had no constitutionally protected property interest in the permits and, accordingly, that no protected property or liberty interest was implicated by their suspension or the notification mailed to Gasco

customers.

However, the plaintiffs have alleged throughout this case that the defendants' suspension of Gasco's bulk use permits was motivated by a desire to retaliate against Soranno for his public criticism of the defendants. [HN3] It is clear that "state action designed to retaliate against and chill political expression strikes at the heart of the *First Amendment*." *Gibson*, 781 F.2d at 1338. There is no dispute that Soranno has a protected interest in commenting on the actions of government officials. See *New York Times v. Sullivan*, 376 U.S. 254, 269-70, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *McKinley v. City of Eloy*, 705 F.2d 1110, 1113 (9th Cir. 1983) (protected interest in criticizing public officials regarding matters of public concern). If the plaintiffs can establish that the decision to suspend the permits was made because of Soranno's exercise of constitutionally protected rights, they have established a *first amendment* violation, and are entitled to relief under *section 1983*. [**9] *Gibson*, 781 F.2d at 1338. The Sorannos therefore need not establish a legally protected interest in the permits themselves. See *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

3

3 In *Mt. Healthy*, the Supreme Court held that an untenured teacher whose contract was not renewed could establish a claim for reinstatement for violation of his constitutional rights if he could establish that the decision not to reinstate him was made by reason of his expression of ideas. The fact that he had no protected property interest in continued employment was not dispositive because his firing, if retaliatory, effectively deprived him of his constitutionally protected right to free speech. 429 U.S. at 283-84.

A similar analysis applies to the plaintiffs' claim that the permit suspension was in retaliation for filing suit against the defendants. [HN4] The right of access to the courts is subsumed under the *first amendment* right to petition the government for redress of grievances. See, e.g., *California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972); *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427-28 (8th Cir. 1986). Deliberate retaliation [**10] by state actors against an individual's exercise of this right is actionable under *section 1983*.

Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988) (intentional obstruction of the right to seek redress "is precisely the sort of oppression that . . . *section 1983* [is] intended to remedy") (quoting *Morello v. James*, 810 F.2d 344, 347 (2d Cir. 1987) (brackets in original)); *Harrison*, 780 F.2d at 1428.

The defendants do not dispute that the allegations of retaliatory action are independent of the due process claims, and that the district court failed to address the former in granting summary judgment. However, they contend that the district court's decision must nevertheless be upheld on the basis that their actions were not motivated by retaliatory intent. In other words, they argue that the plaintiffs cannot meet the causation standard enunciated by the Court in *Mt. Healthy*, 429 U.S. at 285-87.

In *Mt. Healthy*, the Court held that [HN5] a plaintiff alleging retaliation for the exercise of constitutionally protected rights must initially show that the protected conduct was a "substantial" or "motivating" factor in the defendant's decision. 429 U.S. at 287. At that point, the burden shifts to the [**11] defendant to establish that it would have reached the same decision even in the absence of the protected conduct. *Id.* According to the defendants, APCD was entitled by statute to the information requested, and was similarly entitled to suspend the Gasco permits for not providing that information. Thus, they conclude that they could have suspended the permits and notified Gasco's customers [*1315] in the absence of any protected conduct. In consequence, they argue, Gasco is entitled to no relief.

The defendants misperceive the import of the *Mt. Healthy* causation analysis. The rationale for the rule was stated as follows:

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of

those responsible for the decision to rehire, and does indeed play a part in that decision -- even [**12] if the same decision *would* have been reached had the incident not occurred.

discharged for no reason whatever." Yet the case was remanded so that the district court might determine whether the teacher *would* have been discharged.

429 U.S. at 285 (emphasis added). [HN6] The *Mt. Healthy* test requires defendants to show, by a preponderance of the evidence, that they would have reached the same decision in the absence of the protected conduct. The defendants here have merely established that they *could* have suspended the permits. This court has clearly stated that this is insufficient to support summary judgment. *Allen v. Scribner*, 812 F.2d 426, 435 (9th Cir.), amended, 828 F.2d 1445 (9th Cir. 1987).

Allen involved a suit by a California Department of Food and Agriculture entomologist challenging his superiors' decision to transfer him to a clerical assignment. The plaintiff alleged that the transfer was part of a campaign to harass him in retaliation for publicly airing opinions critical of the Mediterranean Fruit Fly Eradication Project's handling of the medfly infestation problem in California in 1980. He argued that the defendants' actions violated his civil rights under section 1983 and the *first amendment*.

The district court granted the defendants' motion for summary judgment, but we reversed. After concluding that Allen's expression [**13] was protected, and that the evidence indicated that the protected expression was a substantial factor in his transfer and harassment, we addressed whether Allen would have been transferred in the absence of his protected conduct. The defendants argued that Allen's insubordination was sufficient to justify his transfer. We responded:

The evidence put forth by the defendants is definitive only in establishing that Allen *could* have been transferred . . . because of his non-protected activity (*i.e.*, his refusal to obey orders), and not that he *would* have been transferred. . . . That Allen's insubordinate conduct might have justified an adverse employment decision, including a transfer, does not suffice. The employee in *Mt. Healthy* was a nontenured high school teacher who "*could* have been

812 F.2d at 435 (emphasis in original) (citations omitted). See also *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988). Noting that [HN7] motivation generally presents a jury question, 812 F.2d at 436, we concluded that whether Allen would have [**14] been transferred was a genuine issue of material fact inappropriate for summary judgment, and remanded for the trier of fact to make that determination.

Allen controls this case. The defendants apparently do not dispute that Soranno's activities, which he alleges induced the retaliation, were protected by the *first amendment*. Viewed in the light most favorable to the plaintiffs, the evidence suggests that Soranno's protected expression was a substantial factor in the decision to suspend the permits and notify Gasco's customers of that suspension. The plaintiffs offer several facts from which a fact finder could infer a retaliatory motive. First, in his deposition, Soranno described a telephone conversation between himself and defendant Morgan in which Morgan allegedly intimated that he would "somehow get even" with Soranno for embarrassing him by generating publicity over [*1316] the vapor recovery device regulations and exceptions.

In addition, the timing and nature of the suspension and notice are suspicious. The 1983 permits were suspended in December, just a few weeks before they were to expire. As a condition for granting 1984 permits, the defendants could have requested updated information [**15] of a similar nature, or initiated revocation proceedings,⁴ but chose to summarily suspend the 1983 permits instead. The plaintiffs contend that a fact finder could infer that the defendants' chosen course of action was designed to maximize harm to Soranno.

4 Morgan's deposition testimony indicates that revocation could not have been effected without a prior hearing. See *Cal. Health & Safety Code* §§ 42307-09 (West 1986).

Similarly, the defendants mailed a notice of suspension to a number of Gasco's customers on the date that Soranno's attorney was scheduled to meet with

defendant Morgan and supply the requested information. Again, this arguably suggests a desire to maximize the harm inflicted upon Soranno, rather than a concern with receiving the requested information.

5 There is apparently some dispute over whether Morgan was aware of Soranno's intention to supply the requested information when the notification letters were sent. Attorney Walter Schmidt's affidavit indicates that Morgan was informed of the purpose of Schmidt's visit before the letters were sent.

The defendants' response is merely to emphasize that suspension of the permit was authorized by statute [**16] and legally permissible. In other words they *could* have suspended the permits even in the absence of the protected activity. However, they have not established that they *would* have suspended the permits in the absence of Soranno's protected activity. As in *Allen*, [HN8] the potential *section 1983* liability depends upon the defendants' motivation. This is a genuine issue of material fact, *Fed.R.Civ.P. 56(c)*, and is therefore inappropriate for summary judgment.

B. Due Process

In addition to arguing that the defendants' allegedly retaliatory permit suspension and customer notification violated Soranno's *first amendment* rights, the plaintiffs claim that the defendants deprived them of liberty and property without due process. The district court granted summary judgment for the defendants on this issue, holding that the plaintiffs had not been deprived of any constitutionally protected interest, and alternatively, that available post-deprivation procedures satisfied the requirements of due process.

(1) Protected Interest

[HN9] The procedural due process guarantees of the *fourteenth amendment* apply only when a constitutionally protected liberty or property interest is at stake. *Board of Regents [**17] v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). The district court held that the plaintiffs had no protected interest in uninterrupted permits, and that under *Paul v. Davis*, 424 U.S. 693, 710-12, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), the alleged injury to business reputation alone was insufficient to establish a protected liberty interest. However, the district court did not directly address the

plaintiffs' interest in the goodwill of their business. [HN10] The goodwill of one's business is a property interest entitled to protection; the owner cannot be deprived of it without due process.

[HN11] We look to independent sources such as state law to define the dimensions of protected property interests. *Paul*, 424 U.S. at 710-12. California recognizes business goodwill as a property interest. *Section 14102 of the California Business and Professions Code* states that "the good will of a business is property and is transferable." *Cal Bus & Prof. Code § 14102* (West 1987). See also *Baker v. Pratt*, 176 Cal. App. 3d 370, 381, 222 Cal. Rptr. 253, 259 (1986) ("The law makes no distinction between goodwill and other property with respect to the right of the owner thereof to recover damages for its impairment or destruction."). Thus, for example, damage to [**18] goodwill is recoverable in [*1317] an eminent domain proceeding. *People ex rel. Dept. of Transp. v. Muller*, 36 Cal. 3d 263, 203 Cal. Rptr. 772, 681 P.2d 1340 (1984). Similar protection afforded business goodwill under Florida law has been deemed sufficient to give rise to due process protection. See *Marrero v. City of Hialeah*, 625 F.2d 499, 514-15 (5th Cir. 1980), cert. denied, 450 U.S. 913, 101 S. Ct. 1353, 67 L. Ed. 2d 337 (1981).

(2) The Process Due

[HN12] Due process generally includes an opportunity for some type of hearing before the deprivation of a protected property interest. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1481-82 (9th Cir. 1989), amended, slip. op. at 2478 (March 23, 1989). However, there are exceptions to the pre-deprivation hearing requirement. The Supreme Court has stated that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of [post-deprivation procedures], can satisfy the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981). In *Parratt* the Court concluded that where a deprivation [**19] of property is the "result of a random and unauthorized act by a state employee," *id.* at 541, meaningful predeprivation process is not possible, and that due process requirements may therefore be satisfied by adequate post-deprivation procedures for obtaining a

remedy.

Citing *Parratt*, the district court held that even if the plaintiffs' interests were of constitutional dimension, plaintiffs were not deprived of those interests without due process because available post-deprivation remedies satisfied the requirements of due process. The district court viewed this case as controlled by *Parratt* because the plaintiffs' allegations of unlawful retaliation rendered the challenged conduct "random and unauthorized" within the meaning of *Parratt*, making a meaningful pre-deprivation remedy impractical. We reject the district court's conclusion that the defendants' actions were the type of "random and unauthorized" deprivation for which pre-deprivation process is impractical. Nevertheless, we affirm the judgment in favor of the defendants on the procedural due process claim on the basis that the public interest in swift administrative action justifies summary suspension with post-deprivation [**20] hearings.

The district court construed the "random and unauthorized" language of *Parratt* too broadly. *Parratt* is limited to situations "in which the state administrative machinery did not and could not have learned of the deprivation until after it had occurred." *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc); see also *Merritt v. Mackey*, 827 F.2d 1368, 1372 (9th Cir. 1987). That is not the case here. Although retaliatory intent may render the defendants' conduct unauthorized, it is not random in that the injury is sufficiently predictable to make a pre-deprivation remedy practicable. The decision to suspend the permits and notify Gasco's customers was a deliberate decision made by the officials possessing the authority to suspend permits at their discretion. See *Merritt*, 827 F.2d at 1372. Defendant Morgan testified that this decision was made after considering a range of possible alternatives.⁶

⁶ Moreover, the defendants' contention throughout this litigation has been that all of their actions were authorized by the California Health and Safety Code and County regulations. It is clear that once the decision to suspend the permit is made, state law expressly provides for post-deprivation hearings. See e.g., *Cal. Health & Safety Code* §§ 42304, 42306 (West 1986) (authorizing pre-hearing permit suspensions and providing for prompt post-deprivation hearings). Similarly, the defendants contend that the customer notification was consistent with the

relevant regulations. Thus, this case is analogous to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982), in which the Court held that the Illinois Fair Employment Commission's negligent failure to schedule plaintiff's conference within 120 days as required by statute, resulting in loss of plaintiff's claim, was not "random and unauthorized" within the meaning of *Parratt*. In the Court's view, the deprivation was effected by the 120-day statutory limitation, rather than the conduct of the state employees. As in *Logan*, the plaintiffs' property interest is impaired by operation of California law, which authorizes pre-hearing suspension and customer notification.

[**21] [*1318] However, [HN13] the "random and unauthorized" deprivation is only one of two situations outlined in *Parratt* in which post-deprivation process may be adequate. It is well-settled that protection of the public interest can justify an immediate seizure of property without a prior hearing. See, e.g., *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 29 S. Ct. 101, 53 L. Ed. 195 (1908) (state may seize and destroy unwholesome food without pre-seizure hearing); see also *United States v. An Article of Device "Theramatic"*, 715 F.2d 1339 (9th Cir. 1983), cert. denied, 465 U.S. 1025, 104 S. Ct. 1281 (1984) (governmental seizure of "misbranded" machine under Food, Drug and Cosmetic Act without prior notice or hearing did not violate due process). We have also applied that principle in holding that a physician is not entitled to a pre-deprivation hearing before suspension from Medicare, and publication of that suspension in a local newspaper. *Cassim v. Bowen*, 824 F.2d 791, 797 (9th Cir. 1987). Because we view this case as the type of situation in which there is a necessity for quick action to protect the public interest, we affirm the district court's grant of summary judgment for the defendants on the procedural due process claim. [**22] See, e.g., *Smith v. Block*, 784 F.2d 993, 996 n. 4 (9th Cir. 1986) (the court of appeals may affirm a district court's decision on any ground supported by the record).

The APCD's power to suspend permits immediately is necessitated by the state's interest in enforcing its pollution control laws. The California legislature has determined that swift administrative action may be necessary in order to protect the public health and safety from violations of the state's pollution control

regulations. We are not in a position to second-guess that legislative determination. We reject Gasco's argument that due process was violated because no immediate threat to public health was involved in this particular situation. To paraphrase the Supreme Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 302, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981), [HN14] the relevant inquiry is not whether a suspension should have been issued in this particular case, but whether the statutory procedure itself is incapable of affording due process. Given the public interest in ongoing enforcement of pollution control regulations, the statutory procedure authorizing prompt post-deprivation hearings is sufficient to afford bulk plant permit [**23] owners due process.

C. Standing

The defendants also contend that the district court's decision can be affirmed on the ground that the individual plaintiffs lack standing to assert their claim. The defendants' argument appears to be derived from the well-established doctrine that [HN15] a shareholder lacks standing to bring a *section 1983* action on behalf of the corporation in which he owns shares. *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969). Similarly, it is not sufficient for the plaintiff to assert a personal economic injury resulting from a wrong to the corporation. *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593, 595 (9th Cir.), cert. denied, 464 U.S. 1012, 104 S. Ct. 537, 78 L. Ed. 2d 717 (1983). However, a shareholder does have standing where he or she has been injured directly and independently of the corporation. *Id.* In this case, there are direct and independent injuries to the individual plaintiffs.

This case is brought both by Gasco and by the Sorannos as individuals, and the complaint alleges violations of the rights of both Gasco and the Sorannos (particularly Mr. Soranno). Two separate personal injuries to the individual plaintiffs are alleged. First, the plaintiffs' argument that the defendants' actions [**24] were taken in retaliation for Soranno's exercise of *first amendment* rights clearly alleges a direct and independent personal wrong. The *first amendment* [*1319] rights that were allegedly violated belong to Mr. Soranno, not the corporation. Mr. Soranno clearly has standing to contest the deprivation of those rights.

Second, the individual plaintiffs complain that they have suffered mental and emotional distress as a result of the defendants' actions. The fact that these injuries arose

from the same conduct as the corporate injuries does not preclude a finding of direct and independent injury to individual plaintiffs for standing purposes. This circuit has held that [HN16] the same conduct can result in both corporate and individual injuries. *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021 (9th Cir. 1983); *Marshall v. Kleppe*, 637 F.2d 1217, 1222 (9th Cir. 1980).

In *Gomez*, the court held that the "humiliation and embarrassment" suffered by plaintiff as a result of the defendants' alleged discrimination against him was a personal injury, distinct from that suffered by his professional corporation. 698 F.2d at 1021. Similarly, in *Marshall* the court held that plaintiff's ulcer and emotional distress [**25] which resulted from defendant's denial of his minority business loan authorization were separate personal injuries. 637 F.2d at 1222.

The Sorannos' allegation of emotional distress arising from APCD's customer notification procedure would appear to fall within the rationale of *Gomez* and *Marshall*. The defendants' argument that *Gomez* is distinguishable because the defendants' discriminatory intent in that case was clear is unpersuasive. The intent of the defendants in this case is the very issue in dispute, and at this point the court must view the facts in the light most favorable to the plaintiffs.

D. Qualified Immunity

The defendants assert qualified immunity as another alternative ground for affirming the district court's decision. [HN17] Government officials performing discretionary functions have qualified immunity from personal liability to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The defendants contend that because they merely followed the existing law and procedure for suspension of permits, they are entitled to summary judgment [**26] on the basis of qualified immunity. That is not the case.

Assuming, as we must, the truth of the plaintiffs' allegation of retaliation, the defendants are not entitled to summary judgment on the qualified immunity issue. It could hardly be disputed that at the time of the permit suspension an individual had a clearly established right to be free of intentional retaliation by government officials

based upon that individual's constitutionally protected expression. *See, e.g., Allen, 812 F.2d at 436* ([HN18] material issue of fact regarding whether defendants' actions were based on retaliatory motive precluded summary judgment on qualified immunity grounds). *Cf. Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988)* (where sufficient evidence existed to suggest that defendants' strip-search was for punitive purposes, district court did not err in denying defendants' motion for summary judgment on the basis of qualified immunity).⁷

7 The same analysis applies to the plaintiffs' judicial access claim.

E. Eleventh Amendment

The defendants also claim that the official-capacity suit is barred by the *eleventh amendment*.⁸ [HN19] A suit against state officials that seeks the payment of retroactive money [**27] damages to be paid from the state treasury is barred by the *eleventh amendment*. *Edelman v. Jordan, 415 U.S. 651, 675-78, [*1320] 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); Blaylock v. Schwinden, 862 F.2d 1352, 1353 (9th Cir. 1988)*. Thus, if the APCD can be characterized as a state entity, the plaintiffs cannot pursue a claim for money damages from the defendants in their official capacities. The critical factor in determining whether the *eleventh amendment* is applicable is the financial nexus between the APCD and the state treasury. *Edelman, 415 U.S. at 663-65*.

8 The plaintiffs sued the defendants both in their individual and official capacities. An official-capacity suit is, of course, merely an alternative means of pleading an action against the governmental entity of which the individual is an agent. *Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)*.

On the record before us, we are unable to determine whether an award of damages against an APCD would be paid from the state treasury. The parties may develop a more adequate record on remand.

IV.

CONCLUSION

We affirm the district court's grant of summary judgment for the defendants on the plaintiffs' due process claims. Because there are genuine issues of material fact regarding [**28] the defendants' retaliatory motivation, and because we are unable to affirm the district court on the alternative grounds urged by the defendants on appeal, we reverse the grant of summary judgment on the *first amendment* claims and remand to the district court for further proceedings.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

APPENDIX 45



SUNDAY LAKE IRON COMPANY v. TOWNSHIP OF WAKEFIELD

No. 38

SUPREME COURT OF THE UNITED STATES

247 U.S. 350; 38 S. Ct. 495; 62 L. Ed. 1154; 1918 U.S. LEXIS 1917

Argued November 9, 1917

June 3, 1918

PRIOR HISTORY: ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN

CASE SUMMARY:

PROCEDURAL POSTURE: A tax assessor for appellee township adopted a valuation for appellant taxpayer's property for one tax year. A county board of review approved the action. A state board of tax assessors (board) raised the assessment to the full value of the property, pursuant to a special act of the legislature. After unsuccessful challenges on *U.S. Const. amend. XIV* grounds, the taxpayer sought a writ of error to the Supreme Court of the State of Michigan.

OVERVIEW: The taxpayer argued that it was denied equal protection because the board assessed its mining property for the subject tax year at full value, whereas other lands throughout the county were generally assessed at one-third of their actual worth. The Court affirmed and held that the evidence did not clearly establish that the board entertained or was chargeable with any purpose or design to discriminate. The Court acknowledged that the record disclosed facts that rendered it more than probable that the taxpayer's property was assessed for the subject year relatively higher than other lands within its county, although the statute enjoined the same rule for all. The Court found that the board's action was not incompatible with an honest effort in new and difficult circumstances to adopt

valuations not relatively unjust or unequal. When the taxpayer first challenged the values placed upon the property of others, no adequate time remained for detailed consideration, nor was there sufficient evidence before the board to justify immediate and general reevaluations. The next year a diligent and successful effort was made to rectify any inequality.

OUTCOME: In a dispute over the tax valuation of property, the Court affirmed the judgment of the state supreme court in favor of the township.

LexisNexis(R) Headnotes

Constitutional Law > Equal Protection > Scope of Protection

Tax Law > State & Local Taxes > Administration & Proceedings > General Overview

[HN1] The purpose of the *equal protection clause* of *U.S. Const. amend. XIV* is to secure every person within a state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. Intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. Mere errors of judgment by officials will not support a claim of

247 U.S. 350, *; 38 S. Ct. 495, **;
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discrimination. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.

LAWYERS' EDITION HEADNOTES:

Constitutional law -- equal protection of the laws -- discrimination in tax assessment. --

Headnote:

An intentional violation of the essential principle of practical uniformity is essential to support the claim of a mining corporation that it has been denied the equal protection of the laws by having its property assessed at full value while other taxable property in the same class is greatly undervalued by the taxing officers.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Evidence -- presumption -- burden of proof -- good faith of tax officers. --

Headnote:

The good faith of tax officials and the validity of their actions are presumed, and when assailed, the burden of proof is upon the complaining party.

[For other cases, see Evidence, II. i, 1, in Digest Sup. Ct. 1908.]

SYLLABUS

An unequal tax assessment cannot be held in violation of the *equal protection clause of the Fourteenth Amendment*, where a purpose of the assessing board to discriminate is not clearly established and where the discrimination may be attributed to an honest mistake of judgment and lack of time and evidence for making general revaluations when objection was made.

The good faith of tax assessors and the validity of their acts are presumed; when assailed the burden of proof is upon the complaining party.

186 Michigan, 626, affirmed.

THE case is stated in the opinion.

COUNSEL: *Mr. Horace Andrews*, with whom *Mr. William P. Belden* was on the briefs, for plaintiff in error:

The question of assessing other property was brought to the attention of the State Board at the earliest opportunity in connection with the holding of the special review ordered by the board. It knew of the general under-assessment of property in the district, and had access to information sufficient for its guidance in adjusting and equalizing the values. It is no answer to say that no notice had been given of the purpose of the board to hold a general review. Since it had knowledge of the general under-valuation, it should either have called a meeting for a general review, where all property could have been raised justly and relatively in the same proportion, or it should have waited until such time as it could do this in a manner satisfactory to itself. If lack of time can operate as an excuse for failure to treat taxpayers equally under the law, then taxing and other officers can with impunity deny the equal protection of the law to the citizens of a State. On principle, the action of the board was violative of the plaintiff's constitutional rights. It resulted in taking from it thousands of dollars which it did not rightfully owe. Lack of time to make a proper assessment cannot justify such a wrong.

The plaintiff does not seek relief because of the overassessment of its property. It complains because the Board of State Tax Commissioners raised the assessed value of its property to 100 per cent., while it knowingly left other property generally in the tax district assessed at 33 1/3 per cent. of its value. The board, like any individual, is presumed to have intended all the natural consequences of its acts. It intended, therefore, to assess the plaintiff's property on a basis three times as high as the property generally in the taxing district -- on a basis which was not just and equal, and to cause it to pay more than its fair and ratable share of taxes.

Cases wherein the complaint was as to the unreasonable amount of the assessment -- that the taxing officers had gone too far in the matter admittedly within their discretion and had assessed the property too high -- are here irrelevant.

The board had no discretion or jurisdiction to change the assessment of plaintiff's property so as to make it relatively three times as high as all other assessments. It was an arbitrary act.

247 U.S. 350, *; 38 S. Ct. 495, **;
62 L. Ed. 1154, ***; 1918 U.S. LEXIS 1917

Mr. James A. O'Neill for defendant in error.

JUDGES: White, McKenna, Holmes, Day, Van
Devanter, Pitney, McReynolds, Brandeis, Clarke

OPINION BY: McREYNOLDS

OPINION

[*352] [**495] [***1155] MR. JUSTICE
McREYNOLDS delivered the opinion of the court.

This is a writ of error to a state court and the only matter for our consideration is the claim that contrary to the *Fourteenth Amendment* plaintiff in error was denied equal protection of the laws by the State Board of Tax Assessors which assessed its property for 1911 at full value, whereas other lands throughout the county were generally assessed at not exceeding one-third of their actual worth. Proceeding in entire good faith, an inexperienced local assessor adopted the valuation which his predecessor had placed upon the company's property -- \$ 65,000.00; the County Board of Review approved his action. Reviewing this in the light of a subsequent detailed report by experts appointed under a special act of the legislature passed in April, 1911, to appraise all mining properties, the State Board raised the assessment to \$ 1,071,000.00; but, because of alleged lack of time and inadequate information, it declined to order a new and general survey of values or generally to increase other assessments, notwithstanding plaintiff in error represented and offered to present evidence showing that they amounted to no more than one-third of true market values.

[HN1] The purpose of the *equal protection clause of the Fourteenth Amendment* is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned [***1156] by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded

as settled that intentional systematic undervaluation by state officials of [*353] other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 35, 37. It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more -- something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. *Head Money Cases*, 112 U.S. 580, 595; *Pittsburgh &c. Ry. Co. v. Backus*, 154 U.S. 421, 435; *Maish v. Arizona*, 164 U.S. 599, 611; *Adams Express Co. v. Ohio*, 165 U.S. 194, 229; *New York State v. Barker*, 179 U.S. 279, 284, 285; *Coulter v. Louisville & Nashville R.R. Co.*, 196 U.S. 599, 608; *Chicago, Burlington & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 597.

The record discloses facts which render it more than probable that plaintiff in error's mines were assessed for the year 1911 (but not before or afterwards) relatively higher than other lands within the county although the statute enjoined the same rule for all. But we are unable to conclude that the evidence suffices clearly to establish that the State Board entertained or is chargeable with any purpose or design to discriminate. Its action is not incompatible with an honest effort in new and difficult circumstances to [**496] adopt valuations not relatively unjust or unequal. When plaintiff in error first challenged the values placed upon the property of others no adequate time remained for detailed consideration nor was there sufficient evidence before the Board to justify immediate and general revaluations. The very next year a diligent and, so far as appears, successful effort was made to rectify any inequality. The judgment of the court below must be

Affirmed.

APPENDIX 46



1 of 100 DOCUMENTS

UNITED MINE WORKERS OF AMERICA, DISTRICT 12 v. ILLINOIS STATE
BAR ASSOCIATION ET AL.

No. 33

SUPREME COURT OF THE UNITED STATES

389 U.S. 217; 88 S. Ct. 353; 19 L. Ed. 2d 426; 1967 U.S. LEXIS 132; 56 Lab. Cas.
(CCH) P12,314; 42 Ohio Op. 2d 394; 32 Cal. Comp. Cas 631; 66 L.R.R.M. 2627

October 17, 1967, Argued
December 5, 1967, Decided

PRIOR HISTORY: CERTIORARI TO THE
SUPREME COURT OF ILLINOIS.

DISPOSITION: 35 Ill. 2d 112, 219 N. E. 2d 503,
vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: On certiorari, petitioner labor union sought review of an order from the Supreme Court of Illinois that affirmed a decree of a trial court permanently enjoining the union from employing attorneys on salary or retainer basis to represent its members. Respondent state bar association and others had filed the complaint alleging that the union's employment of attorneys constituted the unauthorized practice of law.

OVERVIEW: The union sought review of a decision that permanently enjoined the union from employing attorneys on salary or retainer basis to represent its members with respect to worker's compensation claims. The trial court ruled that the union's employment of an attorney for the purpose of representing its members constituted unauthorized practice of law. Ultimately, the state's highest court rejected the union's argument that the trial court's decree abridged the union's and its members' freedom of speech, petition, and assembly under the *First*

and *Fourteenth Amendments* and affirmed. On certiorari the Court reversed, holding that while the states had broad power to regulate the practice of law, the decree at issue significantly impaired the value of associational freedoms. The Court noted that the decree was not needed to protect the state's interest in high standards of legal ethics. The Court held that the rights of free speech and a free press were not confined to political matters of acute social moment or to any field of human interest.

OUTCOME: The Court vacated the decree and the order of affirmance and remanded the case for proceedings not inconsistent with the Court's opinion.

LexisNexis(R) Headnotes

*Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Constitutional Law > Substantive Due Process > Scope of Protection*

[HN1] The freedoms protected against federal encroachment by the *First Amendment* are entitled under the *Fourteenth Amendment* to the same protection from infringement by the states.

389 U.S. 217, *; 88 S. Ct. 353, **;
19 L. Ed. 2d 426, ***; 1967 U.S. LEXIS 132

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Assembly

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

[HN2] The rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the *Bill of Rights*. These rights, moreover, are intimately connected, both in origin and in purpose, with the other *First Amendment* rights of free speech and free press. All these, though not identical, are inseparable. The *First Amendment* would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. Laws that actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom Legal Ethics > Unauthorized Practice of Law

[HN3] That the states have broad power to regulate the practice of law is, of course, beyond question. But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Assembly

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Free Press > General Overview

Legal Ethics > Unauthorized Practice of Law

[HN4] The *First Amendment* does not protect speech and assembly only to the extent it can be characterized as political. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

SUMMARY:

The Illinois State Bar Association filed a complaint in the Illinois Circuit Court of Sangamon County seeking to restrain a labor union from engaging in activities alleged to constitute the unauthorized practice of law, the complaint alleging that the union had employed a licensed attorney on a salary basis to represent any of its members who wished his services to prosecute workmen's compensation claims before the Illinois Industrial Commission. The trial court enjoined this practice, and the Illinois Supreme Court affirmed, rejecting the union's contention that the decree below abridged the freedom of speech, petition, and assembly of its members. (35 Ill 2d 112, 219 NE2d 503.)

On certiorari, the Supreme Court of the United States vacated the judgment and decree below. In an opinion by Black, J., expressing the view of seven members of the court, it was held that the *First* and *Fourteenth Amendments* gave the union the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

Stewart, J., concurred in the result upon the sole ground that the disposition of the present case was controlled by *Brotherhood of Railroad Trainmen v Virginia State Bar*, 377 US 1, 12 L ed 2d 89, 84 S Ct 1113.

Harlan, J., dissented on the ground that there had been no denial of constitutional rights occasioned by Illinois' prohibition of the union plan, upon a finding, not arbitrary, that the plan presented dangers to the public and the legal profession.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAW §935.5

union's right to hire attorney for members --

Headnote:[1]

The freedom of speech, assembly, and petition guaranteed by the *First* and *Fourteenth Amendments* gives a labor union the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights--in the instant case, to represent them in connection with claims under a state workmen's compensation act.

[***LEdHN2]

389 U.S. 217, *; 88 S. Ct. 353, **;
19 L. Ed. 2d 426, ***LEdHN2; 1967 U.S. LEXIS 132

LAW §925.5

First Amendment -- applicability to states --

Headnote:[2A][2B]

The freedoms protected against federal encroachment by the *First Amendment* are entitled under the *Fourteenth Amendment* to the same protection from infringement by the state.

[***LEdHN3]

LAW §940

rights of assembly and petition --

Headnote:[3]

The rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the *Bill of Rights*; these rights are intimately connected, both in origin and in purpose, with the other *First Amendment* rights of free speech and free press, all these, though not identical, being inseparable.

[***LEdHN4]

LAW §925.3

First Amendment rights -- state legislative competence --

Headnote:[4]

Laws which actually affect the exercise of the *First Amendment* rights of free speech and free press and of assembly and petition for redress of grievances cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because the laws do in fact provide a helpful means of dealing with some evil.

[***LEdHN5]

STATES §7

regulation of practice of law --

Headnote:[5]

Although a state has broad powers to regulate the practice of law, it is equally apparent that broad rules

framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms.

[***LEdHN6]

LAW §925.7

freedom of speech and assembly -- object of communication --

Headnote:[6]

The *First Amendment* does not protect speech and assembly only to the extent it can be characterized as political; great secular causes, with small ones, are guarded.

[***LEdHN7]

LAW §940

right to petition -- right of assembly --

Headnote:[7]

The grievances for redress of which the right of petition is insured, and with it the right of assembly, are not solely religious or political ones.

[***LEdHN8]

LAW §925.7

freedom of speech and press --

Headnote:[8]

The rights of free speech and free press are not confined to any field of human interest.

[***LEdHN9]

LAW §925.7

freedom of speech, petition, and assembly -- object of communication --

Headnote:[9A][9B]

The right to freedom of speech, petition, and assembly under the *First* and *Fourteenth Amendments* is as extensive with respect to assembly and discussion related to matters of local as to matters of federal

concern.

SYLLABUS

The Illinois Bar Association and others brought this action to enjoin petitioner Union from the unauthorized practice of law. The Union employs a licensed lawyer, solely compensated by an annual salary, to represent members and their dependents in connection with their claims under the Illinois Workmen's Compensation Act. The trial court found that the Union's employment of the attorney constituted unauthorized practice of law and enjoined the Union from "employing attorneys on salary or retainer basis to represent its members with respect to Workmen's Compensation [or other statutory] claims." The Illinois Supreme Court affirmed, rejecting petitioner's contentions that the decree violated the *First* and *Fourteenth Amendments*. *Held*: The trial court's decree preventing petitioner from hiring attorneys on a salary basis to assist its members in asserting their legal rights violates the freedom of speech, assembly, and petition provisions of the *First Amendment* as incorporated by the *Fourteenth Amendment*. Pp. 221-225.

(a) No restraints by legislation or otherwise upon *First Amendment* rights can be sustained merely because they were imposed for the purpose of dealing with some evil within the State's competence. P. 222.

(b) In this case, as in *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964), and *NAACP v. Button*, 371 U.S. 415 (1963), the principles of which are controlling here, the remote possibility of harm arising from the theoretically conflicting interests of the Union and its members cannot justify the substantial impairment of the Union members' associational rights which results from the trial court's decree. Pp. 222-224.

COUNSEL: Harrison Combs argued the cause for petitioner. With him on the briefs were Edmund Burke, Edward L. Carey, Willard P. Owens and M. E. Boiarsky.

Bernard H. Bertrand argued the cause and filed a brief for respondents.

Briefs of amici curiae, urging reversal, were filed by Jack Greenberg, James M. Nabrit III, Melvyn Zarr and Jay H. Topkis for the NAACP Legal Defense and Educational Fund et al., and by Victor Rabinowitz and Allan Brotsky for the National Lawyers Guild.

Joseph A. Ball, John J. Goldberg and Samuel O. Pruitt, Jr., filed a brief for the State Bar of California, as amicus curiae, urging affirmance.

JUDGES: Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall

OPINION BY: BLACK

OPINION

[*218] [***428] [**354] MR. JUSTICE BLACK delivered the opinion of the Court.

The Illinois State Bar Association and others filed this complaint to enjoin the United Mine Workers of America, District 12, from engaging in certain practices alleged to constitute the unauthorized practice of law. The essence of the complaint was that the Union had employed a licensed attorney on a salary basis to represent any of its members who wished his services to prosecute workmen's compensation claims before the Illinois Industrial Commission. The trial court found from facts that were not in dispute that employment of an attorney by the association for this purpose did constitute unauthorized practice and permanently enjoined the Union from "employing attorneys on salary or retainer basis to represent its members with respect to Workmen's Compensation claims and any and all other claims which they may have under the statutes and laws of Illinois." ¹ The [*219] Illinois Supreme Court rejected the Mine Workers' contention that this decree abridged their freedom of speech, petition, and assembly under the *First* and *Fourteenth Amendments* and affirmed. We granted certiorari, 386 U.S. 941 (1967), to consider whether this holding conflicts with our decisions in *Railroad Trainmen v. Virginia* [***429] *Bar*, 377 U.S. 1 (1964), and *NAACP v. Button*, 371 U.S. 415 (1963).

1 In addition to the portion just quoted, the court's decree enjoins the Union from:

"1. Giving legal counsel and advice

"2. Rendering legal opinions

"3. Representing its members with respect to Workmen's Compensation claims and any and all other claims which they may have under the laws and statutes of the State of Illinois

389 U.S. 217, *219; 88 S. Ct. 353, **354;
19 L. Ed. 2d 426, ***429; 1967 U.S. LEXIS 132

"4. [Quoted above]

"5. Practicing law in any form either directly or indirectly."

It is conceded that the Union's employment of an attorney was the basis for these other provisions of the injunction, and it was not claimed that the Union was otherwise engaged in the practice of law. Our opinion and holding is therefore limited to this one aspect of the Union's activities.

As in the *Trainmen* case, we deal here with a program that has been in successful operation for the Union members for decades. Shortly after enactment of the Illinois Workmen's Compensation Statute ² in 1911, the Mine Workers realized that some form of mutual protection was necessary to enable them to enjoy in practice the many benefits that the statute promised in theory. At the Union's 1913 convention the secretary-treasurer reported that abuses had already developed: "the interests of the members were being juggled and even when not, they were required to pay forty or fifty per cent of the amounts recovered in damage suits, for attorney fees." In response to this situation the convention instructed the Union's incoming executive board to establish the "legal department" which is now attacked for engaging in the unauthorized practice of law.

2 Ill. Rev. Stat., c. 48, § 138 1 *et seq.* (1963).

The undisputed facts concerning the operation of the Union's legal department [**355] are these. The Union employs one attorney on a salary basis to represent members and their dependents in connection with claims for personal injury and death under the Illinois Workmen's Compensation Act. The terms of the attorney's employment, as outlined in a letter from the acting president of the Union to the present attorney, include the following [*220] specific provision: "You will receive no further instructions or directions and have no interference from the District, nor from any officer, and your obligations and relations will be to and with only the several persons you represent." The record shows no departure from this agreement. The Union provides injured members with forms entitled "Report to Attorney on Accidents" and advises them to fill out these forms and send them to the Union's legal department. There is no language on the form which specifically requests the attorney to file with the Industrial

Commission an application for adjustment of claim on behalf of the injured member, but when one of these forms is received, the attorney presumes that it does constitute such a request. The members may employ other counsel if they desire, and in fact the Union attorney frequently suggests to members that they can do so. In that event the attorney is under instructions to turn the member's file over to the new lawyer immediately.

The applications for adjustment of claim are prepared by secretaries in the Union offices, and are then forwarded by the secretaries to the Industrial Commission.³ After the claim is sent to the Commission, the attorney prepares his case from the file, usually without discussing the claim with the member involved. The attorney determines what he believes the claim to be worth, presents his views to the attorney for the respondent coal company during prehearing negotiations, and attempts to reach a settlement. If an agreement between opposing counsel is reached, the Union attorney will notify the injured member, who then decides, in light [*221] of his attorney's advice, whether or not to accept the offer. If no settlement is reached, a hearing is held before the [***430] Industrial Commission, and unless the attorney has had occasion to discuss a settlement proposal with the member, this hearing will normally be the first time the attorney and his client come into personal contact with each other. It is understood by the Union membership, however, that the attorney is available for conferences on certain days at particular locations. The full amount of any settlement or award is paid directly to the injured member. The attorney receives no part of it, his entire compensation being his annual salary paid by the Union.

3 The Union's present attorney, who was the only witness on this matter, testified that the application to be filed with the Industrial Commission was dictated by him to the secretaries, who prepared this form under his direction. R. 18, 40. See also R. 58 (Union's answers to interrogatories).

[***LEdHR1] [1] [***LEdHR2A] [2A]The Illinois Supreme Court rejected petitioner's contention that its members had a right, protected by the *First* and *Fourteenth Amendments*, to join together and assist one another in the assertion of their legal rights by

389 U.S. 217, *221; 88 S. Ct. 353, **355;
19 L. Ed. 2d 426, ***LEdHR2A; 1967 U.S. LEXIS 132

collectively hiring an attorney to handle their claims. That court held that our decision in *Railroad Trainmen v. Virginia Bar*, *supra*, protected plans under which workers were advised to consult specific attorneys, but did not extend to protect plans involving an explicit hiring of such attorneys by the union. The Illinois court recognized that in *NAACP v. Button*, *supra*, we also held protected a plan under which the attorneys recommended to members were actually paid by the association, but the Illinois court viewed the *Button* case as concerned chiefly with litigation that can be characterized as a form of political expression. We do not think our decisions in *Trainmen* and *Button* can be so narrowly limited. We hold that the freedom of [*356] speech, assembly, and petition guaranteed by the *First* and *Fourteenth* ⁴ *Amendments* gives petitioner the right to [*222] hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

[***LEdHR2B] [2B]

4 [HN1] The freedoms protected against federal encroachment by the *First Amendment* are entitled under the *Fourteenth Amendment* to the same protection from infringement by the States. See, e. g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 276-277 (1964), and cases there cited.

[***LEdHR3] [3] [***LEdHR4] [4] We start with the premise that [HN2] the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the *Bill of Rights*. These rights, moreover, are intimately connected, both in origin and in purpose, with the other *First Amendment* rights of free speech and free press. "All these, though not identical, are inseparable." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The *First Amendment* would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *Schneider v. State*, 308 U.S. 147 (1939);

Cantwell v. Connecticut, 310 U.S. 296 (1940).

[***LEdHR5] [5] The foregoing were the principles we invoked when we dealt in the *Button* and *Trainmen* cases with the right of an association to provide [***431] legal services for its members. [HN3] That the States have broad power to regulate the practice of law is, of course, beyond question. See *Trainmen*, *supra*, at 6. But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms. Thus in *Button*, *supra*, we dealt with a plan under which the NAACP not only advised prospective [*223] litigants to seek the assistance of particular attorneys but in many instances actually paid the attorneys itself. We held the dangers of baseless litigation and conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court. Likewise in the *Trainmen* case there was a theoretical possibility that the union's interests would diverge from that of the individual litigant members, and there was a further possibility that if this divergence ever occurred, the union's power to cut off the attorney's referral business could induce the attorney to sacrifice the interests of his client. Again we ruled that this very distant possibility of harm could not justify a complete prohibition of the *Trainmen's* efforts to aid one another in assuring that each injured member would be justly compensated for his injuries.

[***LEdHR6] [6] [***LEdHR7] [7] [***LEdHR8] [8] We think that both the *Button* and *Trainmen* cases are controlling here. The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but [HN4] the *First Amendment* does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes, with small ones, [**357] are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." *Thomas v. Collins*, *supra*, at 531. And of course in *Trainmen*, where the litigation in question was, as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent, see 377 U.S., at 10 (Clark, J.), that the principles announced

389 U.S. 217, *223; 88 S. Ct. 353, **357;
19 L. Ed. 2d 426, ***LEdHR8; 1967 U.S. LEXIS 132

in *Button* were applicable only to litigation for political purposes. See 377 U.S., at 8.

[*224] Nor can the case at bar be distinguished from the *Trainmen* case in any persuasive way.⁵ Here, to be sure, the attorney is actually paid by the Union, not merely the beneficiary of its recommendations. But in both situations the attorney's economic welfare is dependent to a considerable extent on the good will of the union, and if the temptation to sacrifice the client's best interests is stronger in the present situation, it is stronger to a virtually imperceptible [***432] degree. In both cases, there was absolutely no indication that the theoretically imaginable divergence between the interests of union and member ever actually arose in the context of a particular lawsuit; indeed in the present case the Illinois Supreme Court itself described the possibility of conflicting interests as, at most, "conceivabl[e]."

[***LEdHR9B] [9B]

5 It is irrelevant that the litigation in *Trainmen* involved statutory rights created by Congress, while the litigation in the present case involved state-created rights. Our holding in *Trainmen* was based not on State interference with a federal program in violation of the *Supremacy Clause* but rather on petitioner's freedom of speech, petition, and assembly under the *First* and *Fourteenth Amendments*, and this freedom is, of course, as extensive with respect to assembly and discussion related to matters of local as to matters of federal concern.

[***LEdHR9A] [9A] It has been suggested that the Union could achieve its goals by referring members to a specific lawyer or lawyers and then reimbursing the members out of a common fund for legal fees paid. Although a committee of the American Bar Association, in an informal opinion, may have approved such an arrangement,⁶ we think the [*225] view of the Illinois Supreme Court is more relevant on this point. In the present case itself the Illinois court stressed that where a union recommends attorneys to its members, "any 'financial connection of any kind'" between the union and such attorneys is illegal.⁷ It cannot seriously be argued, therefore, that this alternative arrangement would be held proper under the laws of Illinois.

6 American Bar Association, Standing Committee on Professional Ethics, Informal Opinion No. 469 (December 26, 1961). The ABA committee did not in fact consider the problem presented where the union not only pays the fee but also recommends the specific attorney, and it strongly implied that it would reach a different result in such a situation: "there is nothing unethical in the situations which you describe so long as the participation of the employer, association or union is confined to payment of or reimbursement for legal expenses only."

7 35 Ill. 2d 112, 118, 219 N. E. 2d 503, 506 (1966), quoting *In re Brotherhood of R. R. Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163 (1958).

The decree at issue here thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics. In the many years the program has been in operation, there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the Union and the attorney [**358] who represents its members. Since the operative portion of the decree prohibits any financial connection between the attorney and the Union, the decree cannot stand; and to the extent any other part of the decree forbids this arrangement it too must fall.

The judgment and decree are vacated and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART concurs in the result upon the sole ground that the disposition of this case is controlled by *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1.

DISSENT BY: HARLAN

DISSENT

MR. JUSTICE HARLAN, dissenting.

This decision cuts deeply into one of the most

traditional of state concerns, the maintenance of high [*226] standards within the state legal profession. I find myself unable to subscribe to it.

The Canons of Professional Ethics of the Illinois State Bar Association forbid the unauthorized practice of [***433] law by any lay agency.¹ The Illinois Supreme Court, acting in light of these canons and in exercise of its commonlaw power of supervision over the Bar,² prohibited the United Mine Workers of America, District 12, from employing a salaried lawyer to represent its members in workmen's compensation actions before the Illinois Industrial Commission. I do not believe that this regulation of the legal profession infringes upon the rights of speech, petition, or assembly of the Union's members, assured by the *Fourteenth Amendment*.

1 Canons 35, 47, Canons of Ethics of the Illinois State Bar Association. These canons are identical to the corresponding canons of the American Bar Association.

2 Even in the absence of applicable statutes, state courts have held themselves empowered to promulgate and enforce standards of professional conduct drawn from the common law and the closely related prohibitions of the Canons of Ethics. See, e. g., *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N. E. 2d 272, and cases therein cited. See generally Drinker, *Legal Ethics* 26-30, 35-48.

I.

As I stated at greater length in my dissenting opinion in *NAACP v. Button*, 371 U.S. 415, 448, 452-455, the freedom of expression guaranteed against state interference by the *Fourteenth Amendment* includes the liberty of individuals not only to speak but also to unite to make their speech effective. The latter right encompasses the right to join together to obtain judicial redress. However, litigation is more than speech; it is conduct. And the States may reasonably regulate conduct even though it is related to expression. The pivotal point is how these competing interests should be resolved in this instance.

[*227] My brethren are apparently in accord. The majority begins by noting that this activity of the Union is related to expression and therefore is of a type which may be sheltered from state regulation by the Constitution. But the majority's inquiry does not stop

there; it goes on to examine the state concerns and concludes that the decree "is not needed to protect the State's interest in high standards of legal ethics." See *ante*, at 225.³ I agree, [**359] of course, with this "balancing" approach. See, e. g., *NAACP v. Button*, *supra*, at 452-455 (dissenting opinion); *Konigsberg v. California Bar*, 366 U.S. 36, 49-51; *Talley v. California*, 362 U.S. 60, 66 (concurring opinion). Indeed, I cannot conceive of any other sound method of attacking this type [***434] of problem. For if an "absolute" approach were adopted, as some members of this Court have from time to time insisted should be so with "*First Amendment*" cases,⁴ and the state interest in regulation given no weight, there would be no apparent [*228] reason why, for example, a group might not employ a layman to represent its members in court or before an agency because it felt that his low fee made up for his deficiencies in legal knowledge. Cf. *Hackin v. Arizona*, *ante*, p. 143 (DOUGLAS, J., dissenting).

3 This weighing of the competing interests involved is the same approach as that used in *NAACP v. Button*, 371 U.S. 415, and in *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1. However, since a new balance must be struck whenever the competing interests are significantly different, this decision is not controlled by those cases. The union members in this case are not asserting legal rights which stem either from the Constitution or from a federal statute, sources of origin stressed respectively in *Button*, see 371 U.S., at 429-431, 441-444, and in *Railroad Trainmen*, see 377 U.S., at 3-6. Furthermore, the union plan at issue here differs from the referral practice involved in *Railroad Trainmen* because it involves the services of a union-salaried lawyer.

Similarly, the interests in this case are very different from those in cases involving legal aid to the indigent. The situation of a salaried lawyer representing indigent clients was expressly distinguished by the court below. See 35 Ill. 2d 112, 121, 219 N. E. 2d 503, 508.

4 See, e. g., *Lathrop v. Donohue*, 367 U.S. 820, 865, 871-874 (dissenting opinion); *Konigsberg v. California Bar*, 366 U.S. 36, 56, 60-71 (dissenting opinion).

II.

Although I agree with the balancing approach

389 U.S. 217, *228; 88 S. Ct. 353, **359;
19 L. Ed. 2d 426, ***434; 1967 U.S. LEXIS 132

employed by the majority, I find the scales tip differently. I believe that the majority has weighed the competing interests badly, according too much force to the claims of the Union and too little to those of the public interest at stake. As indicated previously, the interest of the Union stems from its members' constitutionally protected right to seek redress in the courts or, as here, before an agency. By the plan at issue, the Union has sought to make it easier for members to obtain benefits under the Illinois Workmen's Compensation Act.⁵ The plan is evidently designed to help injured union members in three ways: (1) by assuring that they will have knowledge of and access to an attorney capable of handling their claims; (2) by guaranteeing that they will not be charged excessive legal fees; and (3) by protecting them from crippling, even though reasonable, fees by making legal costs payable collectively through union dues. These are legitimate and laudable goals. However, the union plan is by no means necessary for their achievement. They all may be realized by methods which are proper under the laws of Illinois.

⁵ Ill. Rev. Stat., c. 48, § 138.1 *et seq.* (1963).

The Illinois Supreme Court in this case repeated its statement in a prior case that a union may properly make known to its members the names of attorneys it deems capable of handling particular types of claims.⁶ [*229] Such union notification would serve to assure union members of access to competent lawyers.

⁶ See 35 Ill. 2d, at 118-119, 219 N. E. 2d, at 506-507. The earlier Illinois decision referred to was *In re Brotherhood of R. R. Trainmen*, 13 Ill. 2d 391, 150 N. E. 2d 163.

As regards the protection of union members against the charging of unreasonable fees, a fully efficient safeguard would seem to be found in the Illinois Workmen's Compensation Act itself. An amendment to the Act in 1915, shortly [**360] after its initial passage,⁷ provided that the Industrial Commission

"shall have the power to determine the reasonableness and fix the amount of any fee or compensation charged by any person for any service performed in connection with this Act, or for which payment is to be made under this Act or rendered in securing any right under this Act."⁸

In 1927, the words "including attorneys, physicians,

surgeons and hospitals" were added following the phrase "or compensation charged by any person."⁹ Thus, there would [***435] now appear to be no reasonable grounds for fearing that union members will be subjected to excessive legal fees.

⁷ It may be significant that the union plan was instituted in 1913, prior to this amendment of the Act. See *ante*, at 219.

⁸ Ill. Laws, 1915, p. 408.

⁹ Ill. Laws, 1927, p. 511.

The final interest sought to be promoted by the present plan is in the collective payment of legal fees. That objective could presumably be realized by imposing assessments on union members for the establishment of a fund out of which injured members would be reimbursed for their legal expenses.¹⁰ There is no reason to believe that this arrangement would be improper under Illinois law, since the union's obligation would run only to the [*230] member and there would be no financial connection between union and attorney.

¹⁰ Cf. American Bar Association, Committee on Professional Ethics, Informal Opinion No. 469 (December 26, 1961) (union may reimburse member client for legal expenses).

The regulatory interest of the State in this instance is found in the potential for abuse inherent in the union plan. The plan operates as follows. The Union employs a licensed lawyer on a salary basis¹¹ to represent members and their dependents in connection with their claims under the Workmen's Compensation Act. Members are told that they may employ other attorneys if they wish. The attorney is selected by the Executive Board of District 12, and the terms of employment specify that the attorney's sole obligation is to the person represented and that there will be no interference by the Union. Injured union members are furnished by the Union with a form which advises them to send the form to the Union's legal department. Upon receipt of the form, the attorney assumes it to constitute a request that he file on behalf of the injured member a claim with the Industrial Commission, though no such explicit request is contained in the form. The application for compensation is prepared by secretaries in the union offices, and when complete it is sent directly to the Industrial Commission. In most instances, the attorney has neither seen nor talked with the union member at this stage, though the attorney is available for consultation at specified times. After the

389 U.S. 217, *230; 88 S. Ct. 353, **360;
19 L. Ed. 2d 426, ***435; 1967 U.S. LEXIS 132

filing of the claim and prior to the hearing before the Commission, the attorney prepares for its presentation by resorting to his file and to the application, usually without conferring with the injured member. Ordinarily the member and this attorney first meet at the time of the hearing before the Commission.

11 The salary paid at the time of this action was \$ 12,400 per annum.

[*231] The attorney determines what he thinks the claim to be worth and attempts to settle with the employer's attorney during prehearing negotiations. If agreement is reached, the attorney recommends to the injured member that he accept the result. If no settlement occurs, a hearing on the merits is held before the Industrial Commission. The full amount of the settlement or award is paid to the injured member. The attorney retains for himself no part of the [**361] amount received, his sole compensation being his annual salary paid by the Union.

This union plan contains features which, in my opinion, Illinois may reasonably consider to present the danger of lowering the quality of representation furnished by the attorney to union members in the handling of their claims. The union lawyer has little contact with his client. He processes the applications of injured members on a mass [***436] basis. Evidently, he negotiates with the employer's counsel about many claims at the same time. The State was entitled to conclude that, removed from ready contact with his client, insulated from interference by his actual employer, paid a salary independent of the results achieved, faced with a heavy caseload,¹² and very possibly with other activities competing for his time,¹³ the attorney will be tempted to place undue emphasis upon quick disposition of each case. Conceivably, the desire to process forms rapidly might influence the lawyer not to check with his client regarding ambiguities or omissions in the form, or to miss facts and circumstances which face-to-face consultation with his client would [*232] have brought to light. He might be led, so the State might consider, to compromise cases for reasons unrelated to their own intrinsic merits, such as the need to "get on" with negotiations or a promise by the employer's attorney of concessions relating to other cases. The desire for quick disposition also might cause the attorney to forgo appeals in some cases in which the amount awarded seemed unusually low.¹⁴

12 The attorney employed by the Union in this case handled more than 400 workmen's compensation claims a year.

13 The attorney employed by the Mine Workers was also an Illinois state senator and had a private practice other than the Mine Workers' representation.

14 Of 351 workmen's compensation cases, from all sources, which were appealed to the Illinois courts during the period 1936-1967, only one was appealed by a miner affiliated with District 12. No such miner has appealed since 1942. See Respondents' Brief, at 17-18.

III.

Thus, there is solid support for the Illinois Supreme Court's conclusion that the union plan presents a danger of harm to the public interest in a regulated bar. The reasonableness of this result is further buttressed by the numerous prior decisions, both in Illinois and elsewhere, in which courts have prohibited the employment of salaried attorneys by groups for the benefit of their members.¹⁵

15 See, e. g., *People ex rel. Courtney v. Association of Real Estate Tax-payers*, 354 Ill. 102, 187 N. E. 823; *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N. E. 2d 272, and cases therein cited; *Richmond Assn. of Credit Men, Inc. v. Bar Assn. of Richmond*, 167 Va. 327, 189 S. E. 153. The Canons of Ethics of the American Bar Association have also been interpreted as forbidding arrangements of the kind at issue here. See American Bar Association, Committee on Unauthorized Practice of the Law, Informative Opinion No. A of 1950, 36 A. B. A. J. 677.

The majority dismisses the State's interest in regulation by pointing out that there have been no proven instances of abuse or actual disadvantage to union members resulting from the operation of the union plan. See *ante*, at 225. But the proper question is not whether [*233] this particular plan has in fact caused any harm. 16 It is, instead, settled that in the absence of any dominant opposing interest a State may enforce prophylactic [**362] measures reasonably calculated to ward off foreseeable abuses, and that the fact that a specific activity has not yet produced any undesirable consequences will not exempt it from regulation. See, e. g., [***437] *Hoopeston Canning Co. v. Cullen*, 318

389 U.S. 217, *233; 88 S. Ct. 353, **362;
19 L. Ed. 2d 426, ***437; 1967 U.S. LEXIS 132

U.S. 313, 321-322; Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 222-225.

16 It is possible that the operation of the plan did result in union members receiving a lower quality of legal representation than they otherwise would have had. For example, the Mine Workers' present attorney recovered an average of \$ 1,160 per case, while his predecessor secured an average of \$ 1,350, even though the permissible rates of recovery were lower during the predecessor's tenure. See Record, at 53-54, 58-60; Brief for Respondents 18. See also n. 14, *supra*.

It is also irrelevant whether we would proscribe the union plan were we sitting as state judges or state legislators. The sole issue before us is whether the Illinois Supreme Court is forbidden to do so because the plan unduly impinges upon rights guaranteed to the Union's members by the *Fourteenth Amendment*. Since the finding that the union plan presents dangers to the public and legal profession is not an arbitrary one, and since the limitation upon union members is so slight, in view of the permissible alternatives still open to them, I would hold that there has been no denial of constitutional rights occasioned by Illinois' prohibition of the plan.

IV.

This decision, which again manifests the peculiar insensitivity to the need for seeking an appropriate constitutional balance between federal and state authority that in recent years has characterized so many of the Court's decisions under the *Fourteenth Amendment*, [*234] puts this Court more deeply than ever in the business of supervising the practice of law in the various States. From my standpoint, what is done today is unnecessary, undesirable, and constitutionally all wrong. In the absence of demonstrated arbitrary or discriminatory regulation, state courts and legislatures should be left to govern their own Bars, free from interference by this Court.¹⁷ Nothing different accords with longstanding and unquestioned tradition and with the most elementary demands of our federal system.

¹⁷ It has been suggested both in this case and elsewhere, cf. *Hackin v. Arizona, ante*, p. 143 (DOUGLAS, J., dissenting), that prevailing Canons of Ethics and traditional customs in the

legal profession will have to be modified to keep pace with the needs of new social developments, such as the Federal Poverty Program. That may well be true, but such considerations furnish no justification for today's heavy-handed action by the Court. The American Bar Association and other bodies throughout the country already have such matters under consideration. See, e. g., 1964 ABA Reports 381-383 (establishment of Special Committee on Ethical Standards); 1966 ABA Reports 589-594 (Report of Special Committee on Availability of Legal Services); 39 Calif. State Bar Journal 639-742 (Report of Committee on Group Legal Services). Moreover, the complexity of these matters makes them especially suitable for experimentation at the local level. And, all else failing, the Congress undoubtedly has the power to implement federal programs by establishing overriding rules governing legal representation in connection therewith.

I would affirm.

REFERENCES

7 *Am Jur 2d, Attorneys at Law* 42, 83; 14 *Am Jur 2d, Champerty and Maintenance* 19

US Digest Anno, Constitutional Law 935.5

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Constitutionality of statute against solicitation of business by or for attorney. 53 ALR 279.

APPENDIX 47



WASHINGTON, ET AL., PETITIONERS v. HAROLD GLUCKSBERG ET AL.

No. 96-110

SUPREME COURT OF THE UNITED STATES

521 U.S. 702; 117 S. Ct. 2258; 117 S. Ct. 2302; 138 L. Ed. 2d 772; 1997 U.S. LEXIS 4039; 65 U.S.L.W. 4669; 97 Cal. Daily Op. Service 5008; 97 Daily Journal DAR 8150; 11 Fla. L. Weekly Fed. S 190

January 8, 1997, Argued

June 26, 1997, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, Reported at: *1996 U.S. App. LEXIS 20704*.

DISPOSITION: *79 F.3d 790*, reversed and remanded.

DECISION:

Washington state statute, which provides that person who knowingly causes or aids another person to attempt suicide is guilty of felony of promoting suicide attempt, held not violative of *Fourteenth Amendment's due process clause*.

SUMMARY:

A Washington state statute enacted in 1975 provided that a person was guilty of the felony of promoting a suicide attempt when the person knowingly caused or aided another person to attempt suicide. In 1994, an action was brought in the United States District Court for the Western District of Washington by several plaintiffs, among whom were (1) physicians who occasionally treated terminally ill, suffering patients, and (2) individuals who were then in the terminal phases of serious and painful illnesses. The plaintiffs, asserting the existence of a liberty interest protected by the *Federal Constitution's Fourteenth Amendment* which extended to

a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide, sought a declaratory judgment that the Washington statute was unconstitutional on its face. The District Court, granting motions for summary judgment by the physicians and the individuals, ruled that the statute was unconstitutional because it placed an undue burden on the exercise of the asserted liberty interest (*850 F. Supp 1454, 1994 US Dist LEXIS 5831*). On appeal, the United States Court of Appeals for the Ninth Circuit, ultimately affirming en banc, expressed the view that (1) the Constitution encompassed a due process liberty interest in controlling the time and manner of one's death; and (2) the Washington statute was unconstitutional as applied to terminally ill, competent adults who wished to hasten their deaths with medication prescribed by their physicians (*79 F.3d 790, 1996 US App LEXIS 3944*).

On certiorari, the United States Supreme Court reversed. In an opinion by Rehnquist, Ch. J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ., it was held that the Washington statute did not violate the due process clause--either on the statute's face or as the statute was applied to competent, terminally ill adults who wished to hasten their deaths by obtaining medication prescribed by their physicians--because (1) pursuant to careful formulation of the interest at stake, the question was whether the liberty specially protected by the due process clause included a right to commit suicide which itself included a right to assistance in doing so; (2)

521 U.S. 702, *; 117 S. Ct. 2258, **;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***

an examination of the nation's history, legal traditions, and practices revealed that the asserted right to assistance in committing suicide was not a fundamental liberty interest protected by the due process clause; (3) the asserted right to assistance in committing suicide was not consistent with the Supreme Court's substantive due process line of cases; and (4) the state's assisted suicide ban was at least reasonably related to the promotion and protection of a number of Washington's important and legitimate interests.

O'Connor, J., concurring, (1) joined the court's opinion, but (2) expressed the view that since the parties agreed that a patient who was suffering from a terminal illness and experiencing great pain had no legal barriers to obtaining medication, from qualified physicians, to alleviate such suffering—even to the point of causing unconsciousness and hastening death—there was no need in the case at hand to reach the question whether a mentally competent person who was experiencing great suffering had a constitutionally cognizable interest in controlling the circumstances of his or her imminent death.

Stevens, J., concurring in the judgment, (1) agreed that the liberty protected by the due process clause did not include a categorical right to commit suicide which itself included a right to assistance in doing so, but (2) expressed the view that a terminally ill, mentally competent patient seeking to hasten death, or a doctor whose assistance was sought, might prevail in a more particularized challenge to a general rule banning the practice of physician-assisted suicide.

Souter, J., concurring in the judgment, expressed the view that (1) given the substantial dispute about the effectiveness of assisted suicide guidelines in the Netherlands, Washington's asserted interest in protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and involuntary, was sufficiently serious to uphold the Washington statute against the claim that the statute violated the due process clause; and (2) as between the institutions of a legislature and a court, the legislative institutional competence was the better one to deal with an emerging issue like assisted suicide.

Ginsburg, J., concurred in the judgment substantially for the reasons stated in the opinion of O'Connor, J.

Breyer, J., (1) concurred in the judgment; (2) joined

the opinion of O'Connor, J., except insofar as such opinion joined the court's opinion; and (3) expressed the view that (a) the core of a liberty interest in dying with dignity included the avoidance of unnecessary and severe physical suffering, and (b) a state law's impact upon the right to such avoidance would be more directly at issue if the legal circumstances were different—for example, if state law prevented the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §528.5

due process -- crime -- assisting suicide -- protection of liberty --

Headnote:[1A][1B][1C][1D][1E][1F][1G][1H]

A state statute which provides that a person is guilty of the felony of promoting a suicide attempt when the person knowingly causes or aids another person to attempt suicide does not violate the due process clause of the *Federal Constitution's Fourteenth Amendment*—either on the statute's face or as the statute is applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their physicians—because (1) pursuant to careful formulation of the interest at stake, the question is whether the liberty specially protected by the due process clause includes a right to commit suicide which itself includes a right to assistance in doing so; (2) an examination of the nation's history, legal traditions, and practices reveals that the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the due process clause, in that (a) in almost every state, and in almost every western democracy, it is a crime to assist a suicide, (b) for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide, (c) the prohibitions against assisting suicide never contained exceptions for those who were near death, (d) by the time the *Fourteenth Amendment* was ratified, it was a crime in most states to assist a suicide, (e) in recent years, the states' assisted suicide bans have been re-examined and, generally, reaffirmed, (f) the Federal Assisted Suicide Funding Restriction Act of 1997 (42 USCS 14401 et seq.) prohibits the use of federal funds in support of

521 U.S. 702, *; 117 S. Ct. 2258, **;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***LEdHN1

physician-assisted suicide, and (g) despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, the nation's laws continue to prohibit assisting suicide, even for terminally ill, mentally competent adults; (3) the asserted right to assistance in committing suicide is not consistent with the United States Supreme Court's substantive due process line of cases; and (4) the state's assisted suicide ban is at least reasonably related to the promotion and protection of the state's important and legitimate interests in (a) preserving human life, (b) preventing suicide and studying, identifying, and treating its causes, (c) protecting the integrity and ethics of the medical profession, (d) protecting vulnerable groups--including the poor, the elderly, and persons with disabilities--from abuse, neglect, and mistakes, and (e) preventing voluntary and perhaps even involuntary euthanasia. (Breyer, J., dissented in part from this holding.)

[***LEdHN2]

APPEAL §1339.5

certiorari -- Court of Appeals' holding --

Headnote:[2A][2B]

On certiorari to review a Federal Court of Appeals' judgment, the holding of the Court of Appeals that is before the United States Supreme Court is whether a state statute prohibiting assisted suicide is unconstitutional as applied to a class of terminally ill, mentally competent patients, notwithstanding that the Court of Appeals' analysis and eventual holding that the statute was unconstitutional was not limited to a particular set of plaintiffs before the Court of Appeals, where (1) an action challenging the statute had been brought in Federal District Court by such patients and others, and (2) on appeal, the Court of Appeals emphasized that it was not deciding the facial validity of the statute.

[***LEdHN3]

CONSTITUTIONAL LAW §513

due process -- analysis --

Headnote:[3A][3B]

The United States Supreme Court begins its analysis in all due process cases by examining the nation's history,

legal traditions, and practices; such examination provides the crucial guideposts for responsible decisionmaking that direct and restrain the Supreme Court's exposition of the due process clause of the *Federal Constitution's Fourteenth Amendment*.

[***LEdHN4]

CONSTITUTIONAL LAW §514

due process -- liberty --

Headnote:[4]

The due process clause of the *Federal Constitution's Fourteenth Amendment* guarantees more than fair process, and the liberty it protects includes more than the absence of physical restraint; the due process clause provides heightened protection against government interference with certain fundamental rights and liberty interests.

[***LEdHN5]

CONSTITUTIONAL LAW §525

due process -- new liberty interests --

Headnote:[5]

The United States Supreme Court, when asked to break new ground by extending constitutional protection to an asserted right or liberty interest under the due process clause of the *Federal Constitution's Fourteenth Amendment*, must exercise the utmost care, lest the liberty protected by the due process clause be subtly transformed into the policy preferences of the members of the Supreme Court.

[***LEdHN6]

CONSTITUTIONAL LAW §525

due process -- liberty -- state interest --

Headnote:[6]

The due process clause of the *Federal Constitution's Fourteenth Amendment* forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

[***LEdHN7]

CONSTITUTIONAL LAW §525

due process -- personal autonomy --

Headnote:[7]

The fact that many of the rights and liberties protected by the due process clause of the *Federal Constitution's Fourteenth Amendment* sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.

[***LEdHN8]

CONSTITUTIONAL LAW §525

due process -- liberty -- rational basis --

Headnote:[8]

With respect to an asserted right which is found not to be a fundamental liberty interested protected by the due process clause of the *Federal Constitution's Fourteenth Amendment*, the due process clause requires that governmental interference with such right be rationally related to legitimate government interests.

[***LEdHN9]

CONSTITUTIONAL LAW §525

due process -- liberty -- quality of life --

Headnote:[9]

Consistent with the liberty interests protected by the due process clause of the *Federal Constitution's Fourteenth Amendment*, states may properly decline to make judgments about the quality of life that a particular individual may enjoy, even for those who are near death.

[***LEdHN10]

CONSTITUTIONAL LAW §854

due process -- crime -- assisting suicide --

Headnote:[10A][10B]

A holding by the United States Supreme Court, to the effect that a state statute which provides that a person

is guilty of the felony of promoting a suicide attempt when the person knowingly causes or aids another person to attempt suicide does not violate the due process clause of the *Federal Constitution's Fourteenth Amendment*, does not absolutely foreclose a particularized due process challenge by an individual seeking to hasten death or by a doctor whose assistance is sought in hastening an individual's death, but such a claim would have to be quite different from a claim that mentally competent, terminally ill adults have a right, under the due process clause, to commit physician-assisted suicide.

SYLLABUS

It has always been a crime to assist a suicide in the State of Washington. The State's present law makes "promoting a suicide attempt" a felony, and provides: "A person is guilty of [that crime] when he knowingly causes or aids another person to attempt suicide." Respondents, four Washington physicians who occasionally treat terminally ill, suffering patients, declare that they would assist these patients in ending their lives if not for the State's assisted-suicide ban. They, along with three gravely ill plaintiffs who have since died and a nonprofit organization that counsels people considering physician-assisted suicide, filed this suit against petitioners, the State and its Attorney General, seeking a declaration that the ban is, on its face, unconstitutional. They assert a liberty interest protected by the *Fourteenth Amendment's Due Process Clause* which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide. Relying primarily on *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, and *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, the Federal District Court agreed, concluding that Washington's assisted-suicide ban is unconstitutional because it places an undue burden on the exercise of that constitutionally protected liberty interest. The en banc Ninth Circuit affirmed.

Held: Washington's prohibition against "causing" or "aiding" a suicide does not violate the Due Process Clause. Pp. 5-32.

(a) An examination of our Nation's history, legal traditions, and practices demonstrates that Anglo-American common law has punished or otherwise disapproved of assisting suicide for over 700 years; that rendering such assistance is still a crime in almost every State; that such prohibitions have never contained

521 U.S. 702, *; 117 S. Ct. 2258, **;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***

exceptions for those who were near death; that the prohibitions have in recent years been reexamined and, for the most part, reaffirmed in a number of States; and that the President recently signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. Pp. 5-15.

(b) In light of that history, this Court's decisions lead to the conclusion that respondents' asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Court's established method of substantive-due-process analysis has two primary features: First, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition. *E.g.*, *Moore v. East Cleveland*, 431 U.S. 494, 503 (plurality opinion). Second, the Court has required a "careful description" of the asserted fundamental liberty interest. *E.g.*, *Reno v. Flores*, 507 U.S. 292, 302. The Ninth Circuit's and respondents' various descriptions of the interest here at stake--*e.g.*, a right to "determine the time and manner of one's death," the "right to die," a "liberty to choose how to die," a right to "control of one's final days," "the right to choose a humane, dignified death," and "the liberty to shape death"--run counter to that second requirement. Since the Washington statute prohibits "aiding another person to attempt suicide," the question before the Court is more properly characterized as whether the "liberty" specially protected by the Clause includes a right to commit suicide which itself includes a right to assistance in doing so. This asserted right has no place in our Nation's traditions, given the country's consistent, almost universal, and continuing rejection of the right, even for terminally ill, mentally competent adults. To hold for respondents, the Court would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. Respondents' contention that the asserted interest *is* consistent with this Court's substantive-due-process cases, if not with this Nation's history and practice, is unpersuasive. The constitutionally protected right to refuse lifesaving hydration and nutrition that was discussed in *Cruzan, supra*, at 279, was not simply deduced from abstract concepts of personal autonomy, but was instead grounded in the Nation's history and traditions, given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical

treatment. And although *Casey* recognized that many of the rights and liberties protected by the Due Process Clause sound in personal autonomy, 505 U.S. at 852, it does not follow that any and all important, intimate, and personal decisions are so protected, see *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33-34. *Casey* did not suggest otherwise. Pp. 15-24.

(c) The constitutional requirement that Washington's assisted-suicide ban be rationally related to legitimate government interests, see *e.g.*, *Heller v. Doe*, 509 U.S. 312, 319-320, is unquestionably met here. These interests include prohibiting intentional killing and preserving human life; preventing the serious public-health problem of suicide, especially among the young, the elderly, and those suffering from untreated pain or from depression or other mental disorders; protecting the medical profession's integrity and ethics and maintaining physicians' role as their patients' healers; protecting the poor, the elderly, disabled persons, the terminally ill, and persons in other vulnerable groups from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards voluntary and perhaps even involuntary euthanasia. The relative strengths of these various interests need not be weighed exactly, since they are unquestionably important and legitimate, and the law at issue is at least reasonably related to their promotion and protection. Pp. 24-31.

79 F.3d 790, reversed and remanded.

COUNSEL: William L. Williams argued the cause for petitioners.

Walter Dellinger argued the cause for the United States, as amicus curiae, by special leave of court.

Kathryn L. Tucker argued the cause for respondents.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined in part. STEVENS, J., SOUTER, J., GINSBURG, J., and BREYER, J., filed opinions concurring in the judgment.

OPINION BY: REHNQUIST

OPINION

[***779] [*705] [**2261] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[***LEdHR1A] [1A]The question presented in this case is whether Washington's prohibition against "causing" or "aiding" a suicide [*706] offends the *Fourteenth Amendment to the United States Constitution*. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature [*707] outlawed "assisting another in the commission of self-murder."¹ Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." *Wash. Rev. Code 9A.36.060(1)* (1994). "Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a \$ 10,000 fine. §§ 9A.36.060(2) and 9A.20.021(1)(c). At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life-sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide." *Wash. Rev. Code § 70.122.070(1)*.²

1 Act of Apr. 28, 1854, § 17, 1854 Wash. Laws 78 ("Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter"); see also Act of Dec. 2, 1869, § 17, 1869 Wash. Laws 201; Act of Nov. 10, 1873, § 19, 1873 Wash. Laws 184; Criminal Code, ch. 249, §§ 135-136, 1909 Wash. Laws, 11th sess., 929.

2 Under Washington's Natural Death Act, "adult persons have the fundamental right to control the decisions relating to the rendering of their own health care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition." *Wash. Rev. Code § 70.122.010* (1994). In Washington, "any adult person may execute a directive directing the withholding or withdrawal of life-sustaining treatment in a terminal condition or permanent unconscious condition," § 70.122.030, and a physician who, in accordance with such a directive, participates in the withholding or withdrawal of life-sustaining treatment is immune from civil, criminal, or professional liability. § 70.122.051.

Petitioners in this case are the State of Washington and its Attorney General. Respondents Harold Glucksberg, M. D., Abigail Halperin, M. D., Thomas A. Preston, M. D., and Peter Shalit, M. D., are physicians who practice in Washington. These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington's assisted-suicide ban.³ In January 1994, respondents, along with three gravely ill, pseudonymous plaintiffs who have since died and [*708] Compassion in Dying, a nonprofit organization that counsels people considering physician-assisted suicide, sued in the United States [***780] District Court, seeking a declaration that *Wash. Rev. Code 9A.36.060(1)* (1994) is, on its face, unconstitutional. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459 (WD Wash. 1994).⁴

3 Glucksberg Declaration, App. 35; Halperin Declaration, *id.*, at 49-50; Preston Declaration, *id.*, at 55-56; Shalit Declaration, *id.*, at 73-74.

4 John Doe, Jane Roe, and James Poe, plaintiffs in the District Court, were then in the terminal phases of serious and painful illnesses. They declared that they were mentally competent and desired assistance in ending their lives. Declaration of Jane Roe, *id.*, at 23-25; Declaration of John Doe, *id.*, at 27-28; Declaration of James Poe, *id.*, at 30-31; *Compassion in Dying*, 850 F. Supp., at 1456-1457.

The plaintiffs asserted "the existence of a liberty interest protected by the *Fourteenth Amendment* which extends to a personal choice by a mentally competent, terminally ill [**2262] adult to commit physician-assisted suicide." *Id.*, at 1459. Relying primarily on *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the District Court agreed, 850 F. Supp., at 1459-1462, and concluded that Washington's assisted-suicide ban is unconstitutional because it "places an undue burden on the exercise of [that] constitutionally protected liberty interest." *Id.*, at 1465.⁵ The District Court also decided that the Washington statute violated the *Equal Protection Clause's* requirement that "all persons similarly situated . . . be treated alike." *Id.*, at 1466 (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)).

5 The District Court determined that *Casey's* "undue burden" standard, 505 U.S. at 874 (joint

521 U.S. 702, *708; 117 S. Ct. 2258, **2262;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***780

opinion), not the standard from *United States v. Salerno*, 481 U.S. 739, 745 (1987) (requiring a showing that "no set of circumstances exists under which the [law] would be valid"), governed the plaintiffs' facial challenge to the assisted-suicide ban. 850 F. Supp., at 1462-1464.

[**LEdHR2A] [2A]A panel of the Court of Appeals for the Ninth Circuit reversed, emphasizing that "in the two hundred and five years of our existence no constitutional right to aid in killing [*709] oneself has ever been asserted and upheld by a court of final jurisdiction." *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (1995). The Ninth Circuit reheard the case en banc, reversed the panel's decision, and affirmed the District Court. *Compassion in Dying v. Washington*, 79 F.3d 790, 798 (1996). Like the District Court, the en banc Court of Appeals emphasized our *Casey* and *Cruzan* decisions. 79 F.3d, at 813-816. The court also discussed what it described as "historical" and "current societal attitudes" toward suicide and assisted suicide, *id.*, at 806-812, and concluded that "the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death--that there is, in short, a constitutionally-recognized 'right to die.'" *Id.*, at 816. After "weighing and then balancing" this interest against Washington's various interests, the court held that the State's assisted-suicide ban was unconstitutional "as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians." *Id.*, at 836, 837. ⁶ The court did not reach the District Court's equal-protection holding. *Id.*, at 838. ⁷ We granted certiorari, 519 U.S. [**781] (1996), and now reverse. [**LEdHR2B] [2B]

⁶ Although, as JUSTICE STEVENS observes, *post*, at 2-3 (opinion concurring in judgment), "[the court's] analysis and eventual holding that the statute was unconstitutional was not limited to a particular set of plaintiffs before it," the court did note that "declaring a statute unconstitutional as applied to members of a group is atypical but not uncommon." 79 F.3d, at 798, n.9, and emphasized that it was "not deciding the facial validity of [the Washington statute]," *id.*, at 797-798, and nn. 8-9. It is therefore the court's holding that Washington's physician-assisted suicide statute is unconstitutional as applied to the

"class of terminally ill, mentally competent patients," *post*, at 14 (STEVENS, J., concurring in judgment), that is before us today.

⁷ The Court of Appeals did note, however, that "the equal protection argument relied on by [the District Court] is not insubstantial," 79 F.3d, at 838, n.139, and sharply criticized the opinion in a separate case then pending before the Ninth Circuit, *Lee v. Oregon*, 891 F. Supp. 1429 (Ore. 1995) (Oregon's Death With Dignity Act, which permits physician-assisted suicide, violates the *Equal Protection Clause* because it does not provide adequate safeguards against abuse), vacated, *Lee v. Oregon*, 107 F.3d 1382 (CA9 1997) (concluding that plaintiffs lacked Article III standing). *Lee*, of course, is not before us, any more than it was before the Court of Appeals below, and we offer no opinion as to the validity of the *Lee* courts' reasoning. In *Vacco v. Quill*, *post*, however, decided today, we hold that New York's assisted-suicide ban does not violate the *Equal Protection Clause*.

[*710] I

[**LEdHR1B] [1B] [**LEdHR3A] [3A]We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices. See, e.g., *Casey*, 505 U.S. at 849-850; *Cruzan*, 497 U.S. at 269-279; *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (noting importance of "careful 'respect [**2263] for the teachings of history'"). In almost every State--indeed, in almost every western democracy--it is a crime to assist a suicide. ⁸ The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. *Cruzan*, 497 U.S. at 280 ("The States--indeed, all civilized nations--demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority [*711] of States in this country have laws imposing criminal penalties on one who assists another to commit suicide"); see *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) ("The primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws"). Indeed, opposition to and condemnation of suicide--and, therefore, of assisting suicide--are consistent and enduring themes of our philosophical, legal, and cultural heritages. See generally, Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional*

521 U.S. 702, *711; 117 S. Ct. 2258, **2263;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***LEdHR3A

Right?, 24 Duquesne L. Rev. 1, 17-56 (1985) (hereinafter Marzen); New York State Task Force on Life and [***782] the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context 77-82 (May 1994) (hereinafter New York Task Force).

8 See *Compassion in Dying v. Washington*, 79 F.3d 790, 847, and nn. 10-13 (CA9 1996) (Beezer, J., dissenting) ("In total, forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide") (citing statutes and cases); *Rodriguez v. British Columbia (Attorney General)*, 107 D. L. R. (4th) 342, 404 (Can. 1993) ("[A] blanket prohibition on assisted suicide . . . is the norm among western democracies") (discussing assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France). Since the Ninth Circuit's decision, Louisiana, Rhode Island, and Iowa have enacted statutory assisted-suicide bans. *La. Rev. Stat. Ann. § 14:32.12* (Supp. 1997); *R. I. Gen. Laws §§ 11-60-1, 11-60-3* (Supp. 1996); *Iowa Code Ann. §§ 707A.2, 707A.3* (Supp. 1997). For a detailed history of the States' statutes, see Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 Duquesne L. Rev. 1, 148-242 (1985) (Appendix) (hereinafter Marzen).

[***LEdHR1C] [1C]More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. ⁹*Cruzan*, 497 U.S. at 294-295 (SCALIA, J., concurring). In the 13th century, Henry de Bracton, one of the first legal-treatise writers, observed that "just as a man may commit felony by slaying another so may he do so by slaying himself." 2 Bracton on Laws and Customs of England 423 (f. 150) (G. Woodbine ed., S. Thorne transl., 1968). The real and personal property of one who killed himself to avoid conviction and punishment for a crime were forfeit to the king; however, thought Bracton, "if a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . . . [only] his movable goods [were] confiscated." *Id.*, at 423-424 (f. 150). Thus, "the principle that suicide of a sane person, for whatever reason, was a punishable felony was . . . introduced into [*712] English common law." ¹⁰ Centuries later, Sir William [**2264] Blackstone, whose Commentaries on the Laws of England not only provided a definitive summary of the

common law but was also a primary legal authority for 18th and 19th century American lawyers, referred to suicide as "self-murder" and "the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure . . ." 4 W. Blackstone, Commentaries * 189. Blackstone emphasized that "the law has . . . ranked [suicide] among the highest crimes," *ibid*, although, anticipating later developments, he conceded that the harsh and shameful punishments imposed for suicide "border a little upon severity." *Id.*, at * 190.

9 The common law is thought to have emerged through the expansion of pre-Norman institutions sometime in the 12th century. J. Baker, *An Introduction to English Legal History* 11 (2d ed. 1979). England adopted the ecclesiastical prohibition on suicide five centuries earlier, in the year 673 at the Council of Hereford, and this prohibition was reaffirmed by King Edgar in 967. See G. Williams, *The Sanctity of Life and the Criminal Law* 257 (1957).

10 Marzen 59. Other late-medieval treatise writers followed and restated Bracton; one observed that "man-slaughter" may be "of oneself; as in case, when people hang themselves or hurt themselves, or otherwise kill themselves of their own felony" or "of others; as by beating, famine, or other punishment; in like cases, all are man-slayers." A. Horne, *The Mirroure of Justices*, ch. 1, § 9, pp. 41-42 (W. Robinson ed. 1903). By the mid-16th century, the Court at Common Bench could observe that "[suicide] is an Offence against Nature, against God, and against the King. . . . To destroy one's self is contrary to Nature, and a Thing most horrible." *Hales v. Petit*, 1 Plowd. Com. 253, 261, 75 Eng. Rep. 387, 400 (1561-1562).

In 1644, Sir Edward Coke published his Third Institute, a lodestar for later common lawyers. See T. Plucknett, *A Concise History of the Common Law* 281-284 (5th ed. 1956). Coke regarded suicide as a category of murder, and agreed with Bracton that the goods and chattels--but not, for Coke, the lands--of a sane suicide were forfeit. 3 E. Coke, *Institutes* * 54. William Hawkins, in his 1716 *Treatise of the Pleas of the Crown*, followed Coke, observing that "our laws have always had . . . an abhorrence

521 U.S. 702, *712; 117 S. Ct. 2258, **2264;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***LEdHRIC

of this crime." 1 W. Hawkins, *Pleas of the Crown*, ch. 27, § 4, p. 164 (T. Leach ed. 1795).

For the most part, the early American colonies adopted the common-law approach. For example, the legislators of the Providence Plantations, which would later become Rhode Island, declared, in 1647, that "self-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared, to be [***783] that, wherein he that doth it, kills himself out [*713] of a premeditated hatred against his own life or other humor: . . . his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing." *The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719*, p. 19 (J. Cushing ed. 1977). Virginia also required ignominious burial for suicides, and their estates were forfeit to the crown. A. Scott, *Criminal Law in Colonial Virginia* 108, and n.93, 198, and n.15 (1930).

Over time, however, the American colonies abolished these harsh common-law penalties. William Penn abandoned the criminal-forfeiture sanction in Pennsylvania in 1701, and the other colonies (and later, the other States) eventually followed this example. *Cruzan*, 497 U.S. at 294 (SCALIA, J., concurring). Zephaniah Swift, who would later become Chief Justice of Connecticut, wrote in 1796 that

"there can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting [of] a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. . . . [Suicide] is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment." 2 Z. Swift, *A System of the Laws of the State of Connecticut* 304 (1796).

This statement makes it clear, however, that the movement away from the common law's harsh sanctions did not represent an acceptance of suicide; rather, as Chief Justice Swift observed, this change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing. *Cruzan*, *supra*, at 294 (SCALIA, J., concurring). Nonetheless, [*714]

although States moved away from Blackstone's treatment of suicide, courts continued to condemn it as a grave public wrong. See, e.g., *Bigelow v. Berkshire Life Ins. Co.*, 93 U.S. 284, 286 (1876) (suicide is "an act of criminal self-destruction"); *Von Holden v. Chapman*, 87 App. Div. 2d 66, 70-71, 450 N. Y. S. 2d 623, 626-627 (1982); *Blackwood v. Jones*, 111 Fla. 528, 532, 149 So. 600, 601 (1933) ("No sophistry is tolerated . . . which seeks to justify self-destruction as commendable or even a matter of personal right").

That suicide remained a grievous, though nonfelonious, wrong is confirmed by the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide. Swift, in his early 19th century treatise on the laws of Connecticut, stated that "if one counsels another to commit suicide, and the other by reason of the advice kills himself, the advisor is guilty of murder as principal." 2 Z. Swift, *A Digest of the Laws of the State of Connecticut* 270 (1823). This was the well established common-law view, see *In re Joseph G.*, 34 Cal. 3d 429, 434-435, 667 P. 2d 1176, [**2265] 1179 (1983); *Commonwealth v. Mink*, 123 Mass. 422, 428 (1877) ("Now if the murder [***784] of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder") (quoting Chief Justice Parker's charge to the jury in *Commonwealth v. Bowen*, 13 Mass. 356 (1816)), as was the similar principle that the consent of a homicide victim is "wholly immaterial to the guilt of the person who caused [his death]," 3 J. Stephen, *A History of the Criminal Law of England* 16 (1883); see 1 F. Wharton, *Criminal Law* §§ 451-452 (9th ed. 1885); *Martin v. Commonwealth*, 184 Va. 1009, 1018-1019, 37 S. E. 2d 43, 47 (1946) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable"). And the prohibitions against assisting suicide never contained exceptions for those who were near death. Rather, "the life of those to whom life had become a burden--of those who [were] hopelessly diseased or fatally wounded--nay, even the lives of criminals [*715] condemned to death, [were] under the protection of law, equally as the lives of those who [were] in the full tide of life's enjoyment, and anxious to continue to live." *Blackburn v. State*, 23 Ohio St. 146, 163 (1872); see *Bowen*, *supra*, at 360 (prisoner who persuaded another to commit suicide could be tried for murder, even though victim was scheduled shortly to be executed).

521 U.S. 702, *715; 117 S. Ct. 2258, **2265;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***784

The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828, Act of Dec. 10, 1828, ch. 20, § 4, 1828 N. Y. Laws 19 (codified at 2 N. Y. Rev. Stat. pt. 4, ch. 1, tit. 2, art. 1, § 7, p. 661 (1829)), and many of the new States and Territories followed New York's example. Marzen 73-74. Between 1857 and 1865, a New York commission led by Dudley Field drafted a criminal code that prohibited "aiding" a suicide and, specifically, "furnishing another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life." *Id.*, at 76-77. By the time the *Fourteenth Amendment* was ratified, it was a crime in most States to assist a suicide. See *Cruzan, supra*, at 294-295 (SCALIA, J., concurring). The Field Penal Code was adopted in the Dakota Territory in 1877, in New York in 1881, and its language served as a model for several other western States' statutes in the late 19th and early 20th centuries. Marzen 76-77, 205-206, 212-213. California, for example, codified its assisted-suicide prohibition in 1874, using language similar to the Field Code's.¹¹ In this century, the Model Penal Code also prohibited "aiding" suicide, prompting many States to enact or revise their assisted-suicide [*716] bans.¹² The Code's drafters observed that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who [***785] expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim." American Law Institute, Model Penal Code § 210.5, Comment 5, p. 100 (Official Draft and Revised Comments 1980).

11 In 1850, the California legislature adopted the English common law, under which assisting suicide was, of course, a crime. Act of Apr. 13, 1850, ch. 95, 1850 Cal. Stats. 219. The provision adopted in 1874 provided that "every person who deliberately aids or advises, or encourages another to commit suicide, is guilty of a felony." Act of Mar. 30, 1874, ch. 614, § 13, 400, 255 (codified at *Cal. Penal Code* § 400 (T. Hittel ed. 1876)).

12 "A person who purposely aids or solicits another to commit suicide is guilty of a felony in the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor." American Law Institute, Model Penal Code § 210.5(2) (Official Draft and Revised Comments 1980).

Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment* 16-18 (1983). Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been [**2266] many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit "living wills," surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment. See *Vacco v. Quill, post*, at 9-11; 79 *F.3d*, at 818-820; *People v. Kevorkian*, 447 *Mich.* 436, 478-480, and nn. 53-56, 527 *N. W. 2d* 714, 731-732, and nn. 53-56 (1994). At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.

The Washington statute at issue in this case, *Wash. Rev. Code* § 9A.36.060 (1994), was enacted in 1975 as part of a revision of that State's criminal code. Four years later, [*717] Washington passed its Natural Death Act, which specifically stated that the "withholding or withdrawal of life-sustaining treatment . . . shall not, for any purpose, constitute a suicide" and that "nothing in this chapter shall be construed to condone, authorize, or approve mercy killing" Natural Death Act, 1979 *Wash. Laws*, ch. 112, §§ 8(1), p. 11 (codified at *Wash. Rev. Code* §§ 70.122.070(1), 70.122.100 (1994)). In 1991, Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide.¹³ Washington then added a provision to the Natural Death Act expressly excluding physician-assisted suicide. 1992 *Wash. Laws*, ch. 98, § 10; *Wash. Rev. Code* § 70.122.100 (1994).

13 Initiative 119 would have amended Washington's Natural Death Act, *Wash. Rev. Code* § 70.122.010 *et seq.* (1994), to permit "aid-in-dying", defined as "aid in the form of a medical service provided in person by a physician that will end the life of a conscious and mentally competent qualified patient in a dignified, painless and humane manner, when requested voluntarily by the patient through a written directive in accordance with this chapter at the

time the medical service is to be provided." App. H to Pet. for Cert. 3-4.

California voters rejected an assisted-suicide initiative similar to Washington's in 1993. On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's "Death With Dignity Act," which legalized physician-assisted suicide for competent, terminally ill adults.¹⁴ Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue [***786] to be introduced in the States' legislatures, but none has been enacted.¹⁵ And [*718] just last year, Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted suicide. See *Iowa Code Ann. §§ 707A.2, 707A.3* (Supp. 1997); *R. I. Gen. Laws §§ 11-60-1, 11-60-3* (Supp. 1996). Also, on April 30, 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. Pub. L. 105-12, 111 Stat. 23 (codified at 42 U.S.C. § 14401 *et seq.*)¹⁶

¹⁴ *Ore. Rev. Stat. §§ 127.800 et seq.* (1996); *Lee v. Oregon*, 891 F. Supp. 1429 (*Ore.* 1995) (Oregon Act does not provide sufficient safeguards for terminally ill persons and therefore violates the *Equal Protection Clause*), vacated, *Lee v. Oregon*, 107 F.3d 1382 (CA9 1997).

¹⁵ See, e.g., Alaska H. B. 371 (1996); Ariz. S. B. 1007 (1996); Cal. A. B. 1080, A. B. 1310 (1995); Colo. H. B. 1185 (1996); Colo. H. B. 1308 (1995); Conn. H. B. 6298 (1995); Ill. H. B. 691, S. B. 948 (1997); Me. H. P. 663 (1997); Me. H. P. 552 (1995); Md. H. B. 474 (1996); Md. H. B. 933 (1995); Mass. H. B. 3173 (1995); Mich. H. B. 6205 (1996); Mich. S. B. 556 (1996); Mich. H. B. 4134 (1995); Miss. H. B. 1023 (1996); N. H. H. B. 339 (1995); N. M. S. B. 446 (1995); N. Y. S. B. 5024 (1995); N. Y. A. B. 6333 (1995); Neb. L. B. 406 (1997); Neb. L. B. 1259 (1996); R. I. S. 2985 (1996); Vt. H. B. 109 (1997); Vt. H. B. 335 (1995); Wash. S. B. 5596 (1995); Wis. A. B. 174, S. B. 90 (1995); Senate of Canada, *Of Life and Death*, Report of the Special Senate Committee on Euthanasia and Assisted Suicide

A--156 (June 1995) (describing unsuccessful proposals, between 1991-1994, to legalize assisted suicide).

¹⁶ Other countries are embroiled in similar

debates: The Supreme Court of Canada recently rejected a claim that the Canadian Charter of Rights and Freedoms establishes a fundamental right to assisted suicide, *Rodriguez v. British Columbia (Attorney General)*, 107 D. L. R. (4th) 342 (1993); the British House of Lords Select Committee on Medical Ethics refused to recommend any change in Great Britain's assisted-suicide prohibition, House of Lords, Session 1993-94 Report of the Select Committee on Medical Ethics, 12 Issues in Law & Med. 193, 202 (1996) ("We identify no circumstances in which assisted suicide should be permitted"); New Zealand's Parliament rejected a proposed "Death With Dignity Bill" that would have legalized physician-assisted suicide in August 1995, Graeme, MPs Throw out Euthanasia Bill, *The Dominion (Wellington)*, Aug. 17, 1995, p. 1; and the Northern Territory of Australia legalized assisted suicide and voluntary euthanasia in 1995. See Shenon, *Australian Doctors Get Right to Assist Suicide*, N.Y. Times, July 28, 1995, p. A8. As of February 1997, three persons had ended their lives with physician assistance in the Northern Territory. Mydans, *Assisted Suicide: Australia Faces a Grim Reality*, N. Y. Times, Febr. 2, 1997, p. A3. On March 24, 1997, however, the Australian Senate voted to overturn the Northern Territory's law. Thornhill, *Australia Repeals Euthanasia Law*, *Washington Post*, March 25, 1997, p. A14; see *Euthanasia Laws Act 1997*, No. 17, 1997 (Austl.). On the other hand, on May 20, 1997, Colombia's Constitutional Court legalized voluntary euthanasia for terminally ill people. *Sentencia No. C-239/97* (Corte Constitucional, Mayo 20, 1997); see *Colombia's Top Court Legalizes Euthanasia*, *Orlando Sentinel*, May 22, 1997, p. A18.

[**2267] [*719] Thus, the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues. For example, New York State's Task Force on Life and the Law--an ongoing, blue-ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen--was convened in 1984 and commissioned with "a broad mandate to recommend public policy on issues raised by medical advances." *New York Task Force vii*. Over the past decade, the Task Force has recommended laws relating to end-of-life

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decisions, surrogate pregnancy, and organ donation. *Id.*, at 118-119. After studying physician-assisted suicide, however, the Task Force unanimously concluded that "legalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable. . . . The potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved." *Id.*, at 120.

[***787] Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

II

[***LEdHR4] [4]The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them'") (quoting [*720] *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); *Casey*, 505 U.S. at 851. In a long line of cases, we have held that, in addition to the specific freedoms protected by the *Bill of Rights*, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952), and to abortion, *Casey*, *supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S. at 278-279. [***LEdHR5] [5]But we "have always been reluctant to expand the

concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125. By extending constitutional protection to an asserted right [**2268] or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," *ibid*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court, *Moore*, 431 U.S. at 502 (plurality opinion).

[***LEdHR3B] [3B] [***LEdHR6] [6]Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, [*721] "deeply rooted in this Nation's history and tradition," *id.*, at 503 [***788] (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *Flores*, *supra*, at 302; *Collins*, *supra*, at 125; *Cruzan*, *supra*, at 277-278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins*, *supra*, at 125, that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores*, the *Fourteenth Amendment* "forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U.S. at 302.

JUSTICE SOUTER, relying on Justice Harlan's dissenting opinion in *Poe v. Ullman*, would largely abandon this restrained methodology, and instead ask "whether [Washington's] statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the *Due Process Clause of the Fourteenth Amendment*," *post*, at 1 (quoting *Poe*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).¹⁷ [*722] In our view, however, the development of this Court's substantive-due-process jurisprudence, described briefly

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above, *supra*, at 15, has been a process whereby the outlines of the "liberty" specially protected by the *Fourteenth Amendment*--never fully clarified, to be sure, and perhaps not capable of being fully clarified--have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement--that a challenged state action implicate a fundamental right--before requiring more than a reasonable relation to a legitimate state interest [***789] to justify the action, it avoids the need for complex balancing of competing interests in every case.

17 In JUSTICE SOUTER'S opinion, Justice Harlan's *Poe* dissent supplies the "modern justification" for substantive-due-process review. *Post*, at 5, and n.2 (SOUTER, J., concurring in judgment). But although Justice Harlan's opinion has often been cited in due-process cases, we have never abandoned our fundamental-rights-based analytical method. Just four Terms ago, six of the Justices now sitting joined the Court's opinion in *Reno v. Flores*, 507 U.S. 292, 301-305 (1993); *Poe* was not even cited. And in *Cruzan*, neither the Court's nor the concurring opinions relied on *Poe*; rather, we concluded that the right to refuse unwanted medical treatment was so rooted in our history, tradition, and practice as to require special protection under the *Fourteenth Amendment*. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278-279 (1990); *id.*, at 287-288 (O'CONNOR, J., concurring). True, the Court relied on Justice Harlan's dissent in *Casey*, 505 U.S. at 848-850, but, as *Flores* demonstrates, we did not in so doing jettison our established approach. Indeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on *stare decisis*. 505 U.S. at 854-869.

[**LEdHR1D] [1D]Turning to the claim at issue here, the Court of Appeals stated that "properly analyzed, the first issue to be resolved is [**2269] whether there is a liberty interest in determining the time and manner of one's death," 79 F.3d, at 801, or, in other words, "is there a right to die?," *id.*, at 799. Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," Brief for Respondents 7, and describe

the asserted liberty as "the right to choose a humane, dignified death," *id.*, at 15, and "the liberty to shape death," *id.*, at 18. As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although *Cruzan* is often described as a "right to die" case, see 79 F.3d, at 799; *post*, at 9 (STEVENS, J., concurring in judgment) (*Cruzan* recognized "the more specific interest in making decisions [*723] about how to confront an imminent death"), we were, in fact, more precise: we assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan*, 497 U.S. at 279; *id.*, at 287 (O'CONNOR, J., concurring) ("[A] liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"). The Washington statute at issue in this case prohibits "aiding another person to attempt suicide," *Wash. Rev. Code* § 9A.36.060(1) (1994), and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.¹⁸

18 See, e.g., *Quill v. Vacco*, 80 F.3d 716, 724 (CA2 1996) ("right to assisted suicide finds no cognizable basis in the Constitution's language or design"); *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (CA9 1995) (referring to alleged "right to suicide," "right to assistance in suicide," and "right to aid in killing oneself"); *People v. Kevorkian*, 447 Mich. 436, 476, n.47, 527 N. W. 2d 714, 730, n.47 (1994) ("The question that we must decide is whether the Constitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance").

We now inquire whether this asserted right has any place in our Nation's traditions. Here, as discussed above, *supra*, at 4-15, we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. See *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the *Fourteenth Amendment* to affect it"); *Flores*, 507 U.S. at 303 ("The mere novelty of such a claim is reason enough

to doubt that 'substantive due process' sustains it").

Respondents contend, however, that the liberty interest they assert *is* consistent with this Court's substantive-due-process [*724] line of cases, if not with this Nation's history and practice. Pointing to *Casey* and [***790] *Cruzan*, respondents read our jurisprudence in this area as reflecting a general tradition of "self-sovereignty," Brief of Respondents 12, and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy," *id.*, at 10; see *Casey*, 505 U.S. at 847 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"). According to respondents, our liberty jurisprudence, and the broad, individualistic principles it reflects, protects the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference." Brief for Respondents 10. The question presented in this case, however, is whether the protections of the Due Process Clause include a right to commit suicide with another's assistance. With this "careful description" of respondents' claim in mind, we turn to *Casey* and *Cruzan*.

In *Cruzan*, we considered whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistent vegetative state, "had a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment" at her parents' request. *Cruzan*, [**2270] 497 U.S. at 269. We began with the observation that "at common law, even the touching of one person by another without consent and without legal justification was a battery." *Ibid.* We then discussed the related rule that "informed consent is generally required for medical treatment." *Ibid.* After reviewing a long line of relevant state cases, we concluded that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." *Id.*, at 277. Next, we reviewed our own cases on the subject, and stated that "the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior [*725] decisions." *Id.*, at 278. Therefore, "for purposes of [that] case, we assumed that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.*, at 279; see *id.*, at 287 (O'CONNOR, J., concurring). We concluded that,

notwithstanding this right, the Constitution permitted Missouri to require clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life-sustaining treatment. *Id.*, at 280-281.

Respondents contend that in *Cruzan* we "acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death," Brief for Respondents 23, and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication," *id.*, at 26. Similarly, the Court of Appeals concluded that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily [***791] recognized a liberty interest in hastening one's own death." 79 F.3d, at 816.

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct. See *Quill v. Vacco*, *post*, at 5-13. In *Cruzan* itself, we recognized that most States outlawed assisted suicide--and even more do today--and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow [*726] transmuted into a right to assistance in committing suicide. 497 U.S. at 280.

Respondents also rely on *Casey*. There, the Court's opinion concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Casey*, 505 U.S. at 846. We held, first, that a woman has a right, before her fetus is viable, to an abortion "without undue interference from the State"; second, that States may restrict post-viability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child. *Ibid.* In reaching

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this conclusion, the opinion discussed in some detail this Court's substantive-due-process tradition of interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and noted that many of those rights and liberties "involve the most intimate and personal choices a person may make in a lifetime." *Id.*, at 851.

[**LEdHR7] [7]The Court of Appeals, like the District Court, found *Casey* "highly instructive" and "almost prescriptive" for determining "what liberty interest may inhere in a terminally [**2271] ill person's choice to commit suicide":

"Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'" 79 *F.3d*, at 813-814.

Similarly, respondents emphasize the statement in *Casey* that:

"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they [*727] formed under compulsion of the State." *Casey*, 505 U.S. at 851.

Brief for Respondents 12. By choosing [***792] this language, the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the *Fourteenth Amendment*.¹⁹ The opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that "though the abortion decision may originate within the zone of conscience and belief, it is *more than a philosophic exercise*." *Casey*, 505 U.S. at 852 (emphasis added). That many of the rights and liberties protected by the Due Process Clause sound in

personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, *San Antonio* [*728] *Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973), and *Casey* did not suggest otherwise.

19 See *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) ("The Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition") (emphasis added); *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965) (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the *Bill of Rights*"); *id.*, at 495-496 (Goldberg, J., concurring) (the law in question "disrupted the traditional relation of the family--a relation as old and as fundamental as our entire civilization"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness"); *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("The decision to marry is a fundamental right"); *Roe v. Wade*, 410 U.S. 113, 140 (1973) (stating that at the Founding and throughout the 19th century, "a woman enjoyed a substantially broader right to terminate a pregnancy"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

[**LEdHR1E] [1E] [**LEdHR8] [8]The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. See *Heller v. Doe*, 509 U.S. 312, 319-320 (1993); *Flores*, 507 U.S. at 305. This requirement is unquestionably met here. As the court below recognized, 79 *F.3d*, at 816-817,²⁰ Washington's assisted-suicide ban implicates a number [**2272] of

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[***793] state interests. ²¹ See 49 *F.3d*, at 592-593; Brief for State of California et al. as *Amici Curiae* 26-29; Brief for United States as *Amicus Curiae* 16-27.

20 The court identified and discussed six state interests: (1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses. 79 *F.3d*, at 816-832.

21 Respondents also admit the existence of these interests, Brief for Respondents 28-39, but contend that Washington could better promote and protect them through regulation, rather than prohibition, of physician-assisted suicide. Our inquiry, however, is limited to the question whether the State's prohibition is rationally related to legitimate state interests.

[**LEdHR1F] [1F]First, Washington has an "unqualified interest in the preservation of human life." *Cruzan*, 497 U.S. at 282. The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. See *id.*, at 280; Model Penal Code § 210.5, Comment 5, at 100 ("The interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of [*729] another"). ²² This interest is symbolic and aspirational as well as practical:

"While suicide is no longer prohibited or penalized, the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions." New York Task Force 131-132.

²² The States express this commitment by other means as well:

"Nearly all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations, or in 'living will' statutes. In addition, all states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." *People v. Kevorkian*, 447 Mich., at 478-479, and nn. 53-56, 527 N. W. 2d, at 731-732, and nn. 53-56.

[**LEdHR9] [9]Respondents admit that "the State has a real interest in preserving the lives of those who can still contribute to society and enjoy life." Brief for Respondents 35, n.23. The Court of Appeals also recognized Washington's interest in protecting life, but held that the "weight" of this interest depends on the "medical condition and the wishes of the person whose life is at stake." 79 *F.3d*, at 817. Washington, however, has rejected this sliding-scale approach and, through its assisted-suicide ban, insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law. See *United States v. Rutherford*, 442 U.S. 544, 558 (1979) ("... Congress could reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise"). As we have previously affirmed, the States "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy," *Cruzan*, 497 U.S. at 282. [*730] This remains true, as *Cruzan* makes clear, even for those who are near death.

[**LEdHR1G] [1G]Relatedly, all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. See Washington State Dept. of Health, Annual Summary of Vital Statistics 1991, pp. 29-30 (Oct. 1992) (suicide is [***794] a leading cause of death in Washington of those between the ages of 14 and 54); New York Task Force 10, 23-33 (suicide rate in the general population is about one percent, and suicide is especially prevalent among the young and the elderly). The State has an interest in preventing suicide, and in studying,

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identifying, and treating its causes. See *79 F.3d, at 820; id., at 854* (Beezer, J., dissenting) ("The state recognizes suicide as a manifestation of medical and psychological anguish"); Marzen 107-146.

Those who attempt suicide--terminally ill or not--often suffer from depression or other mental disorders. See New York Task Force 13-22, 126-128 (more than 95% of those who commit suicide had a major psychiatric illness at the time of death; among the terminally ill, uncontrolled pain is a "risk factor" because it contributes to depression); Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman [**2273] Charles T. Canady to the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 10-11 (Comm. Print 1996); cf. Back, Wallace, Starks, & Pearlman, Physician-Assisted Suicide and Euthanasia in Washington State, 275 JAMA 919, 924 (1996) ("Intolerable physical symptoms are not the reason most patients request physician-assisted suicide or euthanasia"). Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated. H. Hendin, *Seduced by Death: Doctors, Patients and the Dutch Cure* 24-25 (1997) (suicidal, terminally ill patients "usually respond well to treatment for depressive illness and pain medication and are then grateful to be alive"); New York Task Force 177-178. [*731] The New York Task Force, however, expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients' needs. *Id., at 175*. Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.

The State also has an interest in protecting the integrity and ethics of the medical profession. In contrast to the Court of Appeals' conclusion that "the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide]," *79 F.3d, at 827*, the American Medical Association, like many other medical and physicians' groups, has concluded that "physician-assisted suicide is fundamentally incompatible with the physician's role as healer." American Medical Association, Code of Ethics § 2.211 (1994); see Council on Ethical and Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229, 2233 (1992) ("The societal risks of involving physicians in medical interventions to

cause patients' deaths is too great"); New York Task Force 103-109 (discussing physicians' views). And physician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming. Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., [***795] 355-356 (1996) (testimony of Dr. Leon R. Kass) ("The patient's trust in the doctor's whole-hearted devotion to his best interests will be hard to sustain").

Next, the State has an interest in protecting vulnerable groups--including the poor, the elderly, and disabled persons--from abuse, neglect, and mistakes. The Court of Appeals dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as [*732] "ludicrous on its face." *79 F.3d, at 825*. We have recognized, however, the real risk of subtle coercion and undue influence in end-of-life situations. *Cruzan, 497 U.S. at 281*. Similarly, the New York Task Force warned that "legalizing physician-assisted suicide would pose profound risks to many individuals who are ill and vulnerable. . . . The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group." New York Task Force 120; see *Compassion in Dying, 49 F.3d, at 593* ("An insidious bias against the handicapped--again coupled with a cost-saving mentality--makes them especially in need of Washington's statutory protection"). If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs.

The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference." *49 F.3d, at 592*. The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's. See New York Task Force 101-102; Physician-Assisted Suicide and Euthanasia [**2274] in

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117 S. Ct. 2302; 138 L. Ed. 2d 772, ***795

the Netherlands: A Report of Chairman Charles T. Canady, at 9, 20 (discussing prejudice toward the disabled and the negative messages euthanasia and assisted suicide send to handicapped patients).

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. The Court of Appeals struck down [*733] Washington's assisted-suicide ban only "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." 79 F.3d, at 838. Washington insists, however, that the impact of the court's decision will not and cannot be so limited. Brief for Petitioners 44-47. If suicide is protected as a matter of constitutional right, it is argued, "every man and woman in the United States must enjoy it." *Compassion in Dying*, 49 F.3d, at 591; see *Kevorkian*, 447 Mich., at 470, n.41, 527 N. W. 2d, at 727-728, n.41. The Court of Appeals' decision, and its expansive reasoning, provide ample support for the State's concerns. The court noted, for example, that the "decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself," 79 F.3d, at 832, n.120; that "in some instances, the [***796] patient may be unable to self-administer the drugs and . . . administration by the physician . . . may be the only way the patient may be able to receive them," *id.*, at 831; and that not only physicians, but also family members and loved ones, will inevitably participate in assisting suicide. *Id.*, at 838, n.140. Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove extremely difficult to police and contain.²³ Washington's ban on assisting suicide prevents such erosion.

23 JUSTICE SOUTER concludes that "the case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not." *Post*, at 36-37 (opinion concurring in judgment). We agree that the case for a slippery slope has been made out, but--bearing in mind Justice Cardozo's observation of "the tendency of a principle to expand itself to the limit of its

logic," *The Nature of the Judicial Process* 51 (1932)--we also recognize the reasonableness of the widely expressed skepticism about the lack of a principled basis for confining the right. See Brief for United States as *Amicus Curiae* 26 ("Once a legislature abandons a categorical prohibition against physician assisted suicide, there is no obvious stopping point"); Brief for Not Dead Yet et al. as *Amici Curiae* 21-29; Brief for Bioethics Professors as *Amici Curiae* 23-26; Report of the Council on Ethical and Judicial Affairs, App. 133, 140 ("If assisted suicide is permitted, then there is a strong argument for allowing euthanasia"); New York Task Force 132; Kamisar, *The "Right to Die": On Drawing (and Erasing) Lines*, 35 *Duquesne L. Rev.* 481 (1996); Kamisar, *Against Assisted Suicide--Even in a Very Limited Form*, 72 *U. Det. Mercy L. Rev.* 735 (1995).

[*734] This concern is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as "the deliberate termination of another's life at his request"), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent. *Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady*, at 12-13 (citing Dutch study). This study suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. *Id.*, at 16-21; see generally C. Gomez, *Regulating Death: Euthanasia and the Case of the Netherlands* (1991); H. Hendin, *Seduced By Death: Doctors, Patients, and the Dutch Cure* (1997). The New York Task Force, citing the Dutch experience, observed that "assisted suicide and euthanasia are closely linked," New York Task Force 145, and concluded that the "risk [**2275] of . . . abuse is neither speculative nor distant," *id.*, at 134. Washington, like most [*735] other States, reasonably ensures against this risk by banning, rather

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than regulating, assisting suicide. See *United States v. 12 200-ft Reels of Super 8MM Film*, 413 U.S. 123, 127 (1973) ("Each step, when taken, appears a reasonable step in relation to that [***797] which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance").

[***LEdHR1H] [1H] [***LEdHR10A] [10A] We need not weigh exactly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that *Wash. Rev. Code § 9A.36.060(1)* (1994) does not violate the *Fourteenth Amendment*, either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." 79 F.3d, at 838. 24 [***LEdHR10B] [10B]

24 JUSTICE STEVENS states that "the Court does conceive of respondents' claim as a facial challenge--addressing not the application of the statute to a particular set of plaintiffs before it, but the constitutionality of the statute's categorical prohibition . . ." *Post*, at 4 (opinion concurring in judgment). We emphasize that we today reject the Court of Appeals' specific holding that the statute is unconstitutional "as applied" to a particular class. See n.6, *supra*. JUSTICE STEVENS agrees with this holding, see *post*, at 14, but would not "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge," *ibid*. Our opinion does not absolutely foreclose such a claim. However, given our holding that the *Due Process Clause of the Fourteenth Amendment* does not provide heightened protection to the asserted liberty interest in ending one's life with a physician's assistance, such a claim would have to be quite different from the ones advanced by respondents here.

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a

democratic society. The decision of the en banc Court of Appeals is [*736] reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: O'CONNOR; STEVENS; SOUTER; GINSBURG; BREYER

CONCUR

JUSTICE O'CONNOR, concurring. *

* JUSTICE GINSBURG concurs in the Court's judgments substantially for the reasons stated in this opinion. JUSTICE BREYER joins this opinion except insofar as it joins the opinions of the Court.

Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms.

The Court frames the issue in this case as whether the Due Process Clause of the Constitution protects a "right to commit suicide which itself includes a right to assistance in doing so," *ante*, at 18, and concludes that our Nation's history, legal traditions, and practices do not support the existence of such a right. I join the Court's opinions because I agree that there is no generalized right to "commit suicide." But respondents urge us to address the narrower question [***798] whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the New York and Washington laws at issue here. See *ante*, at 18 ("The Washington statute at issue in this case prohibits 'aiding another person to attempt suicide,' . . . and, thus, the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so"). The parties and *amici* agree that in these States a patient who is [*737] suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness

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and hastening death. See *Wash. Rev. Code* § 70.122.010 (1994); Brief for Petitioners in No. 95-1858, p. 15, n.9; Brief for Respondents in No. 95-1858, p. 15. In this light, even assuming that we would recognize such an interest, I agree that the State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide. *Ante*, at 27-30; *post*, at 11 (STEVENS, J., concurring in judgments); *post*, at 33-39 (SOUTER, J., concurring in judgment).

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure. As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. *Ante*, at 11, 12-13; see *post*, at 36-39 (SOUTER, J., concurring in judgment). In such circumstances, "the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'CONNOR, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)).

In sum, there is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that [*738] dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths. The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here.

[***799] JUSTICE STEVENS, concurring in the judgments.

The Court ends its opinion with the important observation that our holding today is fully consistent with a continuation of the vigorous debate about the "morality, legality, and practicality of physician-assisted suicide" in a democratic society. *Ante*, at 32. I write separately to

make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice.

I

The morality, legality, and practicality of capital punishment have been the subject of debate for many years. In 1976, this Court upheld the constitutionality of the practice in cases coming to us from Georgia,¹ Florida², and Texas.³ In those cases we concluded that a State does have the power to place a lesser value on some lives than on others; there is no absolute requirement that a State treat all human life as having an equal right to preservation. Because the state legislatures had sufficiently narrowed the category of lives that the State could terminate, and had enacted special procedures to ensure that the defendant belonged in that limited category, we concluded that the statutes were not unconstitutional on their face. In later cases coming to us from each [*739] of those States, however, we found that some applications of the statutes were unconstitutional.⁴

¹ *Gregg v. Georgia*, 428 U.S. 153 (1976)

² *Proffitt v. Florida*, 428 U.S. 242 (1976).

³ *Jurek v. Texas*, 428 U.S. 262 (1976).

⁴ See, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Enmund v. Florida*, 458 U.S. 782 (1982); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Today, the Court decides that Washington's statute prohibiting assisted suicide is not invalid "on its face," that is to say, in all or most cases in which it might be applied.⁵ That holding, however, does not foreclose the possibility that some applications of the statute might well be invalid.

⁵ See *ante*, at 3, n.5.

As originally filed, this case presented a challenge to the Washington statute on its face and as it applied to three terminally ill, mentally competent patients and to four physicians who treat terminally ill patients. After the District Court issued its opinion holding that the statute placed an undue burden on the right to commit physician-assisted suicide, see *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1462, 1465 (WD Wash. 1994), the three patients died. Although the Court of Appeals considered the constitutionality of the statute "as applied to the prescription of life-ending medication for

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use by terminally ill, competent adult patients who wish to hasten their deaths," *Compassion in Dying v. Washington*, 79 F.3d 790, 798 (CA9 1996), the court did not have before it any individual plaintiff seeking to hasten her death or any doctor who [***800] was threatened with prosecution for assisting in the suicide of a particular patient; its analysis and eventual holding that the statute was unconstitutional was not limited to a particular set of plaintiffs before it.

The appropriate standard to be applied in cases making facial challenges to state statutes has been the subject of debate within this Court. See *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174; 116 S. Ct. 1582; 134 L. Ed. 2d 679 (1996). Upholding the validity of the federal Bail Reform Act of 1984, the Court stated in *United States v. Salerno*, 481 U.S. 739 (1987), that a "facial challenge to a legislative Act is, of course, the most [*740] difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.*, at 745. ⁶ I do not believe the Court has ever actually applied such a strict standard, ⁷ even in *Salerno* itself, and the Court does not appear to apply *Salerno* here. Nevertheless, the Court does conceive of respondents' claim as a facial challenge--addressing not the application of the statute to a particular set of plaintiffs before it, but the constitutionality of the statute's categorical prohibition against "aiding another person to attempt suicide." *Ante*, at 18 (internal quotation marks omitted) (citing *Wash. Rev. Code § 9A.36.060(1)* (1994)). Accordingly, the Court requires the plaintiffs to show that the interest in liberty protected by the *Fourteenth Amendment* "includes a right to commit suicide which itself includes a right to assistance in doing so." *Ante*, at 18.

⁶ If the Court had actually applied the *Salerno* standard in this action, it would have taken only a few paragraphs to identify situations in which the Washington statute could be validly enforced. In *Salerno* itself, the Court would have needed only to look at whether the statute could be constitutionally applied to the arrestees before it; any further analysis would have been superfluous. See Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235, 239-240 (1994) (arguing that if the *Salerno* standard were taken literally, a litigant could not succeed in her facial challenge unless she also succeeded in her as

applied challenge).

⁷ In other cases and in other contexts, we have imposed a significantly lesser burden on the challenger. The most lenient standard that we have applied requires the challenger to establish that the invalid applications of a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). As the Court's opinion demonstrates, Washington's statute prohibiting assisted suicide has a "plainly legitimate sweep." While that demonstration provides a sufficient justification for rejecting respondents' facial challenge, it does not mean that every application of the statute should or will be upheld.

History and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide. Much more than the State's paternalistic interest [*741] in protecting the individual from the irrevocable consequences of an ill-advised decision motivated by temporary concerns is at stake. There is truth in John Donne's observation [***801] that "No man is an island." ⁸ The State has an interest in preserving and fostering the benefits that every human being may provide to the community--a community that thrives on the exchange of ideas, expressions of affection, shared memories and humorous incidents as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life. Thus, I fully agree with the Court that the "liberty" protected by the Due Process Clause does not include a categorical "right to commit suicide which itself includes a right to assistance in doing so." *Ante*, at 18.

⁸ "Who casts not up his eye to the sun when it rises? but who takes off his eye from a comet when that breaks out? Who bends not his ear to any bell which upon any occasion rings? but who can remove it from that bell which is passing a piece of himself out of this world? No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were; any man's death diminishes me, because I am involved in

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mankind; and therefore never send to know for whom the bell tolls; it tolls for thee." J. Donne, *Meditation No. 17, Devotions Upon Emergent Occasions* 86, 87 (A. Raspa ed. 1987).

But just as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so is it equally clear that a decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid. A State, like Washington, that has authorized the death penalty and thereby has concluded that the sanctity of human life does not require that it always be preserved, must acknowledge that there are situations in which an interest in hastening [*742] death is legitimate. Indeed, not only is that interest sometimes legitimate, I am also convinced that there are times when it is entitled to constitutional protection.

II

In *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990), the Court assumed that the interest in liberty protected by the *Fourteenth Amendment* encompassed the right of a terminally ill patient to direct the withdrawal of life-sustaining treatment. As the Court correctly observes today, that assumption "was not simply deduced from abstract concepts of personal autonomy." *Ante*, at 21. Instead, it was supported by the common-law tradition protecting the individual's general right to refuse unwanted medical treatment. *Ibid*. We have recognized, however, that this common-law right to refuse treatment is neither absolute nor always sufficiently weighty to overcome valid countervailing state interests. As Justice Brennan pointed out in his *Cruzan* dissent, we have upheld legislation imposing punishment on persons refusing to be vaccinated, 497 U.S. at 312, n.12, citing *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905), and as JUSTICE SCALIA pointed out in his concurrence, the State ordinarily has the right to interfere with an attempt to commit suicide [***802] by, for example, forcibly placing a bandage on a self-inflicted wound to stop the flow of blood. 497 U.S. at 298. In most cases, the individual's constitutionally protected interest in his or her own physical autonomy, including the right to refuse unwanted medical treatment, will give way to the State's interest in preserving human life.

Cruzan, however, was not the normal case. Given the irreversible nature of her illness and the progressive

character of her suffering,⁹ Nancy Cruzan's interest in refusing medical care was incidental to her more basic interest in controlling the manner and timing of her death. In finding that her [*743] best interests would be served by cutting off the nourishment that kept her alive, the trial court did more than simply vindicate Cruzan's interest in refusing medical treatment; the court, in essence, authorized affirmative conduct that would hasten her death. When this Court reviewed the case and upheld Missouri's requirement that there be clear and convincing evidence establishing Nancy Cruzan's intent to have life-sustaining nourishment withdrawn, it made two important assumptions: (1) that there was a "liberty interest" in refusing unwanted treatment protected by the Due Process Clause; and (2) that this liberty interest did not "end the inquiry" because it might be outweighed by relevant state interests. *Id.*, at 279. I agree with both of those assumptions, but I insist that the source of Nancy Cruzan's right to refuse treatment was not just a common-law rule. Rather, this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law.¹⁰ This freedom embraces, not merely a person's right to refuse a particular kind of unwanted treatment, but also her interest in dignity, and in determining the character of the memories that will survive long after her death.¹¹ In [*744] recognizing that the State's interests did not outweigh Nancy Cruzan's liberty interest in refusing medical treatment, *Cruzan* [***803] rested not simply on the common-law right to refuse medical treatment, but--at least implicitly--on the even more fundamental right to make this "deeply personal decision," 497 U.S. at 289 (O'CONNOR, J., concurring).

⁹ See 497 U.S. at 332, n.2.

¹⁰ "Neither the *Bill of Rights* nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

"I had thought it self-evident that all men were endowed by their Creator with liberty as one

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of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations." *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (STEVENS, J., dissenting).

11 "Nancy Cruzan's interest in life, no less than that of any other person, includes an interest in how she will be thought of after her death by those whose opinions mattered to her. There can be no doubt that her life made her dear to her family and to others. How she dies will affect how that life is remembered." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 344 (1990) (STEVENS, J., dissenting).

"Each of us has an interest in the kind of memories that will survive after death. To that end, individual decisions are often motivated by their impact on others. A member of the kind of family identified in the trial court's findings in this case would likely have not only a normal interest in minimizing the burden that her own illness imposes on others, but also an interest in having their memories of her filled predominantly with thoughts about her past vitality rather than her current condition." *Id.*, at 356.

Thus, the common-law right to protection from battery, which included the right to refuse medical treatment in most circumstances, did not mark "the outer limits of the substantive sphere of liberty" that supported the Cruzan family's decision to hasten Nancy's death. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992). Those limits have never been precisely defined. They are generally identified by the importance and character of the decision confronted by the individual, *Whalen v. Roe*, 429 U.S. 589, 599-600, n.26 (1977). Whatever the outer limits of the concept may be, it definitely includes protection for matters "central to personal dignity and autonomy." *Casey*, 505 U.S. at 851. It includes,

"the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage

of freedom--the [*745] abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 719-720 (CA7 1975) (footnotes omitted), cert. denied, 425 U.S. 916 (1976).

The *Cruzan* case demonstrated that some state intrusions on the right to decide how death will be encountered are also intolerable. The now-deceased plaintiffs in this action may in fact have had a liberty interest even stronger than Nancy Cruzan's because, not only were they terminally ill, they were suffering constant and severe pain. Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly "at the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851.

While I agree with the Court that *Cruzan* does not decide the issue presented by these cases, *Cruzan* did give recognition, not just to vague, unbridled notions of autonomy, but to the more specific interest in making decisions about how to confront an imminent death. Although there is no absolute right to physician-assisted suicide, *Cruzan* makes it clear that some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs. The liberty interest at stake in a case like this differs from, [***804] and is stronger than, both the common-law right to refuse medical treatment and the unbridled interest in deciding whether to live or die. It is an interest in deciding how, rather than whether, a critical threshold shall be crossed.

III

The state interests supporting a general rule banning the practice of physician-assisted suicide do not have the same [*746] force in all cases. First and foremost of these interests is the "unqualified interest in the preservation of human life," *ante*, at 24, (quoting *Cruzan*, 497 U.S. at 282,) which is equated with "the sanctity of life," *ante*, at 25, (quoting the American Law Institute, Model Penal Code § 210.5, Comment 5, p. 100 (Official Draft and Revised Comments 1980)). That interest not only justifies--it commands--maximum protection of every individual's interest in remaining alive, which in

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turn commands the same protection for decisions about whether to commence or to terminate life-support systems or to administer pain medication that may hasten death. Properly viewed, however, this interest is not a collective interest that should always outweigh the interests of a person who because of pain, incapacity, or sedation finds her life intolerable, but rather, an aspect of individual freedom.

Many terminally ill people find their lives meaningful even if filled with pain or dependence on others. Some find value in living through suffering; some have an abiding desire to witness particular events in their families' lives; many believe it a sin to hasten death. Individuals of different religious faiths make different judgments and choices about whether to live on under such circumstances. There are those who will want to continue aggressive treatment; those who would prefer terminal sedation; and those who will seek withdrawal from life-support systems and death by gradual starvation and dehydration. Although as a general matter the State's interest in the contributions each person may make to society outweighs the person's interest in ending her life, this interest does not have the same force for a terminally ill patient faced not with the choice of whether to live, only of how to die. Allowing the individual, rather than the State, to make judgments "about the 'quality' of life that a particular individual may enjoy." *ante*, at 25 (quoting *Cruzan*, 497 U.S. at 282), does not mean that the lives of terminally-ill, disabled people have less value than the lives of those who are healthy, see *ante*, at 28. Rather, it gives [*747] proper recognition to the individual's interest in choosing a final chapter that accords with her life story, rather than one that demeans her values and poisons memories of her. See Brief for Bioethicists as *Amici Curiae* 11; see also R. Dworkin, *Life's Dominion* 213 (1993) ("Whether it is in someone's best interests that his life end in one way rather than another depends on so much else that is special about him--about the shape and character of his life and his own sense of his integrity and critical interests--that no uniform collective decision can possibly hope to serve everyone even decently").

Similarly, the State's legitimate [***805] interests in preventing suicide, protecting the vulnerable from coercion and abuse, and preventing euthanasia are less significant in this context. I agree that the State has a compelling interest in preventing persons from committing suicide because of depression, or coercion by

third parties. But the State's legitimate interest in preventing abuse does not apply to an individual who is not victimized by abuse, who is not suffering from depression, and who makes a rational and voluntary decision to seek assistance in dying. Although, as the New York Task Force report discusses, diagnosing depression and other mental illness is not always easy, mental health workers and other professionals expert in working with dying patients can help patients cope with depression and pain, and help patients assess their options. See Brief for Washington State Psychological Association et al. as *Amici Curiae* 8-10.

Relatedly, the State and *amici* express the concern that patients whose physical pain is inadequately treated will be more likely to request assisted suicide. Encouraging the development and ensuring the availability of adequate pain treatment is of utmost importance; palliative care, however, cannot alleviate all pain and suffering. See Orentlicher, *Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 Boston College L. Rev. (Galley, p. 8) (1997) ("Greater use of palliative care would reduce the demand for [*748] assisted suicide, but it will not eliminate [it]"); see also Brief for Coalition of Hospice Professionals as *Amici Curiae* 8 (citing studies showing that "as death becomes more imminent, pain and suffering become progressively more difficult to treat"). An individual adequately informed of the care alternatives thus might make a rational choice for assisted suicide. For such an individual, the State's interest in preventing potential abuse and mistake is only minimally implicated.

The final major interest asserted by the State is its interest in preserving the traditional integrity of the medical profession. The fear is that a rule permitting physicians to assist in suicide is inconsistent with the perception that they serve their patients solely as healers. But for some patients, it would be a physician's refusal to dispense medication to ease their suffering and make their death tolerable and dignified that would be inconsistent with the healing role. See Block & Billings, *Patient Request to Hasten Death*, 154 Archives Internal Med. 2039, 2045 (1994) (A doctor's refusal to hasten death "may be experienced by the [dying] patient as an abandonment, a rejection, or an expression of inappropriate paternalistic authority"). For doctors who have long-standing relationships with their patients, who have given their patients advice on alternative treatments, who are attentive to their patient's individualized needs,

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and who are knowledgeable about pain symptom management and palliative care options, see Quill, *Death and Dignity, A Case of Individualized Decision Making*, 324 *New England J. of Med.* 691-694 (1991), heeding a patient's desire to assist in her suicide would not serve to harm the physician-patient relationship. Furthermore, because physicians are already involved in making decisions that hasten the death of terminally ill patients--through termination of [***806] life support, withholding of medical treatment, and terminal sedation--there is in fact significant tension between the traditional view of [*749] the physician's role and the actual practice in a growing number of cases.¹²

12 I note that there is evidence that a significant number of physicians support the practice of hastening death in particular situations. A survey published in the *New England Journal of Medicine*, found that 56% of responding doctors in Michigan preferred legalizing assisted suicide to an explicit ban. Bachman et al., *Attitudes of Michigan Physicians and the Public Toward Legalizing Physician-Assisted Suicide and Voluntary Euthanasia*, 334 *New England J. Med.* 303-309 (1996). In a survey of Oregon doctors, 60% of the responding doctors supported legalizing assisted suicide for terminally ill patients. See Lee et al., *Legalizing Assisted Suicide--Views of Physicians in Oregon*, 335 *New England J. Med.* 310-315 (1996). Another study showed that 12% of physicians polled in Washington State reported that they had been asked by their terminally ill patients for prescriptions to hasten death, and that, in the year prior to the study, 24% of those physicians had complied with such requests. See Back, Wallace, Starks, & Perlman, *Physician-Assisted Suicide and Euthanasia in Washington State*, 275 *JAMA* 919-925 (1996); see also Doukas, Waterhouse, Gorenflo, & Seld, *Attitudes and Behaviors on Physician-Assisted Death: A Study of Michigan Oncologists*, 13 *J. Clinical Oncology* 1055 (1995) (reporting that 18% of responding Michigan oncologists reported active participation in assisted suicide); Slome, Moulton, Huffine, Gorter, & Abrams, *Physicians' Attitudes Toward Assisted Suicide in AIDS*, 5 *J. Acquired Immune Deficiency Syndromes* 712 (1992) (reporting that 24% of responding physicians who treat AIDS patients would likely grant a patient's request for

assistance in hastening death).

As the New York State Task Force on Life and the Law recognized, a State's prohibition of assisted suicide is justified by the fact that the "ideal" case in which "patients would be screened for depression and offered treatment, effective pain medication would be available, and all patients would have a supportive committed family and doctor" is not the usual case. *New York State Task Force on Life and the Law, When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context* 120 (May 1994). Although, as the Court concludes today, these *potential* harms are sufficient to support the State's general public policy against assisted suicide, they will not always outweigh the individual liberty [*750] interest of a particular patient. Unlike the Court of Appeals, I would not say as a categorical matter that these state interests are invalid as to the entire class of terminally ill, mentally competent patients. I do not, however, foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge. Future cases will determine whether such a challenge may succeed.

IV

In New York, a doctor must respect a competent person's decision to refuse or to discontinue medical treatment even though death will thereby ensue, but the same doctor would be guilty of a felony if she provided her patient assistance in committing suicide.¹³ Today we hold that the *Equal Protection Clause* is not violated by the resulting disparate treatment of two classes of terminally ill people who may have the same interest in hastening death. I agree that the distinction between permitting death to ensue from an underlying fatal disease and causing it to occur by the administration of medication or other means provides a constitutionally sufficient basis for [***807] the State's classification.¹⁴ Unlike the Court, however, see *Vacco, ante*, at 6-7, I am not persuaded that in all cases there will in fact be a significant difference between the intent of the physicians, the patients or the families in the two situations.

13 See *Vacco v. Quill, ante*, at 1, nn. 1 and 2.

14 The American Medical Association recognized this distinction when it supported Nancy Cruzan and continues to recognize this distinction in its support of the States in these

cases.

There may be little distinction between the intent of a terminally-ill patient who decides to remove her life-support and one who seeks the assistance of a doctor in ending her life; in both situations, the patient is seeking to hasten a certain, impending death. The doctor's intent might also be the same in prescribing lethal medication as it is in terminating [*751] life support. A doctor who fails to administer medical treatment to one who is dying from a disease could be doing so with an intent to harm or kill that patient. Conversely, a doctor who prescribes lethal medication does not necessarily intend the patient's death--rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes. The illusory character of any differences in intent or causation is confirmed by the fact that the American Medical Association unequivocally endorses the practice of terminal sedation--the administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain even when it is clear that the time of death will be advanced. The purpose of terminal sedation is to ease the suffering of the patient and comply with her wishes, and the actual cause of death is the administration of heavy doses of lethal sedatives. This same intent and causation may exist when a doctor complies with a patient's request for lethal medication to hasten her death.¹⁵

15 If a doctor prescribes lethal drugs to be self-administered by the patient, it not at all clear that the physician's intent is that the patient "be made dead," *ante*, at 7 (internal quotation marks omitted). Many patients prescribed lethal medications never actually take them; they merely acquire some sense of control in the process of dying that the availability of those medications provides. See Back, *supra* n.12, at 922; see also Quill, 324 New England J. Med., at 693 (describing how some patients fear death less when they feel they have the option of physician-assisted suicide).

Thus, although the differences the majority notes in causation and intent between terminating life-support and assisting in suicide support the Court's rejection of the respondents' facial challenge, these distinctions may be inapplicable to particular terminally ill patients and their doctors. Our holding today in *Vacco v. Quill* that the *Equal Protection Clause* is not violated by New York's

classification, just like our holding in *Washington v. Glucksberg* that the Washington statute is not invalid on its face, does not foreclose the possibility that some applications of the New [*752] York statute may impose an intolerable intrusion on the patient's freedom.

There remains room for vigorous debate about the outcome of particular cases that are not necessarily resolved by the opinions announced today. How such cases may be decided will depend on their specific facts. In my judgment, however, it is clear that the so-called "unqualified interest in the preservation of human life," *Cruzan*, 497 U.S. at 282, *Glucksberg, ante*, at 24, [***808] is not itself sufficient to outweigh the interest in liberty that may justify the only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering.

JUSTICE SOUTER, concurring in the judgment.

Three terminally ill individuals and four physicians who sometimes treat terminally ill patients brought this challenge to the Washington statute making it a crime "knowingly . . . [to] aid another person to attempt suicide," *Wash. Rev. Code § 9A.36.060* (1994), claiming on behalf of both patients and physicians that it would violate substantive due process to enforce the statute against a doctor who acceded to a dying patient's request for a drug to be taken by the patient to commit suicide. The question is whether the statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the *Due Process Clause of the Fourteenth Amendment*. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). I conclude that the statute's application to the doctors has not been shown to be unconstitutional, but I write separately to give my reasons for analyzing the substantive due process claims as I do, and for rejecting this one.

I

Although the terminally ill original parties have died during the pendency of this case, the four physicians who remain [*753] as respondents here¹ continue to request declaratory and injunctive relief for their own benefit in discharging their obligations to other dying patients who request their help.² See, e.g., *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (question was capable of repetition yet [**2276] evading review). The case reaches us on an order granting summary judgment, and we must take as true the undisputed allegations that

each of the patients was mentally competent and terminally ill, and that each made a knowing and voluntary choice to ask a doctor to prescribe "medications . . . to be self-administered for the purpose of hastening . . . death." Complaint P2.3. The State does not dispute that each faced a passage to death more agonizing both mentally and physically, and more protracted over time, than death by suicide with a physician's help, or that each would have chosen such a suicide for the sake of personal dignity, apart even from relief from pain. Each doctor in this case claims to encounter patients like the original plaintiffs who have died, that is, mentally competent, terminally ill, and seeking medical help in "the voluntary self-termination of life." *Id.*, at P 2.5-2.8. While there may be no unanimity on the physician's professional obligation in such circumstances, I accept here respondents' representation that providing such patients with prescriptions for drugs that go beyond pain relief to hasten death would, in these circumstances, be consistent with standards of medical [***809] practice. Hence, I take it to be true, as respondents say, that the Washington statute prevents the exercise of a physician's "best professional judgment to prescribe medications to [such] patients in dosages that would enable them to act to hasten their own deaths." *Id.*, at P 2.6; see also App. 35-37, 49-51, 55-57, 73-75.

1 A nonprofit corporation known as Compassion in Dying was also a plaintiff and appellee below but is not a party in this Court.

2 As I will indicate in some detail below, I see the challenge to the statute not as facial but as-applied, and I understand it to be in narrower terms than those accepted by the Court.

[*754] In their brief to this Court, the doctors claim not that they ought to have a right generally to hasten patients' imminent deaths, but only to help patients who have made "personal decisions regarding their own bodies, medical care, and, fundamentally, the future course of their lives," Brief for Respondents 12, and who have concluded responsibly and with substantial justification that the brief and anguished remainders of their lives have lost virtually all value to them. Respondents fully embrace the notion that the State must be free to impose reasonable regulations on such physician assistance to ensure that the patients they assist are indeed among the competent and terminally ill and that each has made a free and informed choice in seeking to obtain and use a fatal drug. Complaint P3.2; App.

28-41.

In response, the State argues that the interest asserted by the doctors is beyond constitutional recognition because it has no deep roots in our history and traditions. Brief for Petitioners 21-25. But even aside from that, without disputing that the patients here were competent and terminally ill, the State insists that recognizing the legitimacy of doctors' assistance of their patients as contemplated here would entail a number of adverse consequences that the Washington Legislature was entitled to forestall. The nub of this part of the State's argument is not that such patients are constitutionally undeserving of relief on their own account, but that any attempt to confine a right of physician assistance to the circumstances presented by these doctors is likely to fail. *Id.*, at 34-35, 44-47.

First, the State argues that the right could not be confined to the terminally ill. Even assuming a fixed definition of that term, the State observes that it is not always possible to say with certainty how long a person may live. *Id.*, at 34. It asserts that "there is no principled basis on which [the right] can be limited to the prescription of medication for terminally ill patients to administer to themselves" when the right's justifying principle is as broad as "merciful termination [*755] of suffering." *Id.*, at 45 (citing Y. Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, Hastings Center Report 32, 36-37 (May-June 1993)). Second, the State argues that the right could not be confined to the mentally competent, observing that a person's competence cannot always be assessed with certainty, Brief for Petitioners 34, and suggesting further that no principled distinction is possible between a competent patient acting independently and a patient acting through a duly appointed and competent surrogate, *id.*, at 46. Next, according to the State, such a right might entail a right to or at least merge in practice into "other forms of life-ending assistance," such as euthanasia. *Id.*, at 46-47. Finally, the State believes that a right to physician assistance could not easily be distinguished from a right to assistance [**2277] from others, such as friends, family, and other health-care workers. *Id.*, at 47. The State thus argues that recognition of the substantive [***810] due process right at issue here would jeopardize the lives of others outside the class defined by the doctors' claim, creating risks of irresponsible suicides and euthanasia, whose dangers are concededly within the State's authority to address.

II

When the physicians claim that the Washington law deprives them of a right falling within the scope of liberty that the *Fourteenth Amendment* guarantees against denial without due process of law,³ they are not claiming some sort of procedural defect in the process through which the statute has been enacted or is administered. Their claim, rather, is that the State has no substantively adequate justification for barring the assistance sought by the patient and sought to be offered by the physician. Thus, we are dealing with a claim to one of those rights sometimes described as rights [*756] of substantive due process and sometimes as unenumerated rights, in view of the breadth and indeterminacy of the "due process" serving as the claim's textual basis. The doctors accordingly arouse the skepticism of those who find the Due Process Clause an unduly vague or oxymoronic warrant for judicial review of substantive state law, just as they also invoke two centuries of American constitutional practice in recognizing unenumerated, substantive limits on governmental action. Although this practice has neither rested on any single textual basis nor expressed a consistent theory (or, before *Poe v. Ullman*, a much articulated one), a brief overview of its history is instructive on two counts. The persistence of substantive due process in our cases points to the legitimacy of the modern justification for such judicial review found in Justice Harlan's dissent in *Poe*,⁴ on which I will dwell further on, while the acknowledged failures of some of these cases point with caution to the difficulty raised by the present claim.

3 The doctors also rely on the *Equal Protection Clause*, but that source of law does essentially nothing in a case like this that the Due Process Clause cannot do on its own.

4 The status of the Harlan dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), is shown by the Court's adoption of its result in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and by the Court's acknowledgment of its status and adoption of its reasoning in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848-849 (1992). See also *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (citing Justice Harlan's *Poe* dissent as authority for the requirement that this Court balance "the liberty of the individual" and "the demands of an organized society"); *Roberts v. United States Jaycees*, 468 U.S. 609, 619

(1984); *Moore v. East Cleveland*, 431 U.S. 494, 500-506, and n.12 (1977) (plurality opinion) (opinion for four Justices treating Justice Harlan's *Poe* dissent as a central explication of the methodology of judicial review under the Due Process Clause).

Before the ratification of the *Fourteenth Amendment*, substantive constitutional review resting on a theory of unenumerated rights occurred largely in the state courts applying state constitutions that commonly contained either due process clauses like that of the *Fifth Amendment* (and later the *Fourteenth*) or the textual antecedents of such clauses, repeating [*757] Magna Carta's guarantee of "the law of the land."⁵ On the [***811] basis of such clauses, or of general principles untethered to specific constitutional language, state courts evaluated the constitutionality of a wide range of statutes.

5 Coke indicates that prohibitions against deprivations without "due process of law" originated in an English statute that "rendred" Magna Carta's "law of the land" in such terms. See 2 E. Coke, *Institutes* 50 (1797); see also E. Corwin, *Liberty Against Government* 90-91 (1948).

Thus, a Connecticut court approved a statute legitimating a class of previous illegitimate marriages, as falling within the terms of the "social compact," while making clear its power to review constitutionality in those terms. *Goshen v. Stonington*, 4 Conn. 209, 225-226 (1822). In the same period, a specialized court of equity, created under a Tennessee statute solely to hear cases brought by the state bank against its debtors, found its own authorization unconstitutional as "partial" legislation violating the state constitution's [**2278] "law of the land" clause. *Bank of the State v. Cooper*, 2 Yerg. 599, 602-608 (Tenn. 1831) (Green, J.); *id.*, at 613-615 (Peck, J.); *id.*, at 618-623 (Kennedy, J.). And the middle of the 19th century brought the famous *Wynehamer* case, invalidating a statute purporting to render possession of liquor immediately illegal except when kept for narrow, specified purposes, the state court finding the statute inconsistent with the state's due process clause. *Wynehamer v. People*, 13 N. Y. 378, 486-487 (1856). The statute was deemed an excessive threat to the "fundamental rights of the citizen" to property. *Id.*, at 398 (Comstock, J.). See generally, E. Corwin, *Liberty Against Government* 58-115 (1948) (discussing

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substantive due process in the state courts before the Civil War); T. Cooley, *Constitutional Limitations* *85-*129, *351-*397.

Even in this early period, however, this Court anticipated the developments that would presage both the Civil War and the ratification of the *Fourteenth Amendment*, by making it clear on several occasions that it too had no doubt of the [*758] judiciary's power to strike down legislation that conflicted with important but unenumerated principles of American government. In most such instances, after declaring its power to invalidate what it might find inconsistent with rights of liberty and property, the Court nevertheless went on to uphold the legislative acts under review. See, e.g., *Wilkinson v. Leland*, 2 Pet. 627, 656-661 (1829); *Calder v. Bull*, 3 Dall. 386, 386-395 (1798) (opinion of Chase, J.); see also *Corfield v. Coryell*, 6 F. Cas. 546, 550-552 (No. 3,230) (1823). But in *Fletcher v. Peck*, 6 Cranch 87 (1810), the Court went further. It struck down an act of the Georgia legislature that purported to rescind a sale of public land *ab initio* and reclaim title for the State, and so deprive subsequent, good-faith purchasers of property conveyed by the original grantees. The Court rested the invalidation on alternative sources of authority: the specific prohibitions against bills of attainder, *ex post facto* laws, laws impairing contracts in Article I, § 10 of the Constitution; and "general principles which are common to our free institutions," by which Chief Justice Marshall meant that a simple deprivation of property by the State could not be an authentically "legislative" act. *Fletcher*, 6 Cranch, at 135-139.

Fletcher was not, though, the most telling early example of such review. For its most salient instance in this Court before the adoption of the *Fourteenth Amendment* was, of course, the case that the Amendment would in due course overturn, *Dred Scott v. Sandford*, 19 How. 393 [***812] (1857). Unlike *Fletcher*, *Dred Scott* was textually based on a due process clause (in the *Fifth Amendment*, applicable to the national government), and it was in reliance on that clause's protection of property that the Court invalidated the Missouri Compromise. 19 How., at 449-452. This substantive protection of an owner's property in a slave taken to the territories was traced to the absence of any enumerated power to affect that property granted to the Congress by Article I of the Constitution, *id.*, at 451-452, the implication [*759] being that the government had no legitimate interest that could support the earlier congressional compromise. The

ensuing judgment of history needs no recounting here.

After the ratification of the *Fourteenth Amendment*, with its guarantee of due process protection against the States, interpretation of the words "liberty" and "property" as used in due process clauses became a sustained enterprise, with the Court generally describing the due process criterion in converse terms of reasonableness or arbitrariness. That standard is fairly traceable to Justice Bradley's dissent in the *Slaughter-House Cases*, 16 Wall. 36 (1873), in which he said that a person's right to choose a calling was an element of liberty (as the calling, once chosen, was an aspect of property) and declared that the liberty and property protected by due process are not truly recognized if such rights may be "arbitrarily assailed," *id.*, at 116.⁶ After [**2279] that, opinions comparable to those that preceded *Dred Scott* expressed willingness to review legislative action for consistency with the Due Process Clause even as they upheld the laws in question. See, e.g., *Bartemeyer v. Iowa*, 18 Wall. 129, 133-135 (1874); *Munn v. Illinois*, 94 U.S. 113, 123-135 (1877); *Railroad Comm'n Cases*, 116 U.S. 307, 331 (1886); *Mugler v. [**760] Kansas*, 123 U.S. 623, 659-670 (1887). See generally Corwin, *Liberty Against Government*, at 121-136 (surveying the Court's early *Fourteenth Amendment* cases and finding little dissent from the general principle that the Due Process Clause authorized judicial review of substantive statutes).

⁶ The *Slaughter-House Cases* are important, of course, for their holding that the Privileges or Immunities Clause was no source of any but a specific handful of substantive rights. *Slaughter-House Cases*, 16 Wall., at 74-80. To a degree, then, that decision may have led the Court to look to the Due Process Clause as a source of substantive rights. In *Twining v. New Jersey*, 211 U.S. 78, 95-97 (1908), for example, the Court of the Lochner Era acknowledged the strength of the case against *Slaughter-House's* interpretation of the Privileges or Immunities Clause but reaffirmed that interpretation without questioning its own frequent reliance on the Due Process Clause as authorization for substantive judicial review. See also J. Ely, *Democracy and Distrust* 14-30 (1980) (arguing that the Privileges or Immunities Clause and not the Due Process Clause is the proper warrant for courts' substantive oversight of state legislation). But the

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courts' use of due process clauses for that purpose antedated the 1873 decision, as we have seen, and would in time be supported in the *Poe* dissent, as we shall see.

The theory became serious, however, beginning with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), where the Court invalidated a Louisiana statute for excessive interference with *Fourteenth Amendment* liberty to contract, *id.*, at 588-593, and offered a substantive interpretation of "liberty," that in the aftermath of the so-called *Lochner* Era [***813] has been scaled back in some respects, but expanded in others, and never repudiated in principle. The Court said that *Fourteenth Amendment* liberty includes "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Id.*, at 589. "We do not intend to hold that in no such case can the State exercise its police power," the Court added, but "when and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises." *Id.* at 590.

Although this principle was unobjectionable, what followed for a season was, in the realm of economic legislation, the echo of *Dred Scott*. *Allgeyer* was succeeded within a decade by *Lochner v. New York*, 198 U.S. 45 (1905), and the era to which that case gave its name, famous now for striking down as arbitrary various sorts of economic regulations that post-New Deal courts have uniformly thought constitutionally sound. Compare, *e.g.*, *id.*, at 62 (finding New York's maximum-hours law for bakers "unreasonable and entirely arbitrary") and *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, [*761] 559 (1923) (holding a minimum wage law "so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States") with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (overruling *Adkins* and approving a minimum-wage law on the principle that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"). As the parentheticals here suggest, while the cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review, they

harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused.

Even before the deviant economic due process cases had been repudiated, however, the more durable precursors of modern substantive due process were reaffirming this Court's obligation to conduct arbitrariness review, beginning with *Meyer v. Nebraska*, 262 U.S. 390 [**2280] (1923). Without referring to any specific guarantee of the *Bill of Rights*, the Court invoked precedents from the *Slaughter-House Cases* through *Adkins* to declare that the *Fourteenth Amendment* protected "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.*, at 399. The Court then held that the same *Fourteenth Amendment* liberty included a teacher's right to teach and the rights of parents to direct their children's education without unreasonable interference by the States, *id.*, at 400, [***814] with the result that Nebraska's prohibition on the teaching of foreign languages in the lower grades was, "arbitrary and without reasonable relation to any end within the competency of the State," *id.*, at 403. See also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-536 (1925) [*762] (finding that a statute that all but outlawed private schools lacked any "reasonable relation to some purpose within the competency of the State"); *Palko v. Connecticut*, 302 U.S. 319, 327-238 (1937) ("even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts"; "Is that [injury] to which the statute has subjected [the appellant] a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?") (citation and internal quotation marks omitted).

After *Meyer* and *Pierce*, two further opinions took the major steps that lead to the modern law. The first was not even in a due process case but one about equal protection, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), where the Court emphasized the "fundamental" nature of individual choice about procreation and so foreshadowed not only the later prominence of procreation as a subject of liberty protection, but the corresponding standard of "strict scrutiny," in this Court's

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Fourteenth Amendment law. See *id.*, at 541. *Skinner*, that is, added decisions regarding procreation to the list of liberties recognized in *Meyer* and *Pierce* and loosely suggested, as a gloss on their standard of arbitrariness, a judicial obligation to scrutinize any impingement on such an important interest with heightened care. In so doing, it suggested a point that Justice Harlan would develop, that the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual. *Poe*, 367 U.S. at 543.

The second major opinion leading to the modern doctrine was Justice Harlan's *Poe* dissent just cited, the conclusion of which was adopted in *Griswold v. Connecticut*, 381 U.S. 478 (1965), and the authority of which was acknowledged in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). See also n.4, *supra*. The dissent is important [*763] for three things that point to our responsibilities today. The first is Justice Harlan's respect for the tradition of substantive due process review itself, and his acknowledgement of the Judiciary's obligation to carry it on. For two centuries American courts, and for much of that time this Court, have thought it necessary to provide some degree of review over the substantive content of legislation under constitutional standards of textual breadth. The obligation was understood before *Dred Scott* and has continued after the repudiation of *Lochner's* progeny, most notably on the subjects of segregation in public education, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), interracial marriage, *Loving v. Virginia*, 388 U.S. 1, 12 [***815] (1967), marital privacy and contraception, *Carey v. Population Services Int'l*, 431 U.S. 678, 684-691 (1977), *Griswold v. Connecticut*, *supra*, at 481-486, abortion, *Planned Parenthood of Southeastern [**2281] Pa. v. Casey*, 505 U.S. 833, 849, 869-879 (1992) (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.), *Roe v. Wade*, 410 U.S. 113, 152-166 (1973), personal control of medical treatment, *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 287-289 (1990) (O'CONNOR, J., concurring); *id.*, at 302 (Brennan, J., dissenting); *id.*, at 331 (STEVENS, J., dissenting); see also *id.*, at 278 (majority opinion), and physical confinement, *Foucha v. Louisiana*, 504 U.S. 71, 80-83 (1992). This enduring tradition of American constitutional practice is, in Justice Harlan's view, nothing more than what is required by the judicial authority and obligation to construe constitutional text and review legislation for conformity to that text. See *Marbury v. Madison*, 1 Cranch 137

(1803). Like many judges who preceded him and many who followed, he found it impossible to construe the text of due process without recognizing substantive, and not merely procedural, limitations. "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application [*764] to individuals, nevertheless destroy the enjoyment of all three." *Poe*, 367 U.S. at 541. ⁷ The text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words "liberty" and "due process of law."

7 Judge Johnson of the New York Court of Appeals had made the point more obliquely a century earlier when he wrote that, "the form of this declaration of right, 'no person shall be deprived of life, liberty or property, without due process of law,' necessarily imports that the legislature cannot make the mere existence of the rights secured the occasion of depriving a person of any of them, even by the forms which belong to 'due process of law.' For if it does not necessarily import this, then the legislative power is absolute." And, "To provide for a trial to ascertain whether a man is in the enjoyment of [any] of these rights, and then, as a consequence of finding that he is in the enjoyment of it, to deprive him of it, is doing indirectly just what is forbidden to be done directly, and reduces the constitutional provision to a nullity." *Wynehamer v. People*, 13 N. Y. 378, 420 (1856).

Following the first point of the *Poe* dissent, on the necessity to engage in the sort of examination we conduct today, the dissent's second and third implicitly address those cases, already noted, that are now condemned with virtual unanimity as disastrous mistakes of substantive due process review. The second of the dissent's lessons is a reminder that the business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people. It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise. Thus informed, judicial review still has no warrant [***816] to

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substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable. Part III, below, deals with this second point, and also with the dissent's third, which takes the form of an [*765] object lesson in the explicit attention to detail that is no less essential to the intellectual discipline of substantive due process review than an understanding of the basic need to account for the two sides in the controversy and to respect legislation within the zone of reasonableness.

III

My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847-849 (1992). That understanding begins with a concept of "ordered liberty," *Poe*, 367 U.S. [*2282] at 549 (Harlan, J.); see also *Griswold*, 381 U.S. at 500, comprising a continuum of rights to be free from "arbitrary impositions and purposeless restraints," *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

"Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could [*766] serve as a substitute, in this area, for judgment and restraint." *Id.*, at 542.

See also *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.) ("Appropriate

limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society") (quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)).

After the *Poe* dissent, as before it, this enforceable concept of liberty would bar statutory impositions even at relatively trivial levels when governmental restraints are undeniably irrational as unsupported by any imaginable rationale. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) [***817] (economic legislation "not . . . unconstitutional unless . . . facts . . . preclude the assumption that it rests upon some rational basis"); see also *Poe*, 367 U.S. at 545, 548 (Harlan, J., dissenting) (referring to usual "presumption of constitutionality" and ordinary test "going merely to the plausibility of [a statute's] underlying rationale"). Such instances are suitably rare. The claims of arbitrariness that mark almost all instances of unenumerated substantive rights are those resting on "certain interests requiring particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. *Skinner v. Oklahoma [ex rel. Williamson]*, 316 U.S. 535 (1942)]; *Bolling v. Sharpe*, [347 U.S. 497 (1954)]," *id.*, at 543; that is, interests in liberty sufficiently important to be judged "fundamental," *id.*, at 548; see also *id.*, at 541 (citing *Corfield v. Coryell*, 4 Wash. C. C. 371, 380 (CC ED Pa. 1825)). In the face of an interest this powerful a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted. *Poe*, *supra*, at 548 (Harlan, J., dissenting) (an "enactment involving . . . a most fundamental aspect [*767] of 'liberty' . . . [is] subject to 'strict scrutiny'" (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 541); ⁸ *Reno v. [**2283] Flores*, 507 U.S. 292, 301-302 (1993) (reaffirming that due process "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest").

9

8 We have made it plain, of course, that not every law that incidentally makes it somewhat harder to exercise a fundamental liberty must be justified by a compelling counterinterest. See *Casey*, 505 U.S. at 872-876 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.);

521 U.S. 702, *767; 117 S. Ct. 2258, **2283;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***817

Carey v. Population Services Int'l, 431 U.S. 678, 685-686 (1977) ("An individual's [constitutionally protected] liberty to make choices regarding contraception does not . . . automatically invalidate every state regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not [even] infringe protected individual choices"). But a state law that creates a "substantial obstacle," *Casey*, *supra*, at 877, for the exercise of a fundamental liberty interest requires a commensurably substantial justification in order to place the legislation within the realm of the reasonable.

9 Justice Harlan thus recognized just what the Court today assumes, that by insisting on a threshold requirement that the interest (or, as the Court puts it, the right) be fundamental before anything more than rational basis justification is required, the Court ensures that not every case will require the "complex balancing" that heightened scrutiny entails. See *ante*, at 17-18.

This approach calls for a court to assess the relative "weights" or dignities of the contending interests, and to this extent the judicial method is familiar to the common law. Common law method is subject, however, to two important constraints in the hands of a court engaged in substantive due process review. First, such a court is bound to confine the values that it recognizes to those truly deserving constitutional [***818] stature, either to those expressed in constitutional text, or those exemplified by "the traditions from which [the Nation] developed," or revealed by contrast with "the traditions from which it broke." *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). "We may not draw on our merely personal and private notions and disregard the limits . . . derived from [*768] considerations that are fused in the whole nature of our judicial process . . . [,] considerations deeply rooted in reason and in the compelling traditions of the legal profession." *Id.*, at 544-545 (quoting *Rochin v. California*, 342 U.S. 165, 170-171 (1952)); see also *Palko v. Connecticut*, 302 U.S. at 325 (looking to "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

The second constraint, again, simply reflects the fact that constitutional review, not judicial lawmaking, is a

court's business here. The weighing or valuing of contending interests in this sphere is only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of state and individual. See, e.g., *Poe*, *supra*, at 553 (Harlan, J., dissenting); *Youngberg v. Romeo*, 457 U.S. 307, 320-321 (1982). It is no justification for judicial intervention merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review. It is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have a constitutional right. See *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. at 279 ("Determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests'") (quoting *Youngberg v. Romeo*, *supra*, at 321).¹⁰

10 Our cases have used various terms to refer to fundamental liberty interests, see, e.g., *Poe*, 367 U.S. at 545 (Harlan, J., dissenting) ("basic liberty") (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)); *Poe*, *supra*, at 543 (Harlan, J., dissenting) ("certain interests" must bring "particularly careful scrutiny"); *Casey*, 505 U.S. at 851 ("protected liberty"); *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990) ("constitutionally protected liberty interest"); *Youngberg v. Romeo*, 457 U.S. at 315 ("liberty interests"), and at times we have also called such an interest a "right" even before balancing it against the government's interest, see, e.g., *Roe v. Wade*, 410 U.S. 113, 153-154 (1973); *Carey v. Population Services Int'l*, *supra*, at 686, 688, and n.5; *Poe*, 367 U.S. at 541 ("rights 'which are . . . fundamental'") (quoting *Corfield v. Coryell*, 4 Wash. C.C. 371, 380 (CC ED Pa. 1825)). Precision in terminology, however, favors reserving the label "right" for instances in which the individual's liberty interest actually trumps the government's countervailing interests; only then does the individual have anything legally enforceable as against the state's attempt at

regulation.

[*769] [**2284] The *Poe* dissent thus reminds us of [***819] the nature of review for reasonableness or arbitrariness and the limitations entailed by it. But the opinion cautions against the repetition of past error in another way as well, more by its example than by any particular statement of constitutional method: it reminds us that the process of substantive review by reasoned judgment, *Poe*, 367 U.S. at 542-544, is one of close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value.

Although the *Poe* dissent disclaims the possibility of any general formula for due process analysis (beyond the basic analytic structure just described), see *id.*, at 542, 544, Justice Harlan of course assumed that adjudication under the Due Process Clauses is like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse. See also *Casey*, 505 U.S. at 849 ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment"). When identifying and assessing the competing interests of liberty and authority, for example, [*770] the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive. As in any process of rational argumentation, we recognize that when a generally accepted principle is challenged, the broader the attack the less likely it is to succeed. The principle's defenders will, indeed, often try to characterize any challenge as just such a broadside, perhaps by couching the defense as if a broadside attack had occurred. So the Court in *Dred Scott* treated prohibition of slavery in the Territories as nothing less than a general assault on the concept of property. See *Dred Scott v. Sandford*, 19 How., at 449-452.

Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the

domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The "tradition is a living thing," *Poe*, 367 U.S. at 542 (Harlan, J., dissenting), albeit one that moves by moderate steps carefully taken. "The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a channel for what is to come." *Id.*, at 544 (Harlan, J., dissenting) (internal quotation marks omitted). Exact [***820] analysis and characterization of any due process claim is critical to the method and to the result.

So, in *Poe*, Justice Harlan viewed it as essential to the plaintiffs' claimed right to use contraceptives that they sought to do so within the privacy of the marital bedroom. This detail in fact served two crucial and complementary [*771] functions, and provides a lesson for today. It rescued the individuals' claim from a breadth that would have threatened all state regulation of contraception or intimate relations; extramarital intimacy, no matter how privately practiced, was outside the scope of the right Justice Harlan would have recognized in that case. See *id.*, at 552-553. It was, moreover, this same restriction that allowed the interest to be valued as an aspect of a broader liberty to be free from all unreasonable intrusions into the privacy of the home and the family life within it, a liberty exemplified in constitutional provisions such as the *Third* and *Fourth Amendments*, in prior decisions of the Court involving unreasonable [**2285] intrusions into the home and family life, and in the then-prevailing status of marriage as the sole lawful locus of intimate relations. *Id.*, at 548, 551.¹¹ The individuals' interest was therefore at its peak in *Poe*, because it was supported by a principle that distinguished of its own force between areas in which government traditionally had regulated (sexual relations outside of marriage) and those in which it had not (private marital intimacies), and thus was broad enough to cover the claim at hand without being so broad as to be shot-through by exceptions.

11 Thus, as the *Poe* dissent illustrates, the task of determining whether the concrete right claimed by an individual in a particular case falls within the ambit of a more generalized protected liberty requires explicit analysis when what the individual wants to do could arguably be

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characterized as belonging to different strands of our legal tradition requiring different degrees of constitutional scrutiny. See also Tribe & Dorf, Levels of Generality in the Definition of Rights, 57 *U. Chi. L. Rev.* 1057, 1091 (1990) (abortion might conceivably be assimilated either to the tradition regarding women's reproductive freedom in general, which places a substantial burden of justification on the State, or to the tradition regarding protection of fetuses, as embodied in laws criminalizing feticide by someone other than the mother, which generally requires only rationality on the part of the State). Selecting among such competing characterizations demands reasoned judgment about which broader principle, as exemplified in the concrete privileges and prohibitions embodied in our legal tradition, best fits the particular claim asserted in a particular case.

[*772] On the other side of the balance, the State's interest in *Poe* was not fairly characterized simply as preserving sexual morality, or doing so by regulating contraceptive devices. Just as some of the earlier cases went astray by speaking without nuance of individual interests in property or autonomy to contract for labor, so the State's asserted interest in *Poe* was not immune to distinctions turning (at least potentially) on the precise purpose being pursued and the collateral consequences of the means chosen, see *id.*, at 547-548. It was assumed that the State might legitimately enforce limits on the use of contraceptives through laws regulating divorce and annulment, or even through its tax policy, *ibid.*, but not necessarily be justified in criminalizing the same practice in the marital bedroom, which would entail the consequence of authorizing state enquiry into the intimate relations of a married couple who chose to [***821] close their door, *id.*, at 548-549. See also *Casey*, 505 U.S. at 869 (strength of State's interest in potential life varies depending on precise context and character of regulation pursuing that interest).

The same insistence on exactitude lies behind questions, in current terminology, about the proper level of generality at which to analyze claims and counter-claims, and the demand for fitness and proper tailoring of a restrictive statute is just another way of testing the legitimacy of the generality at which the government sets up its justification. ¹² We may [*773] therefore classify Justice Harlan's example of proper

analysis in any of these ways: as applying concepts of normal critical reasoning, as pointing to the need to attend to the levels of generality at which countervailing interests are stated, or as examining the concrete application of principles for fitness with their own ostensible justifications. But whatever the categories in which we place the dissent's example, it stands in marked contrast to earlier cases whose reasoning was marked by comparatively less discrimination, and it points to the importance of evaluating the claims of the parties now before us with comparable detail. For [**2286] here we are faced with an individual claim not to a right on the part of just anyone to help anyone else commit suicide under any circumstances, but to the right of a narrow class to help others also in a narrow class under a set of limited circumstances. And the claimants are met with the State's assertion, among others, that rights of such narrow scope cannot be recognized without jeopardy to individuals whom the State may concededly protect through its regulations.

12 The dual dimensions of the strength and the fitness of the government's interest are succinctly captured in the so-called "compelling interest test," under which regulations that substantially burden a constitutionally protected (or "fundamental") liberty may be sustained only if "narrowly tailored to serve a compelling state interest," *Reno v. Flores*, 507 U.S. 292, 302 (1993); see also, e.g., *Roe v. Wade*, 410 U.S. at 155; *Carey v. Population Services Int'l*, 431 U.S. at 686. How compelling the interest and how narrow the tailoring must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it, see *Casey*, 505 U.S. at 871-874 (opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *Carey*, *supra*, at 686.

IV

A

Respondents claim that a patient facing imminent death, who anticipates physical suffering and indignity, and is capable of responsible and voluntary choice, should have a right to a physician's assistance in providing counsel and drugs to be administered by the patient to end life promptly. Complaint P3.1. They accordingly claim that a physician must have the

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corresponding right to provide such aid, contrary to the provisions of *Wash. Rev. Code § 9A.36.060* (1994). I do not understand the argument to rest on any assumption that rights either to suicide or to assistance in committing it are historically based as such. Respondents, rather, acknowledge the prohibition of each historically, but rely on the fact that to a substantial extent the State has repudiated that history. The result of this, respondents say, is to open [*774] the door to claims of such a patient to be accorded [***822] one of the options open to those with different, traditionally cognizable claims to autonomy in deciding how their bodies and minds should be treated. They seek the option to obtain the services of a physician to give them the benefit of advice and medical help, which is said to enjoy a tradition so strong and so devoid of specifically countervailing state concern that denial of a physician's help in these circumstances is arbitrary when physicians are generally free to advise and aid those who exercise other rights to bodily autonomy.

1

The dominant western legal codes long condemned suicide and treated either its attempt or successful accomplishment as a crime, the one subjecting the individual to penalties, the other penalizing his survivors by designating the suicide's property as forfeited to the government. See 4 W. Blackstone, *Commentaries* *188-*189 (commenting that English law considered suicide to be "ranked . . . among the highest crimes" and deemed persuading another to commit suicide to be murder); see generally Marzen, O'Dowd, Crone, & Balch, *Suicide: A Constitutional Right?*, 24 *Duquense L. Rev.* 1, 56-63 (1985). While suicide itself has generally not been considered a punishable crime in the United States, largely because the common-law punishment of forfeiture was rejected as improperly penalizing an innocent family, see *id.*, at 98-99, most States have consistently punished the act of assisting a suicide as either a common-law or statutory crime and some continue to view suicide as an unpunishable crime. See generally *id.*, at 67-100, 148-242. ¹³ Criminal prohibitions [*775] on such assistance [**2287] remain widespread, as exemplified [***823] in the Washington statute in question here. ¹⁴

¹³ Washington and New York are among the minority of States to have criminalized attempted suicide, though neither State still does so. See Brief for Members of the New York and Washington State Legislatures as *Amicus Curiae*

15, n.8 (listing state statutes). The common law governed New York as a colony and the New York Constitution of 1777 recognized the common law, N. Y. Const. of 1777, Art. XXXV, and the state legislature recognized common-law crimes by statute in 1788. See Act of Feb. 21, 1788, ch. 37, § 2, 1788 N.Y. Laws 664 (codified at 2 N. Y. Laws 242) (Jones & Varick 1789). In 1828, New York changed the common law offense of assisting suicide from murder to manslaughter in the first degree. See 2 N. Y. Rev. Stat. pt. 4, ch. 1, tit. 2, art. 1, § 7, p. 661 (1829). In 1881, New York adopted a new penal code making attempted suicide a crime punishable by two years in prison, a fine, or both, and retaining the criminal prohibition against assisting suicide as manslaughter in the first degree. Act of July 26, 1881, ch. 676, §§ 172-178, 1881 N. Y. Laws (3 Penal Code), pp. 42-43 (codified at 4 N. Y. Consolidated Laws, Penal Law §§ 2300 to 2306, pp. 2809-2810 (1909)). In 1919, New York repealed the statutory provision making attempted suicide a crime. See Act of May 5, 1919, ch. 414, § 1, 1919 N.Y. Laws 1193. The 1937 New York Report of the Law Revision Commission found that the history of the ban on assisting suicide was "traceable into the ancient common law when a suicide or *felo de se* was guilty of crime punishable by forfeiture of his goods and chattels." State of New York, Report of the Law Revision Commission for 1937, p. 830. The Report stated that since New York had removed "all stigma [of suicide] as a crime" and that "since liability as an accessory could no longer hinge upon the crime of a principal, it was necessary to define it as a substantive offense." *Id.*, at 831. In 1965, New York revised its penal law, providing that a "person is guilty of manslaughter in the second degree when . . . he intentionally causes or aids another person to commit suicide." Penal Law, ch. 1030, 1965 N.Y. Laws at 2387 (codified at *N. Y. Penal Law § 125.15(3)* (McKinney 1975)).

Washington's first territorial legislature designated assisting another "in the commission of self-murder" to be manslaughter, see Act of Apr. 28, 1854, § 17, 1854 Wash. Laws 78, and re-enacted the provision in 1869 and 1873, see Act of Dec. 2, 1869, § 17, 1869 Wash. Laws 201;

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117 S. Ct. 2302; 138 L. Ed. 2d 772, ***823

Act of Nov. 10, 1873, § 19, 1873 Wash. Laws 184 (codified at Wash. Code § 794 (1881)). In 1909, the state legislature enacted a law based on the 1881 New York law and a similar one enacted in Minnesota, see Marzen, O'Dowd, Crone, & Balch, 24 Duquesne L. Rev., at 206, making attempted suicide a crime punishable by two years in prison or a fine, and retaining the criminal prohibition against assisting suicide, designating it manslaughter. See Criminal Code, ch. 249, §§ 133-137, 1909 Wash. Laws, 11th Sess. 890, 929 (codified at Remington & Ballinger's Wash. Code §§ 2385-2389 (1910)). In 1975, the Washington Legislature repealed these provisions, see Wash. Crim. code, 1975, ch. 260, § 9A.92.010 (213-217) 1975 Wash. Laws 817, 858, 866, and enacted the ban on assisting suicide at issue in this case, see Wash. Crim. code, 1975, ch. 260, § 9A.36.060 1975 Wash. Laws 817, 836, codified at Rev. Wash. Code §§ 9A.36.060 (1977). The decriminalization of attempted suicide reflected the view that a person compelled to attempt it should not be punished if the attempt proved unsuccessful. See *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1464, n.9 (WD Wash. 1994) (citing Legislative Council Judiciary Committee, Report on the Revised Washington Criminal Code 153 (Dec. 3, 1970)).

14 Numerous States have enacted statutes prohibiting assisting a suicide. See, e.g., *Alaska Stat. Ann. § 11.41.120(a)(2)* (1996); *Ariz. Rev. Stat. Ann. § 13-1103(A)(3)* (West Supp. 1996-1997); *Ark. Code Ann. § 5-10-104(a)(2)* (1993); *Cal. Penal Code Ann. § 401* (West 1988); *Colo. Rev. Stat. § 18-3-104(1)(b)* (Supp. 1996); *Conn. Gen. Stat. § 53a-56(a)(2)* (1997); *Del. Code Ann. Tit. 11, § 645* (1995); *Fla. Stat. § 782.08* (1991); *Ga. Code Ann. § 16-5-5(b)* (1996); *Haw. Rev. Stat. § 707-702(1)(b)* (1993); Ill. Comp. Stat., ch. 720, § 5/12-31 (1993); Ind. Stat. Ann. §§ 35-42-1-2 to 35-42-1-2.5 (1994 and Supp. 1996); *Iowa Code Ann. § 707A.2* (West Supp. 1997); *Kan. Stat. Ann. § 21-3406* (1995); *Ky. Rev. Stat. Ann. § 216.302* (Michie 1994); *La. Rev. Stat. Ann. § 14:32.12* (West Supp. 1997); *Me. Rev. Stat. Ann., Tit. 17-A, § 204* (1983); *Mich. Comp. Laws Ann. § 752.1027* (West Supp. 1997-1998); *Minn. Stat. § 609.215* (1996); *Miss. Code Ann. § 97-3-49* (1994); *Mo. Stat. § 565.023.1(2)* (1994); *Mont. Code Ann. § 45-5-105*

(1995); *Neb. Rev. Stat. § 28-307* (1995); *N. H. Rev. Stat. Ann. § 630:4* (1996); *N. J. Stat. Ann. § 2C:11-6* (West 1995); *N. M. Stat. Ann. § 30-2-4* (1996); *N. Y. Penal Law § 120.30* (McKinney 1987); *N. D. Cent. Code § 12.1-16-04* (Supp. 1995); *Okla. Stat. Tit. 21, §§ 813-815* (1983); *Ore. Rev. Stat. § 163.125(1)(b)* (1991); *Pa. Cons. Stat. Ann., Tit. 18 Purdon § 2505* (1983); *R. I. Gen. Laws §§ 11-60-1 through 11-60-5* (Supp. 1996); *S. D. Codified Laws § 22-16-37* (1988); *Tenn. Code Ann. § 39-13-216* (Supp. 1996); *Tex. Penal Code Ann. § 22.08* (1994); *Wash. Rev. Code § 9A.36.060* (1994); *Wis. Stat. § 940.12* (1993-1994). See also P. R. Law Ann., Tit. 33, § 4009 (1984).

The principal significance of this history in the State of Washington, according to respondents, lies in its repudiation [*776] of the old tradition to the extent of eliminating the criminal suicide prohibitions. Respondents do not argue that the State's decision goes further, to imply that the State has repudiated any legitimate claim to discourage suicide or to limit its encouragement. The reasons for the decriminalization, after all, may have had more to do with difficulties of law enforcement than with a shift in the value ascribed to [*777] life in various circumstances or in the perceived legitimacy of taking one's own. See, e.g., Kamisar, Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia, in *Euthanasia Examined* 225, 229 (J. Keown ed. 1995); Celoz Cruz, Aid-in-Dying: Should We Decriminalize Physician-Assisted Suicide and Physician-Committed Euthanasia?, *18 Am. J. L. & Med.* 369, 375 (1992); Marzen, O'Dowd, Crone, & Balch 24 Duquesne L. Rev. *supra*, at 98-99. Thus it may indeed make sense for the State to take its hands off suicide as such, while continuing to prohibit the sort of assistance that would make its commission easier. See, e.g., American Law Institute, Model Penal Code § 210.5, Comment 5 (1980). Decriminalization does not, then, imply the existence of a constitutional liberty interest in suicide as such; it simply opens the door to the assertion of a cognizable liberty interest in bodily integrity and associated medical care that would otherwise [***824] have been inapposite so long as suicide, as well as assisting a suicide, was a criminal offense.

[**2288] This liberty interest in bodily integrity was phrased in a general way by then-Judge Cardozo when he said, "every human being of adult years and

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sound mind has a right to determine what shall be done with his own body" in relation to his medical needs. *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 129, 105 N.E. 92, 93 (1914). The familiar examples of this right derive from the common law of battery and include the right to be free from medical invasions into the body, *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. at 269-279, as well as a right generally to resist enforced medication, see *Washington v. Harper*, 494 U.S. 210, 221-222, 229 (1990). Thus "it is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . . . bodily integrity." *Casey*, 505 U.S. at 849 (citations omitted); see also *Cruzan*, 497 U.S. at 278; *id.*, at 288 (O'CONNOR, J., concurring); *Washington v. Harper*, *supra*, at 221-222; *Winston v. Lee*, 470 U.S. 753, 761-762 (1985); *Rochin v. California*, 342 U.S. at 172. [*778] Constitutional recognition of the right to bodily integrity underlies the assumed right, good against the State, to require physicians to terminate artificial life support, *Cruzan*, *supra*, at 279 ("we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition"), and the affirmative right to obtain medical intervention to cause abortion, see *Casey*, *supra*, at 857, 896; cf. *Roe v. Wade*, 410 U.S. at 153.

It is, indeed, in the abortion cases that the most telling recognitions of the importance of bodily integrity and the concomitant tradition of medical assistance have occurred. In *Roe v. Wade*, the plaintiff contended that the Texas statute making it criminal for any person to "procure an abortion," *id.*, at 117, for a pregnant woman was unconstitutional insofar as it prevented her from "terminating her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions,'" *id.*, at 120, and in striking down the statute we stressed the importance of the relationship between patient and physician, see *id.*, at 153, 156.

The analogies between the abortion cases and this one are several. Even though the State has a legitimate interest in discouraging abortion, see *Casey*, 505 U.S. at 871 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.) *Roe*, 410 U.S. at 162, the Court recognized a woman's right to a physician's counsel and care. Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants. Without

physician assistance in abortion, the [***825] woman's right would have too often amounted to nothing more than a right to self-mutilation, and without a physician to assist in the suicide of the dying, the patient's right will often be confined to crude methods of causing death, most shocking and painful to the decedent's survivors.

[*779] There is, finally, one more reason for claiming that a physician's assistance here would fall within the accepted tradition of medical care in our society, and the abortion cases are only the most obvious illustration of the further point. While the Court has held that the performance of abortion procedures can be restricted to physicians, the Court's opinion in *Roe* recognized the doctors' role in yet another way. For, in the course of holding that the decision to perform an abortion called for a physician's assistance, the Court recognized that the good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient. See *id.*, at 153; see also *Griswold v. Connecticut*, 381 U.S. at 482 ("This law . . . operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation"); see generally R. [**2289] Cabot, *Ether Day Address*, *Boston Medical and Surgical J.* 287, 288 (1920). This idea of the physician as serving the whole person is a source of the high value traditionally placed on the medical relationship. Its value is surely as apparent here as in the abortion cases, for just as the decision about abortion is not directed to correcting some pathology, so the decision in which a dying patient seeks help is not so limited. The patients here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death. In that period when the end is imminent, they said, the decision to end life is closest to decisions that are generally accepted as proper instances of exercising autonomy over one's own body, instances recognized under the Constitution and the State's own law, instances in which the help of physicians is accepted as falling within the traditional norm.

[*780] Respondents argue that the State has in fact already recognized enough evolving examples of this tradition of patient care to demonstrate the strength of their claim. Washington, like other States, authorizes

physicians to withdraw life-sustaining medical treatment and artificially delivered food and water from patients who request it, even though such actions will hasten death. See *Wash. Rev. Code* §§ 70.122.110, 70.122.051 (1994); see generally Notes to Uniform Rights of the Terminally Ill Act, 9B U. L. A. 168-169 (Supp. 1997) (listing state statutes). The State permits physicians to alleviate anxiety and discomfort when withdrawing artificial life-supporting devices by administering medication that will hasten death even further. And it generally permits physicians to administer medication to patients in terminal conditions when the primary intent is to alleviate pain, even when the medication is so powerful as to hasten [***826] death and the patient chooses to receive it with that understanding. See *Wash. Rev. Code* § 70.122.010 (1994); see generally P. Rousseau, Terminal Sedation in the Care of Dying Patients, 156 *Archives of Internal Medicine* 1785 (1996); Truog, Berde, Mitchell, & Grier, Barbiturates in the Care of the Terminally Ill, 327 *New Eng. J. Med.* 1678 (1992).

15

15 Other States have enacted similar provisions, some categorically authorizing such pain treatment, see, e.g., *Ind. Code Ann.* § 35-42-1-2.5(a)(1) (Supp. 1996) (ban on assisted suicide does not apply to licensed health care provider who administers or dispenses medications or procedures to relieve pain or discomfort, even if such medications or procedures hasten death, unless provider intends to cause death); *Iowa Code Ann.* § 707A.3.1 (West Supp. 1997) (same); *Ky. Rev. Stat. Ann.* § 216.304 (Michie 1997) (same); *Minn. Stat. Ann.* § 609.215(3) (West Supp. 1997) (same); *Ohio Rev. Code Ann.* §§ 2133.11(A)(6), 2133.12(E)(1) (1994); *R. I. Gen. Laws* § 11-60-4 (Supp. 1996) (same); *S. D. Codified Laws* § 22-16-37.1 (Supp. 1997); see *Mich. Comp. Laws Ann.* § 752.1027(3) (West Supp. 1997); *Tenn. Code Ann.* § 39-13-216(b)(2) (1996); others permit patients to sign health-care directives in which they authorize pain treatment even if it hastens death. See, e.g., *Me. Rev. Stat. Ann., Tit. 18-A*, §§ 5-804, 5-809 (1996); *N. M. Stat. Ann.* §§ 24-7A-4, 24-7A-9 (Supp. 1995); *S. C. Code Ann.* § 62-5-504 (Supp. 1996); *Va. Code Ann.* §§ 54.1-2984, 4.1-2988 (1994).

[*781] 2

The argument supporting respondents' position thus progresses through three steps of increasing forcefulness. First, it emphasizes the decriminalization of suicide. Reliance on this fact is sanctioned under the standard that looks not only to the tradition retained, but to society's occasional choices to reject traditions of the legal past. See *Poe v. Ullman*, 367 U.S. at 542 (Harlan, J., dissenting). While the common law prohibited both suicide and aiding a suicide, with the prohibition on aiding largely justified by the primary prohibition on self-inflicted death itself, see, e.g., American Law Institute, Model Penal Code § 210.5, Comment 1, pp. 92-93, and n.7 (1980), the State's rejection of the traditional treatment of the one leaves the criminality of the other open to questioning that previously would not have been appropriate. The second step in the argument is to emphasize that the State's own act of decriminalization gives a freedom of choice much like the individual's option in recognized instances of bodily autonomy. One of these, abortion, is a legal right to [**2290] choose in spite of the interest a State may legitimately invoke in discouraging the practice, just as suicide is now subject to choice, despite a state interest in discouraging it. The third step is to emphasize that respondents claim a right to assistance not on the basis of some broad principle that would be subject to exceptions if that continuing interest of the State's in discouraging suicide were to be recognized at all. Respondents base their claim on the traditional right to medical care and counsel, subject to the limiting conditions of informed, responsible choice when death is imminent, conditions that support a strong analogy to rights of care in other situations in which medical counsel and assistance have been available as a matter of course. There can be no stronger claim to a physician's assistance than at the time when death is imminent, a moral judgment implied by the State's own recognition of the legitimacy of medical procedures necessarily hastening the moment of impending death.

[***827] [*782] In my judgment, the importance of the individual interest here, as within that class of "certain interests" demanding careful scrutiny of the State's contrary claim, see *Poe, supra*, at 543, cannot be gainsaid. Whether that interest might in some circumstances, or at some time, be seen as "fundamental" to the degree entitled to prevail is not, however, a conclusion that I need draw here, for I am satisfied that the State's interests described in the following section are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless.

B

The State has put forward several interests to justify the Washington law as applied to physicians treating terminally ill patients, even those competent to make responsible choices: protecting life generally, Brief for Petitioners 33, discouraging suicide even if knowing and voluntary, *id.*, at 37-38, and protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and nonvoluntary, *id.*, at 34-35.

It is not necessary to discuss the exact strengths of the first two claims of justification in the present circumstances, for the third is dispositive for me. That third justification is different from the first two, for it addresses specific features of respondents' claim, and it opposes that claim not with a moral judgment contrary to respondents', but with a recognized state interest in the protection of nonresponsible individuals and those who do not stand in relation either to death or to their physicians as do the patients whom respondents describe. The State claims interests in protecting patients from mistakenly and involuntarily deciding to end their lives, and in guarding against both voluntary and involuntary euthanasia. Leaving aside any difficulties in coming to a clear concept of imminent death, mistaken decisions may result from inadequate palliative care or a terminal prognosis that turns out to be error; coercion and abuse may stem from the large medical bills that family members cannot bear [*783] or unreimbursed hospitals decline to shoulder. Voluntary and involuntary euthanasia may result once doctors are authorized to prescribe lethal medication in the first instance, for they might find it pointless to distinguish between patients who administer their own fatal drugs and those who wish not to, and their compassion for those who suffer may obscure the distinction between those who ask for death and those who may be unable to request it. The argument is that a progression would occur, obscuring the line between the ill and the dying, and between the responsible and the unduly influenced, until ultimately doctors and perhaps others would abuse a limited freedom to aid suicides by yielding to the impulse to end another's suffering under conditions going beyond the narrow limits the respondents propose. The State thus argues, essentially, that respondents' claim is not as narrow as it sounds, simply because no recognition of the interest they assert could be limited to vindicating those interests and affecting no others. The State says that the claim, in practical effect, would entail consequences that the State

could, without doubt, legitimately act to prevent.

The mere assertion that the terminally sick might be pressured into [***828] suicide decisions by close friends and family members would [**2291] not alone be very telling. Of course that is possible, not only because the costs of care might be more than family members could bear but simply because they might naturally wish to see an end of suffering for someone they love. But one of the points of restricting any right of assistance to physicians, would be to condition the right on an exercise of judgment by someone qualified to assess the patient's responsible capacity and detect the influence of those outside the medical relationship.

The State, however, goes further, to argue that dependence on the vigilance of physicians will not be enough. First, the lines proposed here (particularly the requirement of a knowing and voluntary decision by the patient) would be more difficult to draw than the lines that have limited [*784] other recently recognized due process rights. Limiting a state from prosecuting use of artificial contraceptives by married couples posed no practical threat to the State's capacity to regulate contraceptives in other ways that were assumed at the time of *Poe* to be legitimate; the trimester measurements of *Roe* and the viability determination of *Casey* were easy to make with a real degree of certainty. But the knowing and responsible mind is harder to assess.¹⁶ Second, this difficulty could become the greater by combining with another fact within the realm of plausibility, that physicians simply would not be assiduous to preserve the line. They have compassion, and those who would be willing to assist in suicide at all might be the most susceptible to the wishes of a patient, whether the patient were technically quite responsible or not. Physicians, and their hospitals, have their own financial incentives, too, in this new age of managed care. Whether acting from compassion or under [*785] some other influence, a physician who would provide a drug for a patient to administer might well go the further step of administering the drug himself; so, the barrier between assisted suicide and euthanasia could become porous, and the line between voluntary and involuntary euthanasia as well.¹⁷ The case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled [***829] basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of

difficult judgment, or by gatekeepers who are subject to temptation, noble or not.

16 While it is also more difficult to assess in cases involving limitations on life incidental to pain medication and the disconnection of artificial life support, there are reasons to justify a lesser concern with the punctilio of responsibility in these instances. The purpose of requesting and giving the medication is presumably not to cause death but to relieve the pain so that the State's interest in preserving life is not unequivocally implicated by the practice; and the importance of pain relief is so clear that there is less likelihood that relieving pain would run counter to what a responsible patient would choose, even with the consequences for life expectancy. As for ending artificial life support, the State again may see its interest in preserving life as weaker here than in the general case just because artificial life support preserves life when nature would not; and, because such life support is a frequently offensive bodily intrusion, there is a lesser reason to fear that a decision to remove it would not be the choice of one fully responsible. Where, however, a physician writes a prescription to equip a patient to end life, the prescription is written to serve an affirmative intent to die (even though the physician need not and probably does not characteristically have an intent that the patient die but only that the patient be equipped to make the decision). The patient's responsibility and competence are therefore crucial when the physician is presented with the request.

17 Again, the same can be said about life support and shortening life to kill pain, but the calculus may be viewed as different in these instances, as noted just above.

Respondents propose an answer to all this, the answer of state regulation with teeth. Legislation proposed in several States, for example, would authorize physician-assisted suicide but require two qualified physicians to confirm the patient's diagnosis, prognosis, and competence; and would mandate that the patient make repeated requests witnessed by at least two others over a specified time span; and would impose reporting requirements and criminal penalties for various acts of coercion. See App. to Brief for State Legislators as *Amici Curiae* 1a-2a.

But at least at this moment there are reasons for caution in predicting the effectiveness [**2292] of the teeth proposed. Respondents' proposals, as it turns out, sound much like the guidelines now in place in the Netherlands, the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence about how such regulations might affect actual practice. Dutch physicians must engage in consultation before proceeding, and must decide whether the patient's decision is voluntary, well considered, and stable, whether the request to die is enduring and made more than once, and whether the patient's future will involve [*786] unacceptable suffering. See C. Gomez, *Regulating Death* 40-43 (1991). There is, however, a substantial dispute today about what the Dutch experience shows. Some commentators marshal evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity. See, e.g., H. Hendin, *Seduced By Death* 75-84 (1997) (noting many cases in which decisions intended to end the life of a fully competent patient were made without a request from the patient and without consulting the patient); Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?*, in *Euthanasia Examined* 261, 289 (J. Keown ed. 1995) (guidelines have "proved signally ineffectual; non-voluntary euthanasia is now widely practised and increasingly condoned in the Netherlands"); Gomez, *supra*, at 104-113. This evidence is contested. See, e.g., R. Epstein, *Mortal Peril* 322 (1997) ("Dutch physicians are not euthanasia enthusiasts and they are slow to practice it in individual cases"); R. Posner, *Aging and Old Age* 242, and n.23 (1995) (noting fear of "doctors' rushing patients to their death" in the Netherlands "has not been substantiated and does not appear realistic"); Van der Wal, Van Eijk, Leenen, & Spreeuwenberg, *Euthanasia and Assisted Suicide, 2, Do Dutch Family Doctors Act Prudently?*, 9 *Family Practice* 135 (1992) (finding no serious abuse in Dutch practice). The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. They are, for me, dispositive of the due process claim at this time.

I take it that the basic concept of judicial review with its possible displacement of legislative judgment bars any finding that a legislature has acted arbitrarily when the following [***830] conditions are met: there is a serious factual controversy over the feasibility of recognizing the

521 U.S. 702, *786; 117 S. Ct. 2258, **2292;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***830

claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power; facts [*787] necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation. It is assumed in this case, and must be, that a State's interest in protecting those unable to make responsible decisions and those who make no decisions at all entitles the State to bar aid to any but a knowing and responsible person intending suicide, and to prohibit euthanasia. How, and how far, a State should act in that interest are judgments for the State, but the legitimacy of its action to deny a physician the option to aid any but the knowing and responsible is beyond question.

The capacity of the State to protect the others if respondents were to prevail is, however, subject to some genuine question, underscored by the responsible disagreement over the basic facts of the Dutch experience. This factual controversy is not open to a judicial resolution with any substantial degree of assurance at this time. It is not, of course, that any controversy about the factual predicate of a due process claim disqualifies a court from resolving it. Courts can recognize captiousness, and most factual issues can be settled in a trial court. At this point, however, the factual issue at the heart of this case does not appear to be one of those. The principal enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation. While an extensive literature on any subject can raise the hopes for judicial understanding, the literature on this subject is only nascent. Since there is little experience directly bearing on the issue, the most that can [**2293] be said is that whichever way the Court might rule today, events could overtake its assumptions, as experimentation in some jurisdictions confirmed or discredited the concerns about progression from assisted suicide to euthanasia.

[*788] Legislatures, on the other hand, have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for factfinding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment

for respondents here, just such experimentation will be attempted in some of the States. See, e.g., *Ore. Rev. Stat. Ann. §§ 127.800 et seq.* (Supp. 1996); App. to Brief for State Legislators as *Amici Curiae* 1a (listing proposed statutes).

I do not decide here what the significance might be of legislative foot-dragging in ascertaining the facts going to the State's argument that the right in question could not be confined as claimed. Sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954). Now, [***831] it is enough to say that our examination of legislative reasonableness should consider the fact that the Legislature of the State of Washington is no more obviously at fault than this Court is in being uncertain about what would happen if respondents prevailed today. We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. The answer has to be, for the reasons already stated, that the legislative process is to be preferred. There is a closely related further reason as well.

One must bear in mind that the nature of the right claimed, if recognized as one constitutionally required, would differ in no essential way from other constitutional rights guaranteed by enumeration or derived from some more definite textual source than "due process." An unenumerated right should not therefore be recognized, with the effect [*789] of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived. To recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions. See *Casey*, 505 U.S. at 864-869.

Legislatures, however, are not so constrained. The experimentation that should be out of the question in constitutional adjudication displacing legislative judgments is entirely proper, as well as highly desirable, when the legislative power addresses an emerging issue like assisted suicide. The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' claim

521 U.S. 702, *789; 117 S. Ct. 2258, **2293;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***831

should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.

JUSTICE GINSBURG, concurring in the judgments.

I concur in the Court's judgments in these cases substantially for the reasons stated by JUSTICE O'CONNOR in her concurring opinion.

JUSTICE BREYER, concurring in the judgments.

I believe that JUSTICE O'CONNOR's views, which I share, have greater legal significance than the Court's opinion suggests. I join her separate opinion, except insofar as it joins the majority. And I concur in the judgments. I shall briefly explain how I differ from the Court.

I agree with the Court in *Vacco v. Quill*, *ante*, that the articulated state interests justify the distinction [*790] drawn between physician assisted suicide and withdrawal of life-support. I also agree with the Court that the critical question in both of the cases before us is whether "the 'liberty' specially protected by the [***832] Due Process Clause includes a right" of the sort that the respondents assert. *Washington v. Glucksberg*, *ante*, at 19. I do not agree, however, with the Court's formulation of that claimed "liberty" interest. The Court describes it as a "right to commit suicide with another's assistance." *Ante*, at 20. But I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering--combined.

As JUSTICE SOUTER points out, *ante* at 13-16 (SOUTER, J., concurring in the judgment), Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), offers some support for such a claim. In that opinion, Justice Harlan referred to the "liberty" that the *Fourteenth Amendment* protects as including "a freedom from all substantial arbitrary impositions and purposeless restraints" and also as recognizing that "*certain interests* require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Id.*, at 543. The "certain interests" to which Justice Harlan referred may well be similar (perhaps identical) to the rights, liberties,

or interests that the Court today, as in the past, regards as "fundamental." *Ante*, at 15; see also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Rochin v. California*, 342 U.S. 165 (1952); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). [*791]

Justice Harlan concluded that marital privacy was such a "special interest." He found in the Constitution a right of "privacy of the home"--with the home, the bedroom, and "intimate details of the marital relation" at its heart--by examining the protection that the law had earlier provided for related, but not identical, interests described by such words as "privacy," "home," and "family." 367 U.S. at 548, 552; cf. *Casey*, *supra*, at 851. The respondents here essentially ask us to do the same. They argue that one can find a "right to die with dignity" by examining the protection the law has provided for related, but not identical, interests relating to personal dignity, medical treatment, and freedom from state-inflicted pain. See *Ingraham v. Wright*, 430 U.S. 651 (1977); *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990); *Casey*, *supra*.

I do not believe, however, that this Court need or now should decide whether or a not such a right is "fundamental." That is because, in my view, the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim and because, as JUSTICE O'CONNOR points out, the laws before us do not *force* a [***833] dying person to undergo that kind of pain. *Ante*, at 2 (O'CONNOR, J., concurring). Rather, the laws of New York and of Washington do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill. Cf. New York State Task Force on Life and the Law, *When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context* 163, n.29 (May 1994). And under these circumstances the laws of New York and Washington would overcome any remaining significant interests and would be justified, regardless.

Medical technology, we are repeatedly told, makes the administration of pain-relieving drugs sufficient, except for a very few individuals for whom the ineffectiveness of pain control medicines can mean, not pain, but the need for sedation [*792] which can end in a coma. Brief for National Hospice Organization 8; Brief

521 U.S. 702, *792; 117 S. Ct. 2258, **2293;
117 S. Ct. 2302; 138 L. Ed. 2d 772, ***833

for the American Medical Association (AMA) et al. as *Amici Curiae* 6; see also Byock, *Consciously Walking the Fine Line: Thoughts on a Hospice Response to Assisted Suicide and Euthanasia*, 9 J. Palliative Care 25, 26 (1993); New York State Task Force, at 44, and n.37. We are also told that there are many instances in which patients do not receive the palliative care that, in principle, is available, *id.*, at 43-47; Brief for AMA as *Amici Curiae* 6; Brief for Choice in Dying, Inc., as *Amici Curiae* 20, but that is so for institutional reasons or inadequacies or obstacles, which would seem possible to overcome, and which do *not* include a *prohibitive set of laws*. *Ante*, at 2 (O'CONNOR, J., concurring); see also 2 House of Lords, Session 1993-1994 Report of Select Committee on Medical Ethics 113 (1994) (indicating that the number of palliative care centers in the United Kingdom, where physician assisted suicide is illegal, significantly exceeds that in the Netherlands, where such practices are legal).

This legal circumstance means that the state laws before us do not infringe directly upon the (assumed) central interest (what I have called the core of the interest in dying with dignity) as, by way of contrast, the state contraceptive laws at issue in *Poe* did interfere with the central interest there at stake--by bringing the State's police powers to bear upon the marital bedroom.

Were the legal circumstances different--for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life--then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as JUSTICE O'CONNOR suggests, the Court might have to revisit its conclusions in these cases.

REFERENCES

22A *Am Jur 2d, Death* 570-588; 40 *Am Jur 2d, Homicide* 111, 585; 61 *Am Jur 2d, Physicians, Surgeons, and Other Healers* 393

USCS, *Constitution, Amendment 14*

Annotated Revised Code of Washington 9A.36.060

L Ed Digest, *Constitutional Law* 854

L Ed Index, *Aiding and Abetting; Due Process; Medical Care or Treatment; Physicians and Surgeons; Suicide*

ALR Index, *Aiding and Abetting; Due Process; Medical Care and Treatment; Physicians and Surgeons; States; Suicide*

Annotation References:

Supreme Court's views as to concept of "liberty" under *due process clauses of Fifth and Fourteenth Amendments*. 47 *L Ed 2d* 975.

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide. 40 *ALR4th* 702.

Druggist's civil liability for suicide consummated with drugs furnished by him. 58 *ALR3d* 828.

Homicide: Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another. 32 *ALR3d* 589.

Civil liability for death by suicide. 11 *ALR2d* 751.

APPENDIX 48



MARGARET WITT, Major, Plaintiff-Appellant, v. DEPARTMENT OF THE AIR FORCE; ROBERT M. GATES, * Secretary of Defense; MICHAEL W. WYNNE, Secretary, Department of the Air Force; MARY L. WALKER, Colonel, Commander, 446th Aeromedical Evacuation Squadron, McChord AFB, Defendants-Appellees.

* Robert M. Gates is substituted for his predecessor Donald H. Rumsfeld as Secretary of Defense. Fed. R. App. P. 43(c)(2).

No. 06-35644

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

527 F.3d 806; 2008 U.S. App. LEXIS 10794; 103 Fair Empl. Prac. Cas. (BNA) 585

November 5, 2007, Argued and Submitted, Seattle, Washington

May 21, 2008, Filed

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by *Witt v. Dep't of the Air Force*, 548 F.3d 1264, 2008 U.S. App. LEXIS 25842 (9th Cir. Wash., 2008)

On remand at, Findings of fact/conclusions of law at *Witt v. United States Dep't of the Air Force*, 2010 U.S. Dist. LEXIS 100781 (W.D. Wash., Sept. 24, 2010)

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-06-05195-RBL. Ronald B. Leighton, District Judge, Presiding.

Witt v. United States Dep't of the Air Force, 444 F. Supp. 2d 1138, 2006 U.S. Dist. LEXIS 51257 (W.D. Wash., 2006)

COUNSEL: James E. Lobsenz, Carney Badley Spellman, P.S., Seattle, Washington, for the appellant.

Aaron H. Caplan, ACLU of Washington, Seattle, Washington, for the appellant.

Peter Keisler, Attorney General, Department of Justice,

Washington, DC, for the appellees.

Anthony J. Steinmeyer, Assistant Branch Director, Appellate Staff, Civil Division, Department of Justice, Washington, DC, for the appellees.

JUDGES: Before: William C. Canby, Senior Circuit Judge, Susan P. Graber, and Ronald M. Gould, Circuit Judges. Opinion by Judge Gould; Partial Concurrence and Partial Dissent by Judge Canby.

OPINION BY: Gould

OPINION

[*809] GOULD, Circuit Judge:

Plaintiff-Appellant Major Margaret Witt ("Major Witt") sued the Air Force, the Secretary of Defense, the Secretary of the Air Force, and her Air Force commander ("the Air Force") after she was suspended from duty as an Air Force reservist nurse on account of her sexual relationship with a civilian woman. Major Witt alleges that 10 U.S.C. § 654, commonly known as the "Don't Ask, Don't Tell" policy ("DADT"), violates substantive

due process, [**2] the *Equal Protection Clause*, and procedural due process. She seeks to enjoin DADT's enforcement. The district court dismissed the suit under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim. We reverse and remand in part, and affirm in part.

I

Major Witt entered the Air Force in 1987.¹ She was commissioned as a Second Lieutenant that same year and promoted to First Lieutenant in 1989, to Captain in 1991, and to Major in 1999. In 1995, she transferred from active to reserve duty and was assigned to McChord Air Force Base in Tacoma, Washington.

¹ Because the district court dismissed the suit below for failure to state a claim, we present and consider the facts as alleged by Major Witt in a light most favorable to her. *Miranda v. Clark County*, 319 F.3d 465, 468 (9th Cir. 2003) (en banc).

By all accounts, Major Witt was an outstanding Air Force officer. She received medals for her service, including the Meritorious Service Medal, the Air Medal, the Aerial Achievement Medal, the Air Force Commendation Medal, and numerous others. Her annual "Officer Performance Reviews" commended her accomplishments and abilities. Major Witt was made an Air Force "poster child" in 1993, [**3] when the Air Force featured her in recruitment materials; photos of her appeared in Air Force promotional materials for more than a decade.

Major Witt was in a committed and long-term relationship with another woman from July 1997 through August 2003. Major Witt's partner was never a member nor a civilian employee of any branch of the armed forces, and Major Witt states that she never had sexual relations while on duty or while on the grounds of any Air Force base. During their relationship, Major Witt and her partner shared a home in Spokane, Washington, about 250 miles [*810] away from McChord Air Force Base. While serving in the Air Force, Major Witt never told any member of the military that she was homosexual.

In July 2004, Major Witt was contacted by Major Adam Torem, who told her that he had been assigned to investigate an allegation that she was homosexual. She declined to make any statement to him. An Air Force

chaplain contacted her thereafter to discuss her homosexuality, but she declined to speak to him, as well. In November 2004, Major Witt's Air Force superiors told her that they were initiating formal separation proceedings against her on account of her homosexuality. This was [**4] confirmed in a memorandum that Major Witt received on November 9, 2004. That memorandum also stated that she could not engage in any "pay or point activity pending resolution" of the separation proceedings. Stated another way, she could not be paid as a reservist, she could not earn points toward promotion, and she could not earn retirement benefits. When she received this memorandum, Major Witt was less than one year short of twenty years of service for the Air Force, at which time she would have earned a right to a full Air Force retirement pension.

Sixteen months later, on March 6, 2006, Major Witt received another memorandum notifying her that a discharge action was being initiated against her on account of her homosexuality. It also advised her of her right to request an administrative hearing, which she promptly did. On April 12, 2006, Major Witt filed this suit in the United States District Court for the Western District of Washington, seeking declaratory and injunctive relief from the discharge proceedings.

A military hearing was held on September 28-29, 2006. The military board found that Major Witt had engaged in homosexual acts and had stated that she was a homosexual in violation [**5] of DADT. It recommended that she be honorably discharged from the Air Force Reserve. The Secretary of the Air Force acted on this recommendation on July 10, 2007, ordering that Major Witt receive an honorable discharge.

Major Witt is well regarded in her unit, and she believes that she would continue to be so regarded even if the entire unit was made aware that she is homosexual. She also contends that the proceedings against her have had a negative effect on unit cohesion and morale, and that there is currently a shortage of nurses in the Air Force of her rank and ability. We must presume those facts to be true for the purposes of this appeal.²

² Four *amicus* briefs were filed in this case. The International Commission of Jurists and the Center for Constitutional Rights wrote in support of Major Witt and argued that the United States Supreme Court has recognized a fundamental privacy right and that the international legal trend

is toward legal equality for homosexuals. The Lambda Legal Defense and Education Fund also supported Major Witt and argued that the Supreme Court has recognized a fundamental right to sexual identity and that the district court undervalued the value of the liberty [**6] interest at stake in the case. The Servicemembers Legal Defense Network wrote in support of Major Witt and argued that the rationale for DADT is not compelling and that DADT forces homosexual service members to hide their identity to avoid discharge. The National Legal Foundation wrote in support of the Air Force and argued that DADT has a valid purpose of supporting unit cohesion, reducing sexual tension, and protecting privacy. We appreciate the advice of all amici on the important issues before us.

II

A

We review de novo a dismissal for failure to state a claim. *Pruitt v. Cheney*, 963 F.2d 1160, 1162-63 (9th Cir. 1992). [**811] DADT, 10 U.S.C. § 654, permits the discharge of members of the armed forces on account of homosexual activity. In relevant part, it provides:

(b) Policy.--A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved [**7] in accordance with procedures set forth in such regulations, that the member has demonstrated that--

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

Id.

Major Witt argues that DADT violates substantive due process, the *Equal Protection Clause*, and [**8] procedural due process. The Ninth Circuit has considered and rejected similar claims in the past, *see, e.g., Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997) (rejecting an *Equal Protection Clause* challenge to DADT under rational basis review); *Philips v. Perry*, 106 F.3d 1420, 1425-26 (9th Cir. 1997) (same); *Beller v. Middendorf*, 632 F.2d 788, 805-12 (9th Cir. 1980) (rejecting procedural due process and substantive due process challenges to a Navy regulation forbidding homosexual service in the Navy). However, Major Witt argues that *Holmes*, *Philips*, and *Beller* are no longer dispositive in light of *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), in which the Supreme Court struck down a Texas statute that banned homosexual sodomy. Accordingly, to resolve this appeal, we must consider the effect of *Lawrence* on our prior precedents.

B

We first assess whether Major Witt has standing to pursue this action. "[T]he irreducible [**9] constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations, footnote, and quotation marks omitted). Second, plaintiff must present a "causal connection between [*812] the injury and the conduct complained of--the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." *Id.* (internal quotation marks and brackets omitted). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561.

There is little doubt that Major Witt meets the second and third requirements, if she can meet the first requirement--an actual injury from DADT. There are, however, questions about whether she has suffered an actual injury for Article III purposes. Although Major Witt has been suspended, the military board recommended her discharge, [**10] and the Secretary of the Air Force ordered her discharge, she has not been formally discharged from the military, as far as the record before us shows. Accordingly, at least some of Major Witt's claims are unripe because they rely on harms which may or may not actually occur. *See Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal quotation marks omitted))

We conclude that Major Witt meets the Article III requirements for her substantive due process and equal protection claims. Although she has not been discharged formally, Major Witt suffered a cognizable injury on account of her long-term suspension. In addition to the loss of pay and points toward promotion and retirement benefits, Major Witt asserts in a declaration in the record that her suspension seriously harmed her chances of being promoted to Colonel. This injury is sufficient to establish "actual injury" for Article III purposes.

However, the situation is different for Major Witt's

procedural due process claim. Major Witt does not allege that she has been deprived of life [**11] or a property interest. Her procedural due process claim rests on her assertion that her discharge papers will reflect the reasons for her discharge, and that this in turn will result in a stigma. The record indicates that Major Witt will receive an honorable discharge. We have suggested that an honorable discharge could be stigmatizing if prospective employers had some reason to know of the reasons for the honorable discharge. *See Beller*, 632 F.2d at 807 (rejecting claim that an honorable discharge resulted in stigma because there was "no evidence indicating that the plaintiffs' service records [we]re likely to impose stigma upon them or make it more difficult for them to seek post-discharge employment"). However, the record does not reflect what will appear on her discharge certificate and, thus, whether any stigma will occur. ³ Accordingly, the procedural [*813] due process claim is not ripe for adjudication on this record because the injury that Major Witt asserts may or may not occur. *See Paul v. Davis*, 424 U.S. 693, 708-10, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) (holding that "defamation, standing alone" does not suffice for a stigma-plus claim; there must be "a right or status previously recognized by state law [that] [**12] was distinctly altered or extinguished").

3 Major Witt relies on a number of cases that have involved "suspension" to support her claim that her liberty has already been violated by her suspension pending a final discharge. However, all of those cases involved property interests. *See FDIC v. Mallen*, 486 U.S. 230, 240, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988) ("It is undisputed that appellee's interest in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the *Fifth Amendment Due Process Clause*."); *Barry v. Barchi*, 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) ("[I]t is clear that Barchi had a property interest in his license sufficient to invoke the protection of the *Due Process Clause*."); *United States v. Two Hundred Ninety-Five Ivory Carvings*, 689 F.2d 850, 853 (9th Cir. 1982) ("Since its summary seizure and during the entire period of the delay, Segal has been deprived of his property without an impartial hearing concerning the seizure."). The plaintiffs in each of those cases had a property right that was actively infringed by a delayed hearing. Here, Major Witt alleges only a right to be free of a

stigma that may or may not occur, and which is not currently [**13] present.

We hesitate to dismiss the claim at this stage, however, because the factual situation surrounding Major Witt's discharge may have changed in the course of this appeal. We therefore remand the procedural due process claim to the district court, where the court can consider the factual details of her discharge with more complete and current information.

III

To evaluate Major Witt's substantive due process claim, we first must determine the proper level of scrutiny to apply. In previous cases, we have applied rational basis review to DADT and predecessor policies. *See, e.g., Holmes, 124 F.3d at 1136; Philips, 106 F.3d at 1425-26.* However, Major Witt argues that *Lawrence* effectively overruled those cases by establishing a fundamental right to engage in adult consensual sexual acts. The Air Force disagrees. Having carefully considered *Lawrence* and the arguments of the parties, we hold that *Lawrence* requires something more than traditional rational basis review and that remand is therefore appropriate.

A

In *Lawrence*, the Supreme Court struck down a Texas statute that criminalized consensual homosexual sodomy. 539 U.S. at 578. In doing so, it also overruled *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), [**14] a 1986 decision of the Supreme Court that had upheld a Georgia law criminalizing consensual sodomy. The Court in *Lawrence* noted that "broad statements of the substantive reach of liberty under the *Due Process Clause*" can be found in earlier cases, including *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and, most pertinently, in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). *Lawrence*, 539 U.S. at 564. "After *Griswold*," the Court wrote, "it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." *Id.* at 565.

Turning to *Bowers*, the Court recognized "the Court's own failure to appreciate the extent of the liberty at stake" in that case. *Id.* at 567. The Court explained:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct [as the Court did in *Bowers*] demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their [**15] penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most [*814] private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

Id.

The Court then discussed the reach of its decision, summarizing:

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id.

The Supreme Court then provided additional reasons why it was overruling *Bowers*. First, [**16] the Court

explained, *Bowers* was predicated on the erroneous belief that homosexuality was "subject to state intervention throughout the history of Western civilization." *Id.* at 571 (internal quotation marks omitted). Second, the logic in *Bowers* "demean[ed] the lives of homosexual persons" and had been widely rejected by state courts and international tribunals. *Id.* at 575-76.

The Supreme Court concluded:

[Homosexuals'] right to liberty under the *Due Process Clause* gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Planned Parenthood v. Casey*, 505 U.S. 833, 847, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Id. at 578.

B

Major Witt argues that *Lawrence* recognized a fundamental right to engage in private, consensual, homosexual conduct and therefore requires us to subject DADT to heightened scrutiny. The Air Force argues that *Lawrence* applied only rational basis review, and that the Ninth Circuit's decisions in *Holmes*, *Philips*, and *Beller* [**17] remain binding law on DADT's validity. Because *Lawrence* is, perhaps intentionally so, silent as to the level of scrutiny that it applied, both parties draw upon language from *Lawrence* that supports their views.

Major Witt argues that the "plain language" of *Lawrence* demonstrates that heightened scrutiny is required here. She notes that, in *Lawrence*, the Supreme Court relied on *Griswold*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Carey v. Population Services International*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977), all of which are fundamental rights cases. She also observes that the language of *Lawrence* emphasizes the importance of the right at issue and refers to "substantial protections" afforded "adult persons in deciding how to conduct their private lives in matters

pertaining to sex." "Substantial protections" are not afforded under rational basis review, Major Witt argues, because rational basis review considers only whether the challenged policy [*815] is rationally related to a legitimate state interest.

In response, the Air Force argues that the same "plain language" implies only rational basis review. In particular, the Air Force stresses the passage in *Lawrence* that states that the challenged [**18] statute "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual," 539 U.S. at 578 (emphasis added). According to the Air Force, legitimate interests are the hallmark of rational basis review. The Air Force also notes that *Lawrence* never stated that it was applying anything other than rational basis review, so, the Air Force concludes, it surely was not.

1

As a preliminary matter, the Air Force argues that no court to date has held that *Lawrence* applied a heightened level of scrutiny. However, the situation is more complex than that presented by the Air Force. Although the Air Force argues that "every Article III court to have decided th[e] question [whether *Lawrence* applied heightened scrutiny], including three courts of appeals, agreed with the District Court in this case that *Lawrence* applied rational-basis review, meaning that the case did not implicate a fundamental right," that is not the case. As we see it, only one court of appeals has directly considered the issue.

The first case that the Air Force claims "decided this question," *Sylvester v. Fogley*, 465 F.3d 851 (8th Cir. 2006), is discussed at length in its [**19] brief. However, the Eighth Circuit explicitly declined to address the issue in *Sylvester*. *See id.* at 858 ("[W]e need not determine whether Sylvester's sexual conduct is protected as a fundamental privacy right because we would reach the same result applying either the strictscrutiny standard of review or the rational-basis standard of review."). The Seventh Circuit made a similar disclaimer in the next case that the Air Force discusses, *Muth v. Frank*, 412 F.3d 808 (7th Cir. 2005), which addressed the issue only in dicta. In *Muth*, the court said:

It may well be that future litigants will insist that *Lawrence* has broader implications for challenges to other state

laws criminalizing consensual sexual conduct. However, because this case is here on habeas review, the only question before this court is whether *Lawrence* announced a new rule proscribing laws prohibiting the conduct for which Muth was convicted [, incest].

Id. at 818. The court concluded that *Lawrence's* holding did not apply to the activity in question--incest--and, thus, did not consider the level of scrutiny applied in *Lawrence. Id.*

Only one of the three courts of appeals that the Air Force claims to have "decided this question" [**20] actually has done so. In *Lofton v. Secretary of the Department of Children & Family Services*, 358 F.3d 804, 817 (11th Cir. 2004), the Eleventh Circuit upheld a law that forbade homosexuals from adopting children, explicitly holding that *Lawrence* did not apply strict scrutiny. Otherwise, our sister circuits are silent.

Nor have we previously directly considered the implications of *Lawrence*. In *Fields v. Palmdale School District*, 427 F.3d 1197, 1208 (9th Cir. 2005), we noted that the right to privacy "encompasses a right of sexual intimacy." (Citing *Lawrence*.) However, we concluded that the action at issue in *Fields*, a survey of elementary school children that included questions relating to sex, did not interfere with the right of parents to make intimate decisions. *Id.* Accordingly, we did not apply [*816] *Lawrence*, whatever the level of scrutiny it might require.⁴

⁴ The Air Force states that, in *Hensala v. Department of the Air Force*, 343 F.3d 951 (9th Cir. 2003), Judge Tashima held that *Lawrence* and *Holmes* "are not closely on point" so that "*Holmes* remains the law of the land." However, Judge Tashima wrote only a partial dissent in that case. See *id. at 959 n.1* (Tashima, J., dissenting in part). [**21] The panel majority held that it need not reach the issue. *Id. at 959* (majority opinion).

One other court of note has considered the implications of *Lawrence*. In *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), the United States Court of Appeals for the Armed Forces considered a challenge to an Air Force sodomy law brought by a serviceman who had been convicted of consensual sodomy with a man of inferior rank within his chain of command. That court

concluded that the application of *Lawrence* must be addressed "in context and not through a facial challenge." *Id. at 206.* *Lawrence*, the court concluded, did not identify a fundamental right; however, it required "searching constitutional inquiry." *Id. at 205.* The court distilled this inquiry into a three-step analysis:

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* [**22] liberty interest?

Id. at 206-07 (citation omitted).

The Court of Appeals for the Armed Forces, in our view, applied a heightened level of scrutiny. By considering whether the policy applied properly to a particular litigant, rather than whether there was a permissible application of the statute, the court necessarily required more than hypothetical justification for the policy--all that is required under rational basis review. The court also required consideration of "additional factors" that might justify the policy, which might be viewed as a corollary to the requirement that a challenged policy serve a "compelling" or "important" government interest under traditional forms of heightened scrutiny.

With this mixed background, we now turn to our analysis of *Lawrence*.

2

The parties urge us to pick through *Lawrence* with a fine-toothed comb and to give credence to the particular turns of phrase used by the Supreme Court that best support their claims. But given the studied limits of the verbal analysis in *Lawrence*, this approach is not conclusive. Nor does a review of our circuit precedent answer the question; as the Court of Appeals for the Armed Forces stated in *Marcum*, 68 M.J. at 204, "[a]lthough [**23] particular sentences within the Supreme Court's opinion may be culled in support of the Government's argument, other sentences may be

extracted to support Appellant's argument." In these ambiguous circumstances, we analyze *Lawrence* by considering what the Court actually *did*, rather than by dissecting isolated pieces of text. In so doing, we conclude that the Supreme Court applied a heightened level of scrutiny in *Lawrence*.

We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review. First, the Court overruled *Bowers*, an earlier case in which the Court had upheld a Georgia sodomy law under rational basis review. If the Court was undertaking rational basis review, then *Bowers* must have been wrong because it [*817] failed under that standard; namely, it must have lacked "any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). But the Court's criticism of *Bowers* had nothing to do with the basis for the law; instead, the Court rejected *Bowers* because of the "Court's own failure to appreciate the extent of the liberty at stake." [**24] *Lawrence*, 539 U.S. at 567.

The criticism that the Court in *Bowers* had misapprehended "the extent of the liberty at stake" does not sound in rational basis review. Under rational basis review, the Court determines whether governmental action is so arbitrary that a rational basis for the action cannot even be conceived *post hoc*. If the Court was applying that standard—"a paradigm of judicial restraint," *Beach*, 508 U.S. at 314—it had no reason to consider the extent of the liberty involved. Yet it did, ultimately concluding that the ban on homosexual sexual conduct sought to "control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." *Lawrence*, 539 U.S. at 567. This is inconsistent with rational basis review.

Second, the cases on which the Supreme Court explicitly based its decision in *Lawrence* are based on heightened scrutiny. As Major Witt pointed out, those cases include *Griswold*, *Roe*, and *Carey*. Moreover, the Court stated that *Casey*, a *post-Bowers* decision, cast its holding in *Bowers* into doubt. *Lawrence*, 539 U.S. at 573-74. Notably, the Court did not mention or apply [**25] the *post-Bowers* case of *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), in which the Court applied rational basis review to a law

concerning homosexuals. Instead, the Court overturned *Bowers* because "[i]ts continuance as precedent demeans the lives of homosexual persons." *Lawrence*, 539 U.S. at 575.

Third, the *Lawrence* Court's rationale for its holding—the inquiry analysis that it was applying—is inconsistent with rational basis review. The Court declared: "The Texas statute furthers no legitimate state interest *which can justify its intrusion into the personal and private life of the individual.*" *Id.* at 578 (emphasis added). Were the Court applying rational basis review, it would not identify a legitimate state interest to "justify" the particular intrusion of liberty at issue in *Lawrence*; regardless of the liberty involved, any hypothetical rationale for the law would do.

We therefore conclude that *Lawrence* applied something more than traditional rational basis review. This leaves open the question whether the Court applied strict scrutiny, intermediate scrutiny, or another heightened level of scrutiny. Substantive due process cases typically apply strict scrutiny in the case of a fundamental [**26] right and rational basis review in all other cases. When a fundamental right is recognized, substantive due process forbids the infringement of that right "at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (emphasis omitted). Few laws survive such scrutiny, and DADT most likely would not.⁵ However, [*818] we hesitate to apply strict scrutiny when the Supreme Court did not discuss narrow tailoring or a compelling state interest in *Lawrence*, and we do not address the issue here.

⁵ The rationale for DADT is found at 10 U.S.C. § 654(a)(15), which states Congress's finding that:

The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Instead, we look to another recent Supreme Court case that applied a heightened level of scrutiny to a substantive due process claim—a scrutiny that resembles and expands upon the analysis performed in *Lawrence*.⁶ In *Sell v. United States*, 539 U.S. 166, 179, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003), [**27] the Court considered whether the Constitution permits the government to forcibly administer antipsychotic drugs to a mentally-ill defendant in order to render that defendant competent to stand trial. The Court held that the defendant has a "significant constitutionally protected liberty interest" at stake, so the drugs could be administered forcibly "only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Id.* at 178-80 (internal quotation marks omitted).

Although the Court's holding in *Sell* is specific to the context of forcibly administering medication, the scrutiny employed by the Court to reach that holding is instructive. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that we are bound by the theory or reasoning underlying a Supreme Court case, not just by its holding). The Court recognized a "significant" liberty interest—the interest "in avoiding the unwanted administration of antipsychotic drugs"—and balanced that liberty interest [**28] against the "legitimate" and "important" state interest "in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others." ⁷ *Sell*, 539 U.S. at 178 (internal quotation marks omitted). To balance those two interests, the Court required the state to justify its intrusion into an individual's recognized liberty interest against forcible medication—just as *Lawrence* determined that the state had failed to "justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578.

⁶ Although we agree with the Eleventh Circuit that the *Lawrence* Court did not apply strict scrutiny, *Lofton*, 358 F.3d at 817, in our view, the Eleventh Circuit failed to appreciate both the liberty interest recognized by *Lawrence* and the heightened-scrutiny balancing employed by *Lawrence*.

⁷ This inquiry is similar to intermediate scrutiny in equal protection cases. See *Craig v. Boren*, 429

U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) ("To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

The [**29] heightened scrutiny applied in *Sell* consisted of four factors: First, a court must find that *important* governmental interests are at stake. . . .

Courts, however, must consider the facts of the individual case in evaluating the Government's interest Special circumstances may lessen the importance of that interest. . . .

Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests. . . .

[*819] Third, the court must conclude that involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. . . .

Fourth, . . . the court must conclude that administration of the drugs is *medically appropriate*

539 U.S. at 180-81. The fourth factor is specific to the medical context of *Sell*, but the first three factors apply equally here. We thus take our direction from the Supreme Court and adopt the first three heightened-scrutiny *Sell* factors as the heightened scrutiny balancing analysis required under *Lawrence*. We hold that when the government attempts to intrude upon the personal and private lives of homosexuals, [**30] in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest. See also *Aptheker v. Sec'y of State*, 378 U.S. 500, 508, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) ("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." (internal quotation marks omitted).

In addition, we hold that this heightened scrutiny analysis is as-applied rather than facial. "This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 447, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). In *Cleburne*, the Court employed a "type of 'active' rational basis review," *Pruitt*, 963 F.2d at 1165-66, in requiring the city to justify its zoning ordinance as applied to the specific plaintiffs in that case. And *Sell* required [**31] courts to "consider the facts of the individual case in evaluating the Government's interest." 539 U.S. at 180. Under this review, we must determine not whether DADT has some hypothetical, post hoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt. This approach is necessary to give meaning to the Supreme Court's conclusion that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Lawrence*, 539 U.S. at 572.

We also conclude that our holding in *Beller*, 632 F.2d 788, that a predecessor policy to DADT survived heightened scrutiny under the *Due Process Clause*, is no longer good law.⁸

⁸ Our observation in *High Tech Gays v. Def. Ind. Security Clearance Office*, 895 F.2d 563, 572 (9th Cir. 1990), that "*Beller* has since been overruled by [*Bowers v. Hardwick*]," does not end our *Beller* inquiry. *Bowers* overruled *Beller's* invocation of heightened scrutiny. See *Bowers*, 478 U.S. at 194-95 (rejecting heightened scrutiny for classifications based on homosexuality); see also *High Tech Gays*, 895 F.2d at 572 ("Neither *Beller* nor [*Hatheway v. Sec'y of Army*, 641 F.2d 1376 (9th Cir. 1981)], [**32] is binding authority on us regarding heightened scrutiny for classifications based on homosexuality."). But *Bowers* did not necessarily alter *Beller's* holding that the regulation at issue survived heightened scrutiny.

In *Beller*, 632 F.2d at 807 n.19, we applied heightened scrutiny because "[t]he kind of all-or-nothing substantive due process approach . . . d[id] not, we think,

reflect [*820] the complexity of the Court's [due process] analysis." We reasoned

that substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals.

Id. at 807. We recognized "that there [wa]s substantial academic comment which argue[d] that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right of privacy." *Id.* at 809. But we held that "the importance of the [**33] government interests furthered . . . outweigh[ed] whatever heightened solicitude is appropriate for consensual private homosexual conduct." *Id.* at 810.

Although the heightened scrutiny employed in *Beller* was prescient of *Lawrence*, *Sell*, and the three factors that we adopt today, in *Beller* we explicitly declined to perform an as-applied analysis. We acknowledged that, "[u]nder the analysis described in our opinion, individual treatment in some circumstances might be required by substantive due process, depending on the outcome of the balancing test." *Id.* at 808 n.20. But we refused to apply individual treatment because of "the relative impracticality at th[at] time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case." *Id.* at 810. *Beller's* refusal to perform an as-applied balancing test is clearly irreconcilable with the individualized balancing analysis required under *Cleburne* and *Sell*.⁹ *Beller's* heightened scrutiny analysis and holding therefore have been effectively overruled by intervening Supreme Court authority.¹⁰ See *Miller*, 335 F.3d at 900 ("We hold that the issues decided by the higher court need not be identical in [**34] order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable. . . . In future [*821] cases of such clear irreconcilability, a three-judge panel of this court and district courts should

consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled.").

9 *Beller's* conclusion that individualized determination were "impractical" at that time has also since been placed into question by the Court of Appeals for the Armed Forces' decision in *Marcum*, where the court held that the application of *Lawrence* must be addressed "in context and not through a facial challenge." 60 M.J. at 206. Although that court's decision does not bind our panel, it is telling that the *Marcum* court did not find it "impractical" to consider particularized facts in each case. See *Middendorf v. Henry*, 425 U.S. 25, 43, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976) (noting that military courts' judgments "are normally entitled to great deference" when "[d]ealing with areas of law peculiar to the military branches.").

10 Other intervening Supreme Court [**35] decisions have also weakened the rationale of *Beller*. In *Pruitt*, 963 F.2d at 1165, we noted that "one of the justifications offered by the Navy in *Beller* was the tension between known homosexuals and other members who despise/detest homosexuality." (Internal quotation marks omitted.) We held that "[t]his justification accepted in *Beller* . . . should not be given unexamined effect today as a matter of law" because it was inconsistent with the Supreme Court's decisions in *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984), and *Cleburne*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313, that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Pruitt*, 963 F.2d at 1165 (quoting *Palmore*, 466 U.S. at 433). However, *Pruitt* noted that, in *Beller*, "we held that there were several grounds on which the regulation could be upheld," *Pruitt*, 963 F.2d at 1164, only one of which was impacted by *Palmore* and *Cleburne*, so *Pruitt* does not end our inquiry.

Here, applying heightened scrutiny to DADT in light of current Supreme Court precedents, it is clear that the government advances an important governmental interest. DADT concerns the management of the military, and "judicial deference [**36] to . . . congressional exercise

of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg*, 453 U.S. 57, 70, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981). Notably, "deference does not mean abdication." *Id.* "Congress, of course, is subject to the requirements of the *Due Process Clause* when legislating in the area of military affairs . . ." *Weiss v. United States*, 510 U.S. 163, 176, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).

However, it is unclear on the record before us whether DADT, as applied to Major Witt, satisfies the second and third factors. The Air Force attempts to justify the policy by relying on congressional findings regarding "unit cohesion" and the like, but that does not go to whether the application of DADT specifically to Major Witt significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest.¹¹ Remand therefore is required for the district court to develop the record on Major Witt's substantive due process claim. Only then can DADT be measured against the appropriate constitutional standard.

11 Indeed, the facts as alleged [**37] by Major Witt indicate the contrary. Major Witt was a model officer whose sexual activities hundreds of miles away from base did not affect her unit until the military initiated discharge proceedings under DADT and, even then, it was her suspension pursuant to DADT, not her homosexuality, that damaged unit cohesion.

IV

We next turn to Major Witt's *Equal Protection Clause* claim. She argues that DADT violates equal protection because the Air Force has a mandatory rule discharging those who engage in homosexual activities but not those "whose presence may also cause discomfort among other service members," such as child molesters. However, *Philips* clearly held that DADT does not violate equal protection under rational basis review, 106 F.3d at 1424-25, and that holding was not disturbed by *Lawrence*, which declined to address equal protection, see 539 U.S. at 574-75 (declining to reach the equal protection argument and, instead, addressing "whether *Bowers* itself ha[d] continuing validity"). We thus affirm the district court's dismissal of Major Witt's equal protection claims.

V

The issues posed by this case might generate great concern both from those who welcome Major Witt's continued participation [**38] in the Air Force and from those who may oppose it. Those issues must be, and have been, addressed in the first instance by leaders of the military community and by those in Congress with law-making responsibilities. All of Congress's laws must abide by the United States Constitution, however. Taking direction from what the Supreme Court decided in *Lawrence* and *Sell*, we hold that DADT, after *Lawrence*, must satisfy an intermediate level of scrutiny under substantive due [**822] process, an inquiry that requires facts not present on the record before us.

In light of the foregoing, we **VACATE** and **REMAND** the district court's judgment with regard to Major Witt's substantive due process claim and procedural due process claim, and **AFFIRM** with regard to the *equal protection clause* claim. The parties shall bear their own costs on appeal.

CONCUR BY: CANBY (In Part)

DISSENT BY: CANBY (In Part)

DISSENT

CANBY, Circuit Judge, concurring in part and dissenting in part:

The majority has written an opinion that is very praiseworthy as far as it goes. I concur in Parts I and II. I also concur in the first portion of Part III, to the end of subdivision (1). Beyond that, I agree substantially with the majority's discussion leading to the conclusion [**39] that the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), applied something more rigorous than traditional rational basis review in striking down Texas's criminalization of sexual relations between members of the same sex. Finally, I agree that the district court erred in dismissing the complaint for failure to state a substantive due process claim, and that we must remand for further proceedings. Unlike the majority, however, I would also reverse the dismissal of the equal protection claim. But where I differ most from the majority is in the level of scrutiny to be applied to both claims. In my view, the so-called "Don't Ask, Don't Tell" statute, ¹ 10 U.S.C. § 654, must be subjected to strict scrutiny. Under that

standard, the Air Force must demonstrate that the statute's restriction of liberty, and its adverse classification of homosexuals, are "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

1 Under the facts alleged in the complaint, the statute's popular name appears to be a misnomer as applied to Major Witt. She did not tell, but the Air Force asked.

Substantive Due Process

As the majority opinion correctly recognizes, [**40] the Supreme Court's opinion in *Lawrence* never unambiguously states what standard of review it is applying. The *Lawrence* opinion leaves no doubt at all, however, about the importance of the right it is protecting. In discussing the flaws of *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), which it was overruling, *Lawrence* explained:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a *personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.*

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of [**41] the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the

confines of their homes and their own [*823] private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. *The liberty protected by the Constitution allows homosexual persons the right to make this choice.*

Lawrence, 539 U.S. at 567 (emphases added). Two points shine forth from this passage and its context in *Lawrence*: first, the right to choose to engage in private, consensual sexual relations with another adult is a human right of the first order and, second, that right is firmly protected by the substantive guarantee of privacy--autonomy of the *Due Process Clause*. Thus, even though the Court did not expressly characterize the right as "fundamental," it certainly treated it as such. It is this treatment, and the important individual values of liberty it recognizes, that require strict scrutiny of governmental encroachment on that [**42] right. In my view, therefore, *Lawrence* itself mandates strict scrutiny of the "Don't Ask, Don't Tell" statute.

In order to apply strict scrutiny, however, we do not need to satisfy ourselves that *Lawrence* commands or expressly adopts that standard of review. We are not reviewing a state criminal conviction, where we are forbidden by the Antiterrorism and Effective Death Penalty Act from applying a constitutional standard unless it has been determined by the Supreme Court. See 28 U.S.C. § 2254(d)(1). In the present context, it is enough that the question is an open one. As the majority opinion recognizes, *Lawrence* avoids (carefully, it seems) stating what standard of review the Court was applying. Certainly nothing in *Lawrence* can reasonably be read as *forbidding* the application of strict scrutiny to statutes attaching severe consequences to homosexual behavior.² The question of the standard of scrutiny in this case is therefore an open one, and we must address it according to our best understanding of the individual constitutional rights and governmental action involved.³ For reasons that should already be apparent from my quotation and discussion of *Lawrence*, I have no difficulty [**43] concluding that the right to engage in homosexual relationships and related private sexual conduct is a personal right of a high constitutional order, and that the "Don't Ask, Don't Tell" statute so penalizes that relationship and conduct that it must be subjected to strict

scrutiny.

2 In that regard, *Lawrence* is to be contrasted with cases of gender discrimination, where the Supreme Court has expressly specified an intermediate standard of review. See *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976).

3 For reasons explained in the following section on equal protection, I do not regard our earlier precedents applying lesser standards of scrutiny to military discrimination against homosexuals as binding after *Lawrence*. See, e.g., *Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir. 1980) (upholding Navy policy of discharging homosexuals even though regulation is "perhaps broader than necessary"); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132-36 (9th Cir. 1997) (upholding "Don't Ask, Don't Tell" policy under equal protection rational basis review); *Philips v. Perry*, 106 F.3d 1420, 1425-29 (9th Cir. 1997) (same).

Equal Protection

Major Witt presented an equal protection claim to the district court, [**44] but acknowledges here that such a claim was rejected by our court in *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997). Although she does not pursue it before our three-judge panel, she does preserve her right to assert the claim in the event she seeks en banc review of our decision; she has not [**824] abandoned the claim.⁴

4 Major Witt does urge upon us a different kind of equal protection claim. She contends that the Air Force violates equal protection because it requires automatic discharge of sexually active homosexuals on the ground that they are offensive to some members of a military unit, while others equally offensive, such as child molesters, are not categorically subject to discharge. See AFI 36-3209, P 2.29.10. Like the majority, I find it unnecessary to address this argument. I also conclude that it would accomplish too little to establish that persons availing themselves of their constitutional right to intimate homosexual relations should be treated at least as well as child molesters.

I do not believe that *Philips* ties our hands. *Philips*

applied rational basis review to an equal protection attack on the "Don't Ask, Don't Tell" policy of the Navy. It did so on the authority of [*45] our earlier decision in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990). See *Philips*, 106 F.3d at 1425. *High Tech Gays*, however, was based on the proposition that it would be inappropriate to apply strict scrutiny to classifications targeting homosexuals when the Supreme Court had held in *Bowers* that homosexual conduct could be made a crime. See *High Tech Gays*, 895 F.2d at 571 ("[I]f there is no fundamental right to engage in homosexual sodomy . . . see [*Bowers v. Hardwick*, . . . it would be incongruous . . . to find a fundamental right of homosexual conduct under the equal protection component of the *Due Process Clause of the Fifth Amendment*."). Because *Lawrence* unequivocally overruled *Bowers*, it "undercut the theory [and] reasoning underlying" *High Tech Gays* and *Philips* "in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). I am therefore convinced that *Philips* is no longer controlling.⁵

5 In *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997), we also applied rational basis review to reject an equal protection challenge to a component of the "Don't Ask, [*46] Don't Tell" policy, relying on *Philips* and *High Tech Gays*. For the reasons just discussed, *Lawrence's* overruling of *Bowers* undermines *Holmes* as well.

An equal protection analysis applying strict scrutiny to the "Don't Ask, Don't Tell" statute is accordingly open to us. There are two different approaches to strict scrutiny under equal protection analysis, and both should be followed in this case.

The most direct path to strict scrutiny of the statute under the equal protection principle is to hold that classifications discriminating against homosexuals are "suspect," like classifications based on race. See *Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (subjecting race-based miscegenation statute to strict scrutiny under the *Equal Protection Clause*). I have long been convinced that classifications against homosexuals are suspect in the equal protection sense, but I was unable to persuade a majority of my colleagues to embark on en banc review to establish that proposition. See *High Tech Gays v. Defense Industrial Security*

Clearance Office, 909 F.2d 375 at 376-80 (1990) (Canby, J., dissenting from denial of rehearing en banc). As I have already explained, however, the overruling of *Bowers* by *Lawrence* [*47] has undermined *High Tech Gays*. We accordingly are free to revisit the question whether the adverse classification of homosexuals is "suspect" under equal protection analysis. My reasons for concluding that such classifications are suspect are fully set out in my dissent from denial of en banc review in *High Tech Gays*, and I will not belabor the matter here. Suffice it to say that homosexuals have "experienced a history of purposeful unequal treatment [and] been subjected [*825] to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (internal quotation marks omitted). They also "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are [] a minority." *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527 (1986). In short, they are a group deserving of protection against the prejudices and power of an often-antagonistic majority.

The Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), is not a barrier to a suspect classification, strict scrutiny approach. In that case, the Court struck down a Colorado constitutional provision prohibiting, [*48] among other things, any anti-discrimination legislation protecting homosexuals. *Id.* at 623-24. The Supreme Court noted that most laws involve a classification and that, if no fundamental right or suspect class is involved, statutes are subject only to rational basis review. *Id.* at 631. The Court then stated that the Colorado provision

fails, indeed defies, *even this* conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation.

Id. at 632 (emphasis added). Thus the Court had no need to address whether homosexuals constituted a suspect class because the Colorado provision failed "even" rational basis review. That ruling does not negate the application of higher levels of scrutiny on similar classifications. Indeed, the strong language of *Romer*

suggests that the invidiousness of the legislation would have supported any standard of review as a path to its invalidation. *Romer*, like *Lawrence*, does not forbid the application of strict scrutiny, even though it may have found that level of scrutiny unnecessary to invalidate the legislation [**49] before the Court in that case.

In addition to the avenue of a suspect classification, there is another path to strict scrutiny under equal protection analysis. Classifications that impinge on a fundamental right are subject to strict scrutiny when challenged as a violation of equal protection. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 337-39, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). As I have already explained, *Lawrence* effectively establishes a fundamental right without so labeling it. At the very least, *Lawrence* leaves the question open, to permit us to recognize the fundamental right to homosexual relations as I have already insisted we must. Even though that right justifies strict scrutiny under a theory of substantive due process, there are good reasons for adding an equal protection analysis in this case. It is true that, in *Lawrence*, the Supreme Court elected not to employ an equal protection theory. 539 U.S. at 574-75. It recognized, however, that equal protection provided a "tenable" basis for declaring the statute invalid, and conceded that a decision recognizing a liberty interest in certain conduct advanced the cause of equality as well as due process. *Id.* at 575. The reason why the Court in *Lawrence* did [**50] not employ an equal protection analysis was itself protective. The Court stated that it would not sufficiently establish the right to intimate homosexual relations if only equal protection were invoked, because a state might frustrate the right by denying heterosexuals as well as homosexuals the right to non-marital sexual relations. See *id.*

[*826] The danger of an end-run remedy of equal treatment is not severe in our case, however. I doubt that the armed services are likely to respond to an invalidation of the "Don't Ask, Don't Tell" statute as a violation of equal protection by decreeing the automatic discharge of any member, heterosexual or homosexual, who is found to have engaged in sexual relations outside of marriage. In any event, we can guard against any such result by retaining our substantive due process analysis along with an equal protection approach.

The reason for including an equal protection analysis is that there is a very clear element of discrimination in

the whole "Don't Ask, Don't Tell" apparatus, and an equal protection analysis focuses the inquiry sharply on a question that should not be ignored: what compelling interest of the Air Force is narrowly served by discharging [**51] homosexuals but not others who engage in sexual relations privately off duty, off base, and with persons unconnected to the military? It is no answer to such a question that the known presence of a sexually active homosexual in a military unit necessarily creates sexual tensions (if indeed that could be shown), unless it were also demonstrated that the presence of heterosexuals in a military unit created no comparable tensions. It is also not a sufficient answer that many military personnel are biased against homosexuals. See *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1992); see also *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Romer*, 517 U.S. at 634-35. There are other requirements of narrow tailoring that would apply during further proceedings applying strict scrutiny, but the point now is that part of the inquiry should address the clear discrimination between homosexuals and heterosexuals, and determine whether that discrimination is necessary to serve a compelling governmental [**52] interest and sweeps no more broadly than necessary.

Order of Inquiry in Further Proceedings

The inquiry on remand should focus first on the Air Force's justification for its impingement on the right to private intimate sexual relations and the compelling nature of any interest that is served by that measure. The Air Force should be required to identify a compelling interest with sufficient specificity so that the relation between the "Don't Ask, Don't Tell" statute and that policy can be evaluated. It is difficult to accomplish that goal if the compelling interest is as broadly stated as "management of the military" or, say, "winning wars." Moreover, under strict scrutiny, it is not enough that the interest be merely "served" by the challenged legislation; the legislation must be *necessary* to that purpose, and must sweep no more broadly than is essential to serve the governmental purpose. See *Dunn*, 405 U.S. at 345-46, 351-52.

Thus, as a matter of due process, the Air Force can be required to show why there is a compelling need to

discharge homosexuals who have been sexually active outside of their duty station with persons unconnected to the military and why the measure it has adopted [**53] is narrowly tailored to the satisfaction of that compelling need. As a matter of equal protection, the Air Force can be asked to show what compelling need is narrowly served by treating homosexuals who are sexually active off duty and outside the military context differently from heterosexuals who are sexually active off duty and outside the military context. These requirements are case-[*827] specific in that they reflect the alleged facts that Major Witt conducted all of her relations with her female partner off-base, and her partner was alleged not to be in or employed by the military. If the Air Force cannot meet these requirements, the statute must be invalidated in such applications.

There are clear advantages to addressing the Air Force's justifications first, before any inquiry into the personal characteristics and situation of Major Witt in her unit. First, requiring the Air Force to make the requisite showing as a threshold matter may end the case.

Second, the inquiry directed toward the Air Force is less potentially disruptive than a focus on Major Witt herself and, particularly, the allegedly favorable attitude toward her on the part of other members of her unit. To require unit [**54] members to testify or submit affidavits concerning the degree to which they do or do not consider themselves adversely affected by the presence of a known, sexually active homosexual, may constitute a distraction from regular duties. It is better to employ such an inquiry only as a last resort.⁶

⁶ For this reason, even if I were to accept the majority's standard of scrutiny, I would modify its remand instructions now directed to determining whether "the application of DADT specifically to Major Witt significantly furthers the government's interest" *Supra* p. 5867. Further proceedings should begin by requiring the Air Force to show what important governmental interest is significantly furthered by the statute. The only facts concerning Major Witt that need to be

developed at that point are that her homosexual relationship was carried on off-duty, away from military premises, with a person unconnected to the military. The Air Force must then demonstrate why it is necessary to apply the statute to a service member in those circumstances. Further details of Major Witt's individual circumstances would best be left to the end, and may be unnecessary.

Finally, requiring the Air Force [**55] to justify the application of the statute to a generic service member who carries on a homosexual relationship and intimate conduct away from the duty station and its personnel provides more protection of the constitutional right set forth in *Lawrence*. Because the right to choose to engage in private, intimate sexual conduct is a constitutional right of a high order, it must be protected not just for the outstanding service member like Major Witt, but also for the run-of-the-mill airman or soldier. It is thus the general application of the statute to the generic service member that the Air Force must be required to justify. In *Lawrence*, after all, the Supreme Court struck down the statute as applied to anyone engaging in homosexual conduct; it did not find it necessary or relevant to inquire into whether the individual conduct of which the petitioners had been convicted was more or less offensive to the interests of the State under the circumstances of its occurrence.

Conclusion

The majority opinion represents a conscientious effort to reach a just result in this case, and I agree with much of its analysis. I conclude, however, that the Air Force must demonstrate that the "Don't Ask, [**56] Don't Tell" statute meets the requirements of strict scrutiny--that it is necessary to serve a compelling governmental interest and that it sweeps no more broadly than necessary. I also conclude that the Air Force must be required to do so for purposes of both substantive due process and equal protection. I therefore respectfully dissent in part from the majority opinion.

APPENDIX 49



**CHARLES ZOSLAW AND JANE ZOSLAW husband and wife, dba MARIN
MUSIC CENTRE, Plaintiff-Appellants, v. MCA DISTRIBUTING
CORPORATION, DOUG ROBERTSON ADVERTISING, INC., MTS, INC.,
TOWER ENTERPRISES, INC., WARNER/ELEKTRA/ATLANTIC
CORPORATION, ABC RECORDS, INC., POLYGRAM DISTRIBUTION, INC.,
CAPITOL RECORDS, INC. and CAPITOL INDUSTRIES-EMI,
Defendants-Appellees**

Nos. 80-4330, 80-4429

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

693 F.2d 870; 1982 U.S. App. LEXIS 23681; 1982-83 Trade Cas. (CCH) P65,078

**November 9, 1981, Argued and Submitted
December 1, 1982**

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of California. Honorable Robert F. Peckham, Chief Judge, Presiding.

* The Honorable David L. Bazelon, Senior Judge for the United States Court of Appeals for the District of Columbia Circuit, sitting by designation.

COUNSEL: For Zoslaw: Maxwell Keith, Esq., Keith & Duryea, San Francisco, California, for Appellant.

OPINION BY: POOLE

OPINION

For WEA: M. Laurence Popofsky, Esq., Heller, Ehrman, White & McAuliffe, San Francisco, California, for MTS & Tower: Melvin R. Goldman, Esq., Morrison & Foerster, M. Laurence Popofsky, Esq., Melvin, R. Goldman, Esq., for Doug Robertson Advertising: Charles F. Gray, Jr., Esq., Gray & Thurn, Sacramento, California, for ABC Records: Alf R. Bandin, Lillickm McHose & Charles, San Francisco, California, for Capitol Records & Capitol Indiana, Emi, Inc. George A. Cumming, Jr., Esq., Brobeck, Phleger & Harrison, San Francisco, California, for Polygram, John Curran Ladd, Esq., Steinhart, Ladd & Jubelirer, San Francisco, California, For MCA: William Billick, Esq., Rosenfeld, Heyer & Susman, Beverly Hills, California, for Appellees.

[**2] [*874] POOLE, Circuit Judge:

This is an appeal by Charles and Jane Zoslaw, the former owners of a retail record store, from a series of orders entered by the district court granting summary judgment in favor of appellee record distributors: Warner/Elektra/Atlantic Corporation (WEA); MCA Distributing Corporation (MCA), Polygram Distribution, Inc. (Polygram),¹ ABC Records, Inc. (ABC) and Capitol Records, Inc. and its parent corporation, Capitol Industries-EMI (jointly, Capitol), appellee retailer, MTS, Inc. (MTS)² and appellee Doug Robertson Advertising, Inc. (Doug Robertson). In this appeal the Zoslaws claim that the district court erred in finding that they had failed to satisfy the "in commerce" jurisdictional requirement of the Robinson-Patman Price Discrimination Act, and in concluding that they had failed to raise an issue of

JUDGES: Bazelon, * Skopil and Poole, Circuit Judges.

material fact concerning their claims under *sections 1* and *2* of the Sherman Antitrust Act. We reverse the district court's ruling as to the Robinson-Patman claims except as to Doug Robertson and affirm as to the Sherman Act claims.

1 Polygram Distribution, Inc. is the company's present name. The company was known as UDC, Inc. between 1971 and 1973, and Phonodisc, Inc. between 1974 and 1977.

[**3]

2 At the time of the filing of this action, MTS was the sole shareholder of Tower Enterprises, Inc., doing business as Tower Records. Since that time, Tower Enterprises, Inc. has merged into MTS.

I. STATEMENT OF CASE

Appellants operated Marin Music Centre, a Mill Valley retail store which sold phonograph records and equipment, prerecorded tapes and related merchandise. They experienced startup losses in 1965 and 1966 and then claimed to have operated at a profit for the following two years. After that period, the store encountered financial difficulties, from which it never recovered, suffering losses from at least 1971 until it went out of business in 1977.

The district court found that during the time the Zoslaws were in business the Marin County record market "changed dramatically." 533 F. Supp. 540, 546 (N.D. Cal. 1980). Several other retail record and tape stores opened in the area and the number of department stores, grocery stores and drug stores with record departments also increased. Charles Zoslaw readily admitted that the store suffered losses because [**4] other stores sold records at lower prices.

In January, 1975, appellants filed this action. They subsequently filed three amended complaints adding various defendants and factual contentions. As thus amended the complaint named all of the appellee record distributors: WEA, MCA, Polygram, Capitol and ABC. Several other named distributors, who subsequently settled with appellants, were CBS, Inc., RCA, Inc., Eric-Mainland Distributing Company, United Artists Music and Record Group, Inc. (UAMARGI) and Transamerica Company, the parent corporation of Eric-Mainland and UAMARGI. Appellants alleged that the distributor defendants violated *section 2(a)* of the

Robinson-Patman Act, 15 U.S.C. § 13(a), by selling records and tapes to retail chain stores at lower prices than those offered to single stores, such as Marin Music Centre, and that the distributors violated *sections 2(d)* and *2(e)* of the Act, 15 U.S.C. §§ 13(d) and 13(e), by discriminating in favor of retail chain stores in granting promotional allowances and furnishing special services. They also alleged that the distributor defendants conspired among themselves and with the retailer defendants [**5] to favor the retail chain stores at the expense of individual stores in violation of *section 1* of the Sherman Act, 15 U.S.C. § 1.

[*875] Three retailers were named defendants: MTS, Integrity Entertainment Corporation (IEC), and CBS, Inc., doing business as Discount Records. The latter two subsequently settled. Also named defendant was Doug Robertson Advertising Agency, with which Tower did business. Appellants alleged that the retailers violated *sections 2(d)*, *2(e)*, and *2(f)* of the Robinson-Patman Act, 15 U.S.C. §§ 13(d), 13(e), and 13(f), by knowingly inducing and receiving the alleged discriminations in price and other terms, allowances and services. The retailer defendants were also charged with violating *section 1* of the Sherman Act by conspiring with the distributors to receive favorable treatment. Finally, appellants accused MTS with monopolizing or attempting to monopolize the retail record market in violation of *section 2* of the Sherman Act.

In the two years after appellants instituted the action, four distributor defendants moved for partial summary judgment on the ground that the court lacked jurisdiction under Robinson-Patman [**6] because the allegedly discriminatory sales were not "in commerce" as required by that Act. The district court granted each of these motions: in favor of WEA on June 21, 1976, see *Zoslaw v. Columbia Broadcasting System*, 1977-1 Trade Reg. Rep. (CCH) para. 61,756; in favor of Eric-Mainland on July 20, 1976; in favor of CBS on April 18, 1977; and in favor of Polygram (limited to the period 1974 and 1976) on August 17, 1977.³

3 The district court limited the summary judgment to this period because the declaration of Dale Johnson, a Polygram employee, filed in support of the motion, did not demonstrate personal knowledge for the 1971-73 period. The court denied Polygram's motion for the period 1971-73 without prejudice to its renewal.

In October, 1977, appellants filed a motion for preliminary injunction to prevent the defendant distributors from favoring chain store retailers and to prevent the defendant retailers from accepting such preferences. The motion also sought to prohibit Capitol Records from refusing [**7] to sell phonograph records, tapes and cassettes to Marin Music Centre. This claim arose when Capitol, shortly after settling with the appellants, ceased selling merchandise to them. Appellants then amended their complaint to reinstate Capitol as a defendant based on its refusal to deal. The district court denied the motion, finding that appellants had failed to demonstrate a likelihood of success on the merits or a showing of irreparable injury.

In September, 1978, the district court granted Capitol's motion for summary judgment on the refusal to deal claim, finding that Capitol had legitimate business reasons for its action.⁴ Three of the four remaining distributor defendants, WEA, MCA, and Polygram, as well as MTS and Doug Robertson, then moved for summary judgment on all of the remaining claims against them. In January, 1980, the court granted all of the defendants' pending motions. In its opinion, the district court, held, first, that appellants failed to produce competent evidence to support their factual allegations. The court noted that the appellants' opposition papers "regularly and systematically" violated *Rule 56 of the Federal Rules of Civil Procedure* as well as [**8] Rule 220-8 of the Local Rules of the Northern District of California. The court observed that most of the documents submitted by appellants with their opposition lacked authentication and that they often failed to support the factual inference for which they had been provided.

⁴ The court's order effectively removed Capitol as a defendant. However, since Capitol neither requested nor received a separate judgment under *Rule 54(b) of the Federal Rules of Civil Procedure*, it did not take an appeal until after the court entered final judgment in June, 1980.

The court then ruled that even if appellants had properly supported their factual allegations, summary judgment was still appropriate since they had failed to advance an adequate legal theory of the case. The remaining Robinson-Patman claims were dismissed against two of the distributor defendants, MCA and Polygram, on the finding that appellants had failed to satisfy the "in commerce" requirement of the Act. [*876]

The court also held that it lacked [**9] jurisdiction over appellants' Robinson-Patman claims against MTS and Doug Robertson because the Supreme Court's decision in *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979), precluded jurisdiction under *section 2(f)* and that there was no private right of action against buyers under *sections 2(d)* and *2(e)*.

As for the Sherman Act *section 1* claims, the court found no basis in the material submitted by appellants to support any of the claims of conspiracies to restrain trade alleged by appellants, and found no reasonable factual inference in support of appellants' monopolization and attempted monopolization claims against MTS.

In May, 1980, the last remaining defendant, ABC, filed its motion for summary judgment on both the Robinson-Patman and Sherman Act claims. The district court granted this motion and entered judgment in favor of all of the defendants in June, 1980.⁵

⁵ In summary, the appellees in this action include five distributors: WEA, Polygram, Capitol, ABC, and MCA; one retailer, MTS; and Doug Robertson Advertising Agency. Appellants appeal the following rulings with respect to each defendant:

WEA: June 21, 1976, CR 311, partial summary judgment on the Robinson-Patman claims. January 17, 1980, CR 808 summary judgment on the Sherman Act claims.

POLYGRAM: August 17, 1977, CR 499, partial summary judgment on the Robinson-Patman claims for 1974-76.

January 17, 1980, CR 808, summary judgment on the Robinson-Patman claims for 1971-73 and on Sherman Act claims.

MCA: January 17, 1980, CR 808, summary judgment on both the Robinson-Patman and Sherman Act claims.

CAPITOL: September 28, 1978, CR 636, summary judgment on the refusal to deal Sherman Act claim.

ABC: May 12, 1980, CR 851, summary judgment on both the Robinson-Patman and

Sherman Act claims.

MTS-TOWER & DOUG ROBERTSON:
January 17, 1980, CR 808, summary judgment on both the Robinson-Patman and Sherman Act claims.

[**10] Appellants challenge the district court's findings that the allegedly discriminatory sales were not "in commerce" as required by *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974), and therefore not within *section 2(a)* of the Robinson-Patman Act. Alternatively, they contend that even if *section 2(a)* is inapplicable, the court still had jurisdiction over the distributor defendants under *sections 2(d)* and *2(e)*, and over MTS and Doug Robertson under *section 2(f)*. As for the Sherman Act, appellants claim that the district court erred in finding no genuine issue of material fact concerning the existence of a conspiracy among distributors and retailers to favor certain chain retailers. They also contend that the district court erred in finding no evidentiary support for their claim that MTS attempted to monopolize trade. Finally, appellants contend that the district court ignored disputed factual issues when it concluded on motion for summary judgment that Capitol's refusal to deal was a unilateral act made for legitimate business reasons.

II. ROBINSON-PATMAN JURISDICTION

A. *The Distributor Appellees*

Although the [**11] district court issued several opinions in granting summary judgment on the Robinson-Patman claims involving the distributor appellees, the relevant facts regarding the sales by each appellee can be briefly summarized.

Two of the distributor appellees, WEA and Polygram are wholly owned subsidiaries of corporations engaged in record and tape production.⁶ During the relevant period the other two appellees, ABC and MCA, manufactured and distributed records and [*877] tapes nationwide.⁷ Each distributor maintained a regional warehouse in California which supplied records and tapes for stores in the San Francisco Bay Area, including MTS and Marin Music Centre. Depending on the distributor involved, each of the warehouses received a varying percentage of records and tapes which were manufactured out of state. For example, WEA's California warehouse received approximately 10% of its records and tapes from out of

state, while Polygram's warehouse received approximately 15% of its goods from out of state.⁸

6 WEA is a wholly owned subsidiary of Warner Brothers Records, Inc., which in turn is owned by Warner Communications, Inc. WEA distributes records and tapes manufactured by Warner Brothers Records and two other Warner Communications, Inc. subsidiaries, Elektra Records and Atlantic Records. Polygram is a California corporation distributing records and tapes produced by affiliated corporations, Polygram, Inc. and Polydor International.

[**12]

7 MCA is a wholly owned subsidiary of MCA Records, Inc. From 1971 to 1979 ABC was a wholly owned subsidiary of American Broadcasting Companies, Inc. In 1979, it went out of business and its assets were sold to MCA.

8 Although MCA's declaration in support of its motion for summary judgment does not contain any percentage figures on the amount of records and tapes manufactured outside of California, it seems to indicate that a substantial amount of the records in its California warehouse were manufactured in Illinois. ABC's answers to interrogatories indicate that an unidentified percentage of the records and tapes in its California warehouse were manufactured outside of California.

In certain instances, each distributor made "drop shipments" to Bay Area retail record stores. A drop shipment occurred when the distributor's California warehouse was unable to fill an order from a retail store. In that case the distributor would order the out of state manufacturing plant to send a shipment of records or tapes *directly* to the local retailer. Drop shipments occurred infrequently. [**13] For example, MCA calculated its cumulative percentage of dollar sales to the San Francisco Bay Area attributable to drop shipments at 0.44%.

To prove jurisdiction under *section 2(a)* of the Robinson-Patman Act, a plaintiff must demonstrate: (1) that the defendant is "engaged in interstate commerce;" (2) that the price discrimination occurred "in the course of such commerce;" and (3) that "either or any of the purchases involved in such discrimination are in commerce." *William Inglis & Sons Baking Co. v. ITT*

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Continental Baking Co., 668 F.2d 1014, 1043 (9th Cir. 1981).⁹

9 The relevant jurisdictional language in *section 2(a)* reads:

It shall be unlawful for any person engaged in commerce, in the course of such commerce to discriminate in price between different purchasers . . . where either or any of the purchases involved in such discrimination are in commerce.

[**14] In *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974), the Supreme Court concluded that the jurisdictional "in commerce" language in *section 2(a)* is not as broad as the "affecting commerce" language in the Sherman Antitrust Act. In particular, the court interpreted the "purchases . . . in commerce" requirement as limiting the section's application to cases "where 'at least one of the two transactions which, when compared generate a discrimination . . . cross[es] a state line.'" 419 U.S. at 200 (quoting *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4, 9 (5th Cir.), cert. denied, 396 U.S. 901, 24 L. Ed. 2d 177, 90 S. Ct. 212 (1969)). See *Inglis*, 668 F.2d at 1043.

The district court, in applying *Gulf Oil*, concluded that the sales by the distributor appellees were not "in commerce" and that the drop sales were *de minimis* and therefore would not support jurisdiction under *section 2(a)*. Appellants challenge both of these rulings.

1. *Were the Record and Tape Sales to Bay Area Stores "In Commerce?"*

In examining the interstate sales, the [**15] district court recognized that if goods from out of state are still within the "practical, economic continuity" of the interstate transaction at the time of the intrastate sale, the latter sale is considered "in commerce" for purposes of the Robinson-Patman Act. See *Hampton v. Graff Vending Co.*, 516 F.2d 100, 102 (5th Cir. 1975) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 195). In determining whether the sales of records here were therefore in the flow of commerce the court relied on the traditional intent test derived [*878] from the Fair Labor

Standards Act, and subsequently applied in Robinson-Patman cases.¹⁰ See *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570, 87 L. Ed. 460, 63 S. Ct. 332 (1942); *Walker Oil Co. v. Hudson Oil Co.*, 414 F.2d 588, 590 (5th Cir.), cert. denied, 396 U.S. 1042, 24 L. Ed. 2d 686, 90 S. Ct. 684 (1969); *Food Basket, Inc. v. Albertson's Inc.*, 383 F.2d 785 (10th Cir. 1967); 4 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* [**16] § 26.02[3] (1969 & Supp. 1981).

10 Appellees argue that *Gulf Oil* superseded the "flow of commerce" test and therefore requires an actual sale across state lines to invoke the Act. However, in *Gulf Oil*, the product sold, asphaltic concrete, was manufactured entirely in state from products obtained intrastate and its market was entirely local. 419 U.S. at 192. Therefore, the Court did not have to address the issue when sales of goods produced in another state are "in commerce."

In fact, however, the court in *Gulf Oil* repeatedly refers to the flow of commerce test. Thus in comparing the Sherman Act and Robinson-Patman Act jurisdictional provisions the Court states:

In contrast to § 1, the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce -- the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the customer.

419 U.S. at 195.

Accordingly, courts interpreting *section 2(a)* after *Gulf Oil* continued to apply the "flow of commerce" analysis. See *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1116, (5th Cir. 1982); *Great Atlantic & Pacific Tea Co. v. FTC*, 557 F.2d 971, 979 (2d Cir. 1977), revd. on other grounds, 440 U.S. 69, 59 L. Ed. 2d 153, 99 S. Ct.

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925 (1979); *Hampton v. Graff*, 516 F.2d 100 (5th Cir. 1975).

[**17] Under this approach, the flow of commerce ends when goods reach their "intended" destination. *Von Kalinowski*, *supra*. In gauging the point of destination courts consider whether goods coming from out of state respond to a particular customer's order or anticipated needs. *Walling*, 317 U.S. at 567-70. If so, the sales meet the "in commerce" requirement even though the goods may be stored in a warehouse before actual sale to the buyer.¹¹ *Walling*, 317 U.S. at 570; *Hampton*, 516 F.2d at 102-03. However, goods leave the stream of commerce when they are stored in a warehouse or storage facility for general inventory purposes, that is, with no particular customer's needs in mind. *Hampton*, 516 F.2d at 103; *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, (5th Cir. 1969).

11 The other indicium of intent involves whether goods have been altered or processed in some fashion after their arrival in the state of their eventual sale. Courts have generally held that where goods are processed in some substantial way, the flow of commerce ends when they arrive at the place of alteration. *See Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928, 33 L. Ed. 2d 341, 92 S. Ct. 2494 (1972); *Baldwin Hills Building Material Co. v. Fibreboard Paper Products Corp.*, 283 F. Supp. 202 (C.D. Cal. 1968); *Von Kalinowski*, *supra*, at § 26.02[3].

In this case, since the records and tapes were sealed after manufacture, this factor is not relevant.

[**18] In *Walker Oil*, 414 F.2d at 588, for example, the plaintiff service station owner charged the defendant, Hudson Oil, with selling gasoline at a different price at its Florida station than at its Alabama station. Hudson purchased gasoline for the two stations from a supplier in Mobile, Alabama. The Fifth Circuit concluded that since Hudson's purchases from the Alabama supplier for its Florida station were not based on specific needs of retail customers of the service station, the flow of commerce ended when the gasoline was delivered to the station.

The district court here determined from affidavits submitted by appellees that the latter stocked their California warehouses for general inventory purposes

depending on a record's anticipated performance, and did not order records for particular customers. That conclusion is supported by the record, and appellants do not offer serious dispute. Based on this finding, the court held that the subsequent sales to Bay Area retailers were not in the flow of commerce.

This emphasis on intended destination as a key to the statute's coverage has been criticized by some commentators as providing [*879] a means by which [**19] interstate producers may avoid Robinson-Patman liability by setting up local storage facilities in the secondary states. *See* 1 P. Areeda & D. Turner, *Antitrust Law* para. 233(b) (1978); ABA Antitrust Section, *The Robinson-Patman Act: Policy and Law* 44-45 (1980). On the contrary, the cases relied on by the district court and cited by appellees primarily involve sales by out of state producers to distributors or retailers who then resell the goods intrastate at the allegedly discriminatory price. *See, e.g., Walling*, 317 U.S. at 564; *Food Basket*, 383 F.2d at 785; *Hampton*, 516 F.2d at 100. In such cases the analysis of intent is useful in determining whether the initial sale from the out of state producer bears sufficient relationship to the subsequent allegedly discriminatory sale to conclude that the latter sale, is part of a continuous interstate transaction and hence in commerce. *See* P. Areeda & D. Turner, *supra*. Conversely, where a producer simply moves goods manufactured out of state into the state and resells at [**20] the allegedly discriminatory price, there is no intermediate sale to break the flow of commerce. And indeed, it would seem that *Standard Oil Co. v. FTC*, 340 U.S. 231, 95 L. Ed. 239, 71 S. Ct. 240 (1951), in which the Supreme Court held that in state storage of gasoline by an interstate oil producer did not end the flow of commerce, imposes some limit upon the application of the intent rule.

In *Standard Oil*, the defendant, accused of discriminating in selling oil to Michigan jobbers, refined the oil out of state and then shipped it to its own storage facilities in Michigan from which delivery was made to customers upon individual orders. Although the gasoline rested up to several months in the storage facility, the court held that it remained part of the flow of commerce:

Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small concerns. Such

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temporary storage of the gasoline as occurs . . . does not deprive the gasoline of its interstate character.

340 U.S. at 237-38 (citations omitted). Moreover, the Court [**21] specifically distinguished the early Fair Labor Standard Act cases, including *Walling*, noting that in those cases "interstate commerce ceased on delivery to a local distributor," while "the sales involved here are those of an interstate producer and refiner to a local distributor." 340 U.S. at 238 n.6.

We interpret *Standard Oil* to indicate that interstate producers of goods produced out of state do not meaningfully interrupt the flow of commerce by simply storing them in the state of eventual sale. Viewed in this light we think the district court prematurely granted summary judgment to the appellee distributors. In particular, the declarations and answers to interrogatories submitted by ABC and MCA indicate that both manufactured records and tapes outside of California, which were then placed in California warehouses for eventual sale to retailers. Those actions were not alone sufficient to remove the goods from the stream of commerce.

WEA and Polygram did not themselves manufacture records, but they were wholly owned subsidiaries of companies engaged in record and [**22] tape production. Sales to subsidiaries in such instances do not necessarily remove such transactions from Robinson-Patman jurisdiction. See *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 23 L. Ed. 2d 599, 89 S. Ct. 1871 (1969) ("We find no basis for immunizing Standard's price discrimination simply because the product in question passed through an additional formal exchange before reaching the level of Perkin's actual competitor"). Similarly, "passage of title or the terms of shipment, although relevant, do not control." *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 934 (9th Cir.1981); *S&M Materials Co. v. Southern Stone Co.*, 612 F.2d 198, 200 (5th Cir.), cert. denied, 449 U.S. 832, 66 L. Ed. 2d 37, 101 S. Ct. 101 (1980).

Therefore, as to the record and tape sales by the parent corporations to the WEA and [*880] Polygram warehouses in California, we examine the extent to which the subsidiaries acted as independent distributors in their

pricing and marketing decisions, in effect, breaking the flow of commerce between [**23] the manufacturer and the local retailer. See *United States v. American Building Maintenance Industries*, 422 U.S. 271, 285, 45 L. Ed. 2d 177, 95 S. Ct. 2150 (1975); ¹² P. Areeda & D. Turner, *supra*, at para. 233(b). Such threshold issues of jurisdiction are normally questions of fact for the jury to resolve. *Hasbrouck*, 663 F.2d at 933. Since the district court did not consider these controlling principles and it appears that there are genuine issues of material fact in dispute regarding their resolution the grants of summary judgment in favor of WEA and Polygram were improper.

12 In *American Building Maintenance*, the Supreme Court held that two janitorial service corporations were not "in commerce" as required under section 7 of the Clayton Act. In particular the court rejected the United States' claim the firms' purchases of cleaning equipment manufactured out of state provided jurisdiction:

Those products were purchased in intrastate transactions from local distributors. Once again, therefore, the Benton companies were separated from direct participation in interstate commerce by the pricing and other marketing decisions of independent intermediaries. By the time the Benton companies purchased their janitorial supplies, the flow of commerce had ceased.

422 U.S. at 285. In contrast, here there is a legitimate question of material fact whether the record retailers were in fact insulated from interstate commerce by WEA or Polygram.

[**24] 2. *De minimis interstate drop sales.*

After finding the sales to Bay Area retailers from the distributors' California warehouses not "in commerce", the district court considered the impact of the interstate drop sales. It held the sales so "scattered and insignificant" that they insufficiently support a Robinson-Patman Act claim. We have ruled that summary judgment was improperly granted as to the sales from the warehouses but to avoid uncertainty on

remand, it should be stated that in our view the district court correctly excluded the drop sales as a basis for jurisdiction.

The principle of *de minimis* is usually appropriate in the light of a finding going to the substance of the action itself that a claimed price discrimination did not "substantially lessen" competition as required by the statute. See, e.g., *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220 (5th Cir. 1973), cert. denied, 414 U.S. 1136, 38 L. Ed. 2d 761, 94 S. Ct. 880 (1974). However, in several instances courts have made *de minimis* findings regarding jurisdiction [**25] under the Act. Thus in *Food Basket*, 383 F.2d 785, the court found that certain "drop-sales" of goods from out of state suppliers to a grocery chain were not sufficient to bring the chain under the Act where it received all of its other goods from warehouses located in the state. *Accord Skinner v. United States Steel Corp.*, 233 F.2d 762 (5th Cir. 1956); *Baldwin Hills Building Material Co. v. Fibreboard Paper Products Corp.*, 283 F. Supp. 202 (C.D. Cal. 1968). But see *Von Kalinowski*, supra, at § 26.01[2] (criticizing use of the *de minimis* test for jurisdictional purposes).

Since the district court's decision in this case, we have had occasion to rule on the applicability of the *de minimis* rule to jurisdictional challenges under the Robinson-Patman Act. In *William Inglis*, 668 F.2d 1014, the defendant bakery located in California marketed its bread primarily in state. However, it also made sales to accounts in Nevada. We rejected the contention that the Nevada sales were *de minimis* and therefore insufficient to invoke jurisdiction. While recognizing that interstate sales which were merely [**26] "inadvertent or incidental" to a pattern of intrastate sales might justify application of a *de minimis* rule, 668 F.2d at 1044 n. 54, we concluded that the sales involved were part of a multi-state marketing operation and therefore not *de minimis*. Id.¹³

13 Appellants interpret *Inglis* to suggest that any interstate sales by the record distributors here satisfy the Robinson-Patman jurisdictional requirements. However, their reliance on *Inglis* fails to recognize the structural difference between the two cases. *Inglis* was a "primary line" Robinson-Patman case in which the plaintiff alleged that another seller's discriminatory pricing scheme damaged his bakery. As the court in

Inglis noted, in such a primary line case the relevant sales for jurisdictional purposes include all sales, both intrastate and interstate, reflecting the price disparity since the court is concerned with all sales which allegedly damaged a competitor's business.

In contrast, this is a "secondary line" case, in which one buyer complains of discriminatory treatment between itself and another buyer. In such a case, the only relevant sales are those between the competing buyers. *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763, 767 (7th Cir. 1973), cert. denied, 414 U.S. 1146, 39 L. Ed. 2d 102, 94 S. Ct. 899 (1974); *P. Areeda & D. Turner*, supra, at para. 233(c). Out of state sales made by the distributors are irrelevant in this case since they were not made to stores competing with appellants.

[**27] [**881] In contrast the drop sales here were not part of the normal marketing or distribution pattern of the distributors, which, instead focused on supplying Bay Area stores from California warehouses. Drop sales occurred when there were gaps in that distribution system. Given their relative size and sporadic nature the sales appear as an anomaly in the normal distribution pattern. See *Food Basket*, 383 F.2d at 788. We therefore determine that the circumstances here involve the narrow category in which application of *de minimis* principles to jurisdictional questions is appropriate.

3. Jurisdiction under Sections 2(d) and 2(e) of the Robinson-Patman Act

Appellants contend that even if section 2(a) does not apply to the distributor appellees, sections 2(d) and 2(e) apply because the jurisdictional test for those sections is more liberal than the standard under section 2(a).¹⁴ Again, while we reverse the summary judgment that there was no jurisdiction under section 2(a), we conclude that the court correctly held that the jurisdictional reach of sections 2(d) and 2(e) goes no further than section 2(a).

14 Sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(d) and 13(e) provide:

(d) *Discriminatory payments for services or facilities*

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That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) *Discrimination in furnishing services or facilities*

That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

[**28] *Section 2(d)* relates to payments for services or facilities and requires that the seller be "engaged in commerce" and that the payment or benefit be "in the course of such commerce." *Section 2(e)* covers the furnishing of services or facilities for processing and handling and contains no "in commerce" language. However, it has been held that the omission of such language was inadvertent. See *Elizabeth Arden, Inc. v.*

FTC, 156 F.2d 132, 134 (2d Cir. 1946), cert. denied, 331 U.S. 806, 91 L. Ed. 1828, 67 S. Ct. 1189 (1947). Neither section contains language as does *section 2(a)*, referring to "purchases . . . in commerce." Appellants therefore argue that those sections are not limited by the requirement that there be an interstate sale.

Sections 2(d) and *2(e)* of the Robinson-Patman Act were enacted to prevent sellers from circumventing *section 2(a)* by discriminating between buyers in respects other than price. See *FTC v. Simplicity Pattern Co., 360 U.S. 55, 68-69, 3 L. Ed. 2d 1079, 79 S. Ct. 1005 (1959).* It would therefore be incongruous [**29] to hold as appellants suggest, that those sections go beyond the coverage of *section 2(a)*. See W. Patman, *Complete Guide to the Robinson-Patman Act* 132 (1963); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 393 (1962). There are decisions to the contrary, see *Shreveport Macaroni Manufacturing Co. v. FTC, 321 F.2d 404, 408 (5th Cir. 1963), cert. denied, 375 U.S. 971, 84 S. Ct. 491, 11 L. Ed. 2d 418 (1964)*, but in general cases have concluded that *sections 2(d)* and *2(e)* have the same jurisdictional limitation as *section 2(a)*. See *L & L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113, 1116 (5th Cir. 1982); Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949); R.S.E., Inc. v. Pennsy Supply, Inc., 489 F. Supp. 1227, 1236 (M.D. Penn. 1980), Rohrer v. Sears, Roebuck & Co., 1975-1 Trade Reg. Rep. (CCH) para. 60,302 (C.D. Mich. 1975).*

B. *The Retailer Appellee -- MTS*

Section 2(f) of the Robinson-Patman Act makes it [**30] unlawful for a buyer "engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." (Emphasis added). In *Great Atlantic & Pacific Tea Co., 440 U.S. at 69 (1979)*, the Supreme Court held that a buyer does not violate *section 2(f)* in receiving a discrimination in price unless the discrimination is unlawful under *section 2(a)*.

The district court, relying on *Great Atlantic & Pacific Tea Co.*, correctly ruled that since the sales by distributors failed to meet the "in commerce" requirement of *section 2(a)*, MTS could not be liable under *section 2(f)* for receiving the allegedly discriminatory prices. However, since we reverse the court's grant of summary judgment as to the *section 2(a)* claims, we also reverse the ruling against the *section 2(f)* claim for further

consideration in the light of this opinion.¹⁵

15 The district court also dismissed appellants' claim against MTS under *sections 2(d) and 2(e)* for receiving discriminatory payments or services. Unlike *section 2(f)*, *sections 2(d) and 2(e)* do not provide for a buyer's liability for receiving enumerated benefits. See Rowe, *supra*, at § 14.5. Consequently there is no private right of action against buyers for violating those sections. See *Grand Union Company v. FTC*, 300 F.2d 92 (2d Cir. 1962); *Rickles, Inc. v. Frances Denney Corp.*, 508 F. Supp. 4, 1980-81 Trade Reg. Rep. (CCH) P63,829 (D. Mass. 1981); *General Beverage Sales Co. v. East Side Winery*, 396 F. Supp. 590 (E.D. Wis. 1975). Cf. *American News Co. v. FTC*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824, 9 L. Ed. 2d 64, 83 S. Ct. 44 (1962) (FTC may reach such conduct as an "unfair trade practice" under section 5 of the Clayton Act, 15 U.S.C. § 15).

[**31] C. *The Appellee Advertiser-Doug Robertson*

The district court found no "factual or legal basis upon which plaintiffs hope to hold Doug Robertson Advertising Agency liable." 533 F. Supp. at 551. We agree. Doug Robertson handled MTS advertising. The uncontested declaration submitted by it indicates that the only other connection between the two appellees was that Doug Robertson owned 5% of several MTS subsidiary corporations. It is therefore clear that Doug Robertson did nothing to violate *sections 2(a), 2(d) or 2(e)* of the Robinson-Patman Act by providing discriminatory prices, promotional or other services to record retailers. Similarly, it received no price discrimination from the record distributors. Accordingly, given the absence of any justiciable claim against it, the district court correctly granted summary judgment to Doug Robertson on the Robinson-Patman claims.

III. THE SHERMAN ACT CLAIMS

The district court granted summary judgment in favor of appellees on all of appellants' claims under the Sherman Antitrust Act. We are admonished by the Supreme [**32] Court to proceed with caution in considering summary judgment in antitrust cases. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962). See *Program Engineering v. Triangle Publications*, 634 F.2d 1188,

1192 (9th Cir. 1980); *Ron Tonkin Gran Turismo v. Fiat Distributors*, 637 F.2d 1376, 1381 (9th Cir. 1981), *cert. denied*, 454 U.S. 831, 102 S. Ct. 128, 70 L. Ed. 2d 109 (1981). However, the Court has also indicated that clever pleading does not entitle an antitrust claimant to a trial with no regard for *Rule 56 of the Federal Rules of Civil Procedure*. [**883] *First National Bank of Arizona v. Cities Service, Co.*, 391 U.S. 253, 289-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968). See *Ron Tonkin*, 637 F.2d at 1381; *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1207-08 (9th Cir. 1982).

Under *Rule 56*, summary judgment is appropriate "where the record before the court on the motion reveals the absence of any material issue of [**33] fact and [where] the moving party is entitled to judgment as a matter of law." *Portland Retail Druggists Association v. Kaiser Foundation Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981). The burden of demonstrating the absence of an issue of material fact lies with the moving party. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 441 U.S. 968, 60 L. Ed. 2d 1074, 99 S. Ct. 2420 (1979). The opposing party must then "present specific facts demonstrating that there is a factual dispute about a material issue." *Program Engineering*, 634 F.2d at 1193; *British Airways*, 585 F.2d at 951.

In this case, the district court found that the appellees carried their burden in demonstrating the absence of a genuine issue of material fact. It ruled, however, that the opposition materials submitted by appellants did not comply with the requirements of *Rule 56(e) Fed.R.Civ.P.* or *Rule 220-8* of the Local Rules of the Northern District of California. The court therefore found [**34] that appellants failed to present competent evidence to dispute appellees' showing.¹⁶

16 The district court observed the same evidentiary shortcomings on appellants' part in its opinion granting summary judgment in favor of Capitol on the refusal to deal claim in September, 1978, see 1978-2 Trade Cases para. 62,269 (N.D. Cal. 1978), and its subsequent opinion granting summary judgment on the Sherman Act claims in favor of appellees WEA, MCA, Polygram, MTS and Doug Robertson of June, 1980. 533 F. Supp. 540 (N.D. Cal. 1980).

Our review of the record amply confirms the district court's finding. In the main, appellants sought to oppose

the summary judgment motions by introducing literally hundreds of pages of documents purporting in their cumulative effect to show the existence of a genuine issue of material fact. To meet the requirements of *Rule 56* as supplemented by the Local Rules [**35] of the district court, such materials are required to be authenticated by affidavits or declarations of persons with personal knowledge through whom they could be introduced at trial. See *United States v. Dibble*, 429 F.2d 598, 602 (9th Cir. 1970) (writings are not admissible under motion for summary judgment without proper foundation); *California Pacific Bank v. Small Business Administration*, 557 F.2d 218, 222 (9th Cir. 1977). As the district court observed, most of the documents lacked any authentication whatsoever. Moreover, appellants made virtually no effort to organize the documents in a reasonably intelligible manner. In many particulars, entire correspondence files or sets of records were included with no attempt to sort out or identify that material which was relevant.

A party may not prevail in opposing a motion for summary judgment by simply overwhelming the district court with a miscellany of unorganized documentation. (The district court characterized it as "ersatz evidence.") But even were that organizational prerequisite satisfied, [**36] we would be compelled to hold that the materials offered did not, even viewed in the light most favorable to appellants, give rise to a genuine issue of material fact sufficient to prevent a motion for summary judgment. See *Cities Services*, 391 U.S. at 253; *British Airways*, 585 F.2d at 951-52.

A. *The Section 1 Conspiracy Claims*

As the district court stated, appellants' Sherman Act allegations come through as an attempt to breathe new life into their Robinson-Patman claims by recasting them in the form of a conspiracy of which appellants suggest two possibilities. The first is an overall conspiracy among the record distributors and chain retailers to favor the latter group at the expense of small record [*884] retailers.¹⁷ The second suggestion is of a vertical conspiracy to restrain competition between each distributor and each chain store retailer.

¹⁷ Appellants also allege a variant of the overall conspiracy consisting of a series of conspiracies between all the distributors and each chain store retailer. Summary judgment was appropriate as to this claim for the same reasons as in our

discussion of the overall conspiracy set out below.

[**37] 1. *The Horizontal Conspiracy*

Appellants claim error by the district court in granting summary judgment on the basis that there was no genuine issue of material fact regarding the existence of an overall conspiracy. We have repeatedly articulated the test for granting summary judgment in antitrust conspiracy cases:

Once the allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, if the plaintiff then fails to come forward with specific factual support of its allegations of conspiracy, summary judgment for the defendants becomes proper.

ALW, Inc. v. United Air Lines, Inc., 510 F.2d 52, 55 (9th Cir. 1975); *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). In this case, since the appellees' affidavits all denied any conspiracy with the others, and since appellants presented no direct evidence of conspiracy, appellants' only chance depended on their presentation of circumstantial evidence sufficient [**38] to support the inference of a "conscious parallelism" conspiracy theory and on such further inferences as appellants might be able to draw from trade association and credit managers' meetings among the various distributors.

a. *Conscious Parallelism*

In proof of the hypothesis of consciously parallel business behavior, appellants point to the distributors' use of similar account classifications, pricing structures and promotional policies. However, as the district court determined, appellants failed to make a proper showing of sufficiently similar conduct in such matters. See *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), cert. denied, 375 U.S. 922, 11 L. Ed. 2d 165, 84 S. Ct. 267 (1963). Instead, appellees successfully demonstrated considerable variation in the distributors' account classification systems as well as variance in prices offered to retailers by distributors. Moreover, each distributor offered its

own package of promotional offers and discounts which, in fact, substantially encouraged competition in the record business.

Yet, even if appellants had successfully demonstrated the requisite [**39] parallel conduct, the courts also require that the plaintiff demonstrate that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment. See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41, 98 L. Ed. 273, 74 S. Ct. 257 (1954); *Syufy Enterprises v. National General Theatres, Inc.*, 575 F.2d 233, 236 (9th Cir. 1978); *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971). The appellees presented sufficient evidence of legitimate business decisions to justify their actions. For example, WEA justified its two-tier account classification system between "subdistributors" and "retailers" as a means of meeting the competition of those distributors who had previously entered the market and who maintained multiple-tier account classifications. In addition, it presented evidence that the lower subdistributor price reflected cost savings to WEA because subdistributors had a centralized location for purchases, [**40] billings, returns and deliveries and subdistributors made box-lot purchases of the same records.

Certain distributors did give to chain store retailers discounts in addition to those to which they were entitled under their account classification systems. For example, WEA apparently gave MTS a subdistributor price in 1975 even though MTS did not meet WEA's technical definition of a subdistributor. However, appellants' own [**885] evidence indicated that the distributors did so because of claims by the large retailers that they were receiving lower prices from the distributors' competitors and that failure to reduce price would adversely affect the retailers' merchandising of the distributor's records. Such evidence does not indicate a conspiracy to favor large record stores. In fact, the Sherman Act is intended to encourage such competition between sellers. See *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 83 n.16.

Finally, appellants' conscious parallelism claim is deficient because it never established a plausible motivation for the conspirators' conduct. In [**41] *Cities Service* the court found the plaintiff's conspiracy theory to be inadequate where the interests of the alleged conspirators were divergent. In the absence of any

common motivation, the court concluded, there existed no grounds for inferring a conspiracy. 391 U.S. at 287. *Accord Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975). Here, appellants are unable to advance any plausible reason why the major record distributors would conspire to favor certain retailers, thus limiting the retail outlets for their own products. Appellants' theory of conspiracy would increase the bargaining power of the major chain stores against the distributors themselves. Indeed, the statements of Joel Friedman, of WEA, which appellants attempted to introduce into evidence, indicates that WEA viewed the buying and marketing practices of chain store retailers as a threat to the distributors. In sum, aside from the most conclusory allegations, appellants have made no attempt to show why it should be held to have been in the interest [**42] of the record distributors to engage in conspiracy the result of which would be lowering of prices offered to their largest customers.¹⁸

18 In what appears as an afterthought, appellants also claim that the distributors engaged in resale price maintenance. Yet they offered no probative evidence in support of this proposition. Moreover, the claim is fundamentally inconsistent with their principal theory of the case -- that the Zoslaws were unable to compete with the large retailers because the distributors gave those retailers more favorable terms. Under appellants' theory, retail price maintenance would have been advantageous to them since it would have restricted the large retailers' ability to undercut their prices.

b. Distributors' meetings and discussions

Aside from their conscious parallelism theory, appellants also attempt to prove the existence of a conspiracy on the basis of trade association meetings and exchanges of credit information among distributors. They contend that the participation [**43] of distributors at meetings of the National Association of Record Manufacturers (NARM) evidences a "cartel." However, in the absence of any indication of agreement or consent to an illegal arrangement, evidence of industry meetings is not sufficient to prove a conspiracy. *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 575, 69 L. Ed. 1093, 45 S. Ct. 578 (1925); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074, 50 L. Ed. 2d 792, 97 S. Ct. 813

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(1977). Moreover, appellants presented no evidence that the distributors exchanged price information such as that found objectionable in *United States v. Container Corp.*, 393 U.S. 333, 335, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969) (exchange of information among competitors as to most recent prices charged specific customers).

As for the exchange of credit information, appellants introduced evidence that the record distributors' credit managers attended meetings of the National Association of Credit Managers and its [**44] regional affiliate, the Credit Managers Association of Southern California, and that at those meetings they exchanged information regarding individual retailers' credit histories.

Appellants suggest that the decision of the Supreme Court in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980), is that all exchange of credit information is a *per se* violation of *section 1* of the Sherman Act. On the [*886] contrary, the court stated that, *assuming* plaintiff could prove that the defendants agreed to fix credit terms to their customers, such an agreement would be a *per se* violation of *section 1*. In fact the court in *Catalano* explicitly adverted to its earlier holding in *Cement Manufacturing Protective Association v. United States*, 268 U.S. 588, 69 L. Ed. 1104, 45 S. Ct. 586 (1925), permitting exchange of credit information for the individual use of each member in determining whether to exercise credit. 446 U.S. at 648 n.12.

The appellants' evidence indicated that the information exchanged by the credit managers regarding certain retailers' credit standing was of the sort [**45] the distributors could use for self protection purposes. For example, the distributors exchanged information regarding individual retailers' total indebtedness. However, there was no indication of any agreement to fix credit terms aside from appellants' observation that large retailers in fact received more favorable credit terms than Marin Music Centre -- a hardly surprising result in light of their relative volume of sales.

2. Vertical Conspiracy

Appellants allege a number of vertical conspiracies each based on the sales agreement between a distributor and a favored retailer which "caused discrimination in the sale of phonograph records and tapes to the named retail chain stores." In essence, appellants suggest that price discrimination between individual buyers and sellers

which would ordinarily form the basis of a secondary-line Robinson-Patman case is also a violation of *section 1* of the Sherman Act. Yet the courts have held that such an agreement, without proof of an arrangement to exclude others from the buyer's market does not give rise to a *section 1* claim. ¹⁹ See e. [**46] g., *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir. 1979); *Rutledge v. Electric Hose & Rubber Co.*, 327 F. Supp. 1267 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668 (9th Cir. 1975).

19 In contrast, we have recognized that a predatory pricing claim may form the basis of both a primary-line Robinson-Patman case alleging injury to another seller and a *section 2* Sherman Act claim since both statutory provisions "are directed at the same evil and have the same substantive content." *William Inglis*, 668 F.2d at 1041 (quoting *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977)). Here, however, appellants' secondary-line Robinson-Patman claim -- that they did not receive the same price as a competing buyer -- has no direct counterpart under *section 1* of the Sherman Act.

[**47] In *National Tire*, for example, the court rejected the plaintiff's claim that a newspaper's failure to sell its advertising on the same terms as it gave to plaintiff's main competitor violated *section 1*, stating:

Plaintiff does not allege any basis for a vertical combination in violation of *section 1*. The contract for advertising space between the Post and Market, albeit a combination, is not a combination within the scope of *section 1*. The contract sets forth the terms of dealings between the parties; plaintiff does not allege that the terms of the contract in any way restrict either party's dealings with others.

441 F. Supp. at 81.

Here appellants presented no evidence of any vertical agreement to exclude competitors. Instead, the record indicates that certain retailers negotiated a favorable price

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with individual distributors. However, even were we to assume some evidence of an exclusionary effect, we have held that such vertical arrangements are not a *per se* violation of *section 1*. See *Ron Tonkin*, 637 F.2d at 1382-87; [**48] *Gough v. Rossmoor*, 585 F.2d 381, 388 (9th Cir. 1978); *Mutual Fund Investors*, 553 F.2d at 626; *Joseph Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78-79 (9th Cir. 1969). Therefore such agreements do not violate *section 1* unless they are found to be unreasonable. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304 (9th Cir. 1982), *cert. denied*, 459 U.S. 1009, 103 S. Ct. 364, 74 L. Ed. 2d 400, 51 U.S.L.W. 3354 (1982). The reasonableness inquiry is "directed to a balancing of the competitive evils of the restraint against the anticompetitive [*887] benefits asserted on its behalf." *Gough*, 585 F.2d at 388-89.

Here there is simply no indication that the sales agreements between individual distributors and retailers constituted an unreasonable restraint of trade. Indeed, the Supreme Court has recognized that the price discrimination which results where buyers seek competitive advantage from sellers encourages the aims of the Sherman Act, [**49] a respect in which the Sherman Act is inconsistent with the aims of the Robinson-Patman Act. See *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 82, 83 n.16; *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 73-74, 97 L. Ed. 1454, 73 S. Ct. 1017 (1953). And while appellants point to injury to their particular business, they do not make the necessary showing of a substantially adverse effect on competition in the record market in general. See *Ron Tonkin*, 637 F.2d at 1388; *Mutual Fund Investors*, 553 F.2d at 627. In fact, as the district court observed, appellants themselves acknowledge the competitive character of the record and tape sales market. Thus the district court correctly held that appellants had failed to raise a genuine issue of material fact in support of their vertical conspiracy charge.

B. *The Section 2 Attempted Monopolization Claim Against MTS*

Appellants claim that MTS attempted to monopolize the retail market in record and tape sales in the San Francisco Bay Area in violation of *section 2* of the Sherman Act. [**50] An attempted monopoly claim under *section 2* consists of three elements: (1) a specific intent to control prices or destroy competition in some

part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *Twin City Sportservice*, 676 F.2d at 1308; *Portland Retail Druggists*, 662 F.2d at 647. *William Inglis*, 668 F.2d at 1027.

In *Inglis* we discussed at length the interrelationship between the three elements. Thus we observed that intent to monopolize may be inferred from anticompetitive conduct but that to carry such a burden the conduct "must fall into one of two categories, either (1) conduct forming the basis for a substantial claim of restraint of trade, or (2) conduct that is clearly threatening to competition or clearly exclusionary." 668 F.2d at 1029 n.11. In either case the conduct "must be such that its anticompetitive benefits [are] dependent upon its tendency to discipline or eliminate competition and thereby enhance [**51] the firm's long-term ability to reap the benefits of monopoly power." *Inglis*, 668 F.2d at 1030. In turn, the dangerous probability of success requirement, which is usually although not necessarily, associated with market power may be inferred from direct evidence of intent implemented by conduct, or conduct alone of the sort described above, from which intent may be inferred. 668 F.2d at 1029.

As the district court observed, appellants presented no direct evidence of specific intent to monopolize, relying instead on MTS' alleged anticompetitive conduct to prove a violation of *section 2*. Their chief claim in this regard is that Tower engaged in predatory pricing by setting its prices for records and tapes below appellants' cost of doing business.

A predatory price exists "where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup profits." *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied*, 439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978). [**52] In making such a determination we have had occasion to identify as a useful standard for predation the test set out by Professors Areeda and Turner. See P. Areeda & D. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); *Inglis*, 668 F.2d at 1033; *Janich Bros.*, 570 F.2d at 858. Under this approach a price is not predatory if it equals or exceeds the average variable cost of production. [**888] P. Areeda & D. Turner, *Predatory Pricing*, *supra*,

at 711.²⁰

20 According to Areeda and Turner average variable cost is actually an imperfect substitute for marginal cost, made necessary because business firms rarely keep records reflecting marginal cost. P. Areeda & D. Turner, *Predatory Pricing*, *supra*, at 717. A price equal or exceeding marginal cost is the appropriate test because then only less efficient producers will suffer larger losses per unit. In addition a price equal to marginal cost signals to consumers the "true social cost" of producing the additional unit, therefore promoting the efficient allocation of resources. P. Areeda & D. Turner, *Predatory Pricing*, *supra*, at 710-713; *Inglis*, 668 F.2d at 1032.

[**53] Pursuing such a guide, appellants' predatory pricing claim would appear to be inadequate on its face since it does not suggest that MTS priced below its own average variable cost -- but that it was below only some unidentified cost of appellants. In *Inglis* we indicated that a plaintiff might be able to prove a predatory pricing claim without showing that the defendant priced below its average variable cost, *see* 668 F.2d at 1035, or even possibly below its average total cost.²¹ However, in such instances it is the plaintiff's burden to prove that the defendant "sacrificed greater profits or incurred greater losses than necessary in order to eliminate the plaintiff." *Inglis*, 668 F.2d at 1036. In the absence of such a claim on the part of appellants, much less any evidence to that effect, appellants' predatory pricing claim is inadequate as a matter of law. Indeed, any other conclusion would support the perverse rationale that a defendant may not compete by lowering its prices "if competition would injure its competitors." *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 742 (9th Cir. 1979). [**54]

21 *Inglis* specifically reserved the question whether a price above the defendant's average total cost could ever be considered predatory. 668 F.2d at 1035 n.30. In that instance, the producer recovers the total cost of production, including fixed costs, as well as a "normal" rate of return on its investment, making the price "profitable" from an economist's view. *Id.*

Appellants' other example of MTS' predatory conduct concerns MTS' negotiation of favorable sales terms with the individual distributors. Yet we have

already concluded that such conduct did not constitute an unreasonable restraint of trade under *section 1* of the Sherman Act. And since, as we have previously stated, the reasonableness standard of *section 1* governs parallel conduct under *section 2*, *see Inglis*, 668 F.2d at 1030 n.14; *California Computer Products*, 613 F.2d at 737, MTS' actions do not constitute a "substantial restraint of trade" in violation of *section 2*. Nor do we consider [**55] the attempt to negotiate favorable terms here "conduct that is clearly threatening to competition or clearly exclusionary."

Our conclusion regarding MTS' conduct in this case is reinforced by the evidence in the record concerning its market power. In *Inglis* we recognized that a defendant may introduce evidence "that market conditions are such that a course of conduct described by the plaintiff would be unlikely to succeed in monopolizing the market." 668 F.2d at 1030. *See also Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 936 (9th Cir. 1980), *cert. denied*, 450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981). Aside from their claim of "breath-taking growth of monopoly power," appellants suggested no evidence of market power whatsoever. In contrast MTS, introduced evidence that it operated only two retail stores in the six San Francisco Bay Area counties which the appellants asserted constituted a relevant geographic market and that it accounted for no more than 10% of the total retail record and tape sales in that area.²² The [*889] absence of significant market power on the part of the MTS and the existence [**56] of numerous other retail outlets lends further weight to our conclusion that the appellants failed to raise an issue of material fact regarding the attempted monopolization claim.²³

22 MTS did not operate any stores in Marin County during the period in question. Its two stores in the San Francisco Bay Area are in San Francisco and Berkeley.

The district court identified the relevant geographic market here as the San Francisco-Marín County market since that is the only geographic area of competition between Marin Music Centre and MTS. Yet appellants did not present any evidence nor do they even argue that MTS' share of this submarket is larger than its share of the six San Francisco Bay Area counties. Indeed, MTS only operates one store in the "San Francisco-Marín County" market.

23 Appellants' complaint also charged MTS with monopolization of the retail record and tape market in violation of *section 2* of the Sherman Act. The district court granted summary judgment on this claim and appellants do not raise this issue on appeal. In any event, appellants' failure to respond to MTS' evidence of its relatively small market share made summary judgment on this claim appropriate. *See, e.g., Forro Precision, Inc. v. International Business Machines Corp.*, 673 F.2d 1045, 1058 (9th Cir. 1982) (evidence of 35% of market share alone insufficient as a matter of law to support monopolization claim).

[**57] C. *Capitol's Refusal to Deal*

Appellants contended that the district court erred in granting summary judgment in favor of Capitol on their refusal to deal claims under *sections 1* and *2* of the Sherman Act. This court has previously held that a party may refuse to deal with another "provided there is no effect which contravenes the antitrust laws." *Mutual Fund Investors*, 553 F.2d at 626. In such cases, the adverse effects of the termination on the party refused are not relevant "when the refusal 'is for business reasons which are sufficient to the [defendant] in the absence of any agreement restraining trade.'" *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 989 (9th Cir. 1980); (quoting *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119 (9th Cir. 1972)). *Accord Marquis v. Chrysler Corp.*, 577 F.2d 624, 640 (9th Cir. 1977). Such a determination is not appropriate for summary judgment where there is a material issue of fact regarding the defendant's unlawful intent or the anticompetitive effect of its action. *California Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001, 1004 (9th Cir. 1981); [**58] *Program Engineering*, 634 F.2d at 1196.

The district court concluded that Capitol's acknowledged aim of attempting to avoid future litigation after its settlement with appellants constituted a legitimate business purpose for the termination. During the period covered by the complaint, Capitol sold approximately \$3,800 of records and tapes per year to Marin Music Centre. In June, 1975, Capitol and appellants entered into an agreement settling all of appellants' claims existing on that date for \$7,500, but expressly permitting appellants to bring an action for events occurring after the date of the settlement. Capitol introduced evidence indicating that it stopped selling to

Marin Music because of the near certainty that continuing business would give rise to litigation whose costs would exceed any benefits derived from that business.

Appellants point to two Ninth Circuit cases, *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 805 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977), and *Germon v. Times Mirror Co.*, 520 F.2d 786, 788 (9th Cir. 1975), which suggest in dicta that a [**59] court may enjoin a defendant in an antitrust action from refusing to deal with the plaintiff. However, both of those cases involve the use of injunctions to preserve the status quo during the litigation, and more importantly, they recognize that the termination must be pursuant to a plan "to foster an unlawful competitive scheme." 520 F.2d at 788.

In contrast, in *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962), the court explicitly held that in the absence of any arrangement to restrain trade a manufacturer's refusal to deal with a retail store because of an antitrust suit filed against it by the store did not constitute an unlawful purpose in violation of the Sherman Act:

Appellee does not cite, and we have not found any case in which a "refusal to deal" based on a customer's prosecution of a suit against a manufacturer has been held to constitute an unreasonable restraint of trade. This when considered is not astonishing, for the relationship between [*890] a manufacturer and his customer should be reasonably harmonious; and the bringing of a lawsuit by the customer may provide a sound business reason [**60] for the manufacturer to terminate their relation.

298 F.2d at 871 (citations omitted). Thus Capitol's acknowledged purpose of avoiding future litigation whose costs exceeded the benefits from doing business with appellants qualified as a legitimate business reason for refusing to deal. *See Marquis*, 577 F.2d at 620.

As the district court recognized, appellants' only attempt to prove that the termination was otherwise violative of the antitrust laws was to suggest that it was

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connected with the alleged horizontal and vertical conspiracies among the distributors and chain store retailers. However, appellants introduced no evidence indicating any connection between the conspiracies alleged and the termination sufficient to raise an issue of material fact. *See ALW, 510 F.2d at 55.* Indeed Capitol's action did not even prevent appellants from selling its records. Capitol introduced evidence that its records were available from independent distributors and were in fact carried in appellants' store long after the termination. In [**61] any event, since we have concluded that appellants have failed to raise an issue of material fact

regarding the existence of any such vertical or horizontal conspiracy, their allegations against Capitol based on those conspiracies were also appropriate for summary judgment.

IV. CONCLUSION

The district court's judgment in favor of appellees on appellants' Robinson-Patman claims is reversed except as to Doug Robertson. The court's judgment as to the Sherman Act claims is affirmed. The case is remanded for further proceedings consistent with this opinion.

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4 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
5 DIVISION 1

6 SHANGHAI COMMERCIAL BANK
7 LIMITED, a banking corporation organized
8 and existing under the Laws of Hong Kong
Special Administrative Region, the People's
Republic of China,

9 Respondents,

10 vs.

11 KUNG DA CHANG and "JANE DOE"
12 CHANG, husband and wife, and the marital
community comprised thereof, ,

13 Appellants.

Div. I Case No. 70526-1

King County Superior Court
Case No. 12-2-21293-7 SEA

PROOF OF SERVICE
ON
OPENING BRIEF OF APPELLANT

14 I hereby certify that on November 15, 2013, I mailed the Appellants' Opening
15 Brief to the following via courier:

16 Counsel for Respondents:
17 Stellman Keehnel / Stephen Hsieh /
18 Katherine Heaton / Patsy Howson
19 DLA Piper LLC (US)
701 Fifth Ave., Ste 7000
Seattle WA 98104-7044

20 Dated this 15th day of November, 2013, I certify under penalty of perjury under
21 the laws of the State of Washington that the foregoing is true and correct. Signed in
22 Lynnwood, Washington.

23 TOLLEFSEN LAW, PLLC

24 s/Belinda Born-Reid
25 Belinda Born-Reid, Paralegal

Proof of Service
*Chang, Kung-da, et al (Appellant) v. Shanghai Commercial
Bank (Appellee)*

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